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the 1990s, the number of people in the UK who are employed in the public sector has increased by 1.5 million, from 2.5 million in 1980 to 4 million in 1995. The public sector has become a major employer in the UK, and its growth has been a key factor in the overall growth of the economy.

The public sector has also become a major provider of social services, and its growth has been a key factor in the overall growth of the economy. The public sector has become a major provider of social services, and its growth has been a key factor in the overall growth of the economy.

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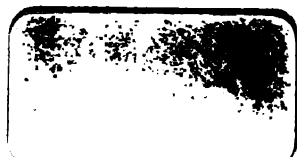
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105

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REPORTS

OF

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CASES ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

COMPLETE EDITION, WITH NOTES AND REFERENCES.

BOOK IV.

Containing WHEATON, Vols. 1, 2, 3 and 4.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
NEWARK, WAYNE COUNTY, NEW YORK.

1882.



Entered according to Act of Congress, in the year eighteen hundred and eighty-two, by
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
in the Office of the Librarian of Congress, at Washington, D. C.

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

CASES REPORTED IN VOL. I.

[Figures refer to Marginal Figures in respective vols.]

A.		H.	
A MMIDON <i>v.</i> Smith <i>et al.</i> , - - -	447	Hiram, The, Cornthwait <i>et al.</i> , Claimants,	440
Anderson <i>v.</i> Longden, - - -	85	Hord, Matson <i>v.</i> - - -	180
Antonia Johanna, The - - -	159	Hunter's Lessee, Martin, Heir and Devisee	
Astrea, The - - -	125	of Fairfax, <i>v.</i> - - -	304
Aurora, The Walden <i>et al.</i> , Claimants, -	96		
B.		I.	
Ball, Henry <i>v.</i> - - -	1	L'Invincible—The Consul of France <i>et al.</i> ,	
Barr, J. & T. <i>v.</i> Lapsley <i>et al.</i> , - - -	151	Claimants, - - -	238
Browder, Preston <i>v.</i> - - -	115		
C.		J.	
Commercen, The, Lindgren, Claimant, -	382	Jones <i>et al. v.</i> Shore's Executor, <i>et al.</i> , -	462
Coolidge <i>et al.</i> , The United States <i>v.</i> -	415		
Corporation of New Orleans <i>v.</i> Winter, -	91	L.	
D.		Lapsley <i>et al.</i> , Barr, J. & T. <i>v.</i> - - -	151
Danforth's Lessee <i>v.</i> Thomas, - - -	155	L'Invincible—The Consul of France <i>et al.</i> ,	
Davis <i>et al. v.</i> Wood, - - -	6	Claimants, - - -	238
Dunlop & Co., Hepburn & Dundas's Heirs		Longden, Anderson <i>v.</i> - - -	85
and Ex'ors <i>v.</i> - - -	179		
Dunlop & Co. <i>v.</i> Hepburn & Dundas's Heirs		M.	
and Ex'ors, - - -	179	Mandeville, Welch <i>v.</i> - - -	238
E.		Mary and Susan, The, G. & H. Van Wage-	
Easton, Patton's Lessee <i>v.</i> - - -	476	nen, Claimants, - - -	25
Edward, The, Scott, Claimant, - - -	261	Mary and Susan, The, Richardson, Claim-	
Elsineur, The, Jones, Claimant, - - -	439	ant, - - -	46
F.		Marshall, Renner & Bussard <i>v.</i> - - -	215
Fisher <i>et al.</i> , Harnden <i>v.</i> - - -	300	Martin, Heir and Devisee of Fairfax, <i>v.</i>	
G.		Hunter's Lessee, - - -	304
Gray, Thompson <i>v.</i> - - -	75	Matson <i>v.</i> Hord, - - -	130
Gratz, The Heirs of Walden <i>v.</i> - - -	292	Morean <i>v.</i> The U. S. Ins. Co., - - -	219
George, The, The Bothnea, and The Jahns-		Mutual Ass. Society, The, <i>v.</i> Watts' Executor,	279
ton, - - -	408		
H.		N.	
Harnden <i>v.</i> Fisher <i>et al.</i> , - - -	300	New Orleans, Corporation of, <i>v.</i> Winter <i>et al.</i> ,	91
Harrison, The Herbert, Claimant, - - -	298	Nereid, The, Pinto, Claimant, - - -	171
Henry <i>v.</i> Ball, - - -	1		
Hepburn & Dundas's Heirs and Ex'ors <i>v.</i>		O.	
Dunlop & Co., - - -	179	Octavia, The, Nicholls <i>et al.</i> , Claimants,	20
		P.	
		Preston <i>v.</i> Browder, - - -	115
		Patton's Lessee <i>v.</i> Easton, - - -	476

R.		Thomson <i>v.</i> Gray,	75
Rugen, The, Buhring, Claimant,	62	Trustees of Transylvania University, Rus-	
Renner & Bussard <i>v.</i> Marshall,	215	sel <i>et al.</i> <i>v.</i>	432
Ross & Morrison <i>v.</i> Reed,	432	U.	
Russel <i>et al.</i> <i>v.</i> The Trustees of Transylva-	432	U. S. Ins. Co., The, Morean <i>v.</i>	219
nia University,		United States, The, <i>v.</i> Coolidge <i>et al.</i> , . .	415
S.		V.	
Samuel, The, Pierce and Beach, Claimants, .	9	Venus, The, Jademerowsky, Claimant, . .	112
St. Joze Indiano, The, Lizaar, Claimant, .	208	W.	
St. Nicholas, The, Meyer <i>et al.</i> , Claimants, .	417	Walden <i>v.</i> The Heirs of Gratz,	292
Shore's Executor <i>et al.</i> , Jones <i>et al.</i> <i>v.</i> . .	462	Walton & Hundly, Taylor <i>v.</i>	141
Smith <i>et al.</i> , Ammidon <i>v.</i>	447	Watts' Executor, The Mutual Assurance	
T.		Society <i>v.</i>	279
Taylor <i>v.</i> Walton & Hundly,	141	Welch <i>v.</i> Mandeville,	233
Thomas, Danforth's Lessee <i>v.</i>	155	Winter, Corporation of New Orleans <i>v.</i> . .	91

CASES REPORTED IN VOL. II.

A.		M.	
Ariadne, The, (Prize),	- 143	Mayberry, Slocum <i>v.</i> (Constitutional Law),	1
Argo, The, (Practice),	- 287	M'Iver <i>v.</i> Ragan (Local Law),	25
Anna Maria, The, (Prize),	- 327	M'Coul <i>v.</i> Lekamp (Common Law),	111
B.		Mary, The, (Prize),	123
Beverly <i>v.</i> Brooke (Common Law),	- 100	Morgan's heirs <i>v.</i> Morgan (Chancery),	290
Bothnea and the Jahnstoff, The, (Prize),	169	Miller's heirs, Shipp <i>v.</i> (Local Law),	316
Barker, The United States <i>v.</i> (Practice),	- 395	M'Cluny <i>v.</i> Silliman (Constitutional Law),	368
Brooke, Beverly <i>v.</i> (Common Law),	- 100	Marine Ins. Company, The, Leeds <i>v.</i> (Chancery),	380
Bryant, Hunter <i>v.</i> (Chancery),	- 32	O.	
C.		Organ, Laidlaw <i>v.</i> (Local Law),	178
Cook, Greenleaf <i>v.</i> (Common Law),	- 13	Otis <i>v.</i> Walter (Common Law),	18
Craig, Duvall <i>v.</i> (Common Law),	- 45	P.	
Coolidge <i>v.</i> Payson (Common Law),	- 66	Payson, Coolidge <i>v.</i> (Common Law),	66
Chirac <i>v.</i> Chirac (Common Law),	- 259	Pannel's heirs, Johnson <i>v.</i> (Local Law),	206
Colson <i>v.</i> Thompson (Chancery),	- 396	Patterson <i>v.</i> The United States (Common Law),	221
Coolidge, Inglee <i>v.</i> (Common Law),	- 363	Pizarro, The (Prize),	227
Colson <i>v.</i> Lewis (Constitutional Law),	- 377	Peyton, Raborg <i>v.</i> (Common Law),	385
D.		R.	
Duvall <i>v.</i> Craig (Common Law),	- 45	Rutherford <i>v.</i> Greene's heirs (Local Law)	196
Dos Hermanos, The, (Prize),	- 76	Roberts, Lenox <i>v.</i> (Chancery),	373
E.		Raborg <i>v.</i> Peyton (Common Law),	385
Eleanor, The, (Prize),	- 345	Ragan, M'Iver <i>v.</i> (Local Law),	25
F.		S.	
Fortuna, The, (Prize),	- 161	Slocum <i>v.</i> Mayberry (Constitutional Law),	1
G.		Sheldon, The United States <i>v.</i> (Common Law),	119
Greenleaf <i>v.</i> Cook (Common Law),	- 13	San Pedro, The, (Instance Court),	132
Greene's Heirs Rutherford <i>v.</i> (Local Law),	196	Shipp <i>v.</i> Miller's heirs (Local Law),	316
George, The (Prize),	- 278	Smith, Thelusson <i>v.</i> (Common Law),	396
Green, Liter <i>v.</i> (Common Law),	- 306	T.	
H.		Tenbroek, The United States <i>v.</i> (Common Law),	248
Hunter <i>v.</i> Bryant (Chancery),	- 32	Thompson, Colson <i>v.</i> (Chancery),	336
I.		Thelusson <i>v.</i> Smith (Common Law),	396
Inglee <i>v.</i> Coolidge (Practice),	- 363	U.	
J.		United States, The, <i>v.</i> Sheldon (Common Law),	119
Jahnstoff and Bothnea, The, (Prize),	- 169	United States, The, Patterson <i>v.</i> (Common Law),	221
Johnson <i>v.</i> Pannel's heirs (Local Law),	- 206	United States, The, <i>v.</i> Tenbroek (Common Law),	248
L.		Union Bank, The, <i>v.</i> Laird (Chancery),	390
Lekamp, M'Coul <i>v.</i> (Common Law),	- 111	W.	
Laidlaw <i>v.</i> Organ (Local Law),	- 178	Walter, Otis <i>v.</i> (Common Law),	18
Liter <i>v.</i> Green (Common Law),	- 306	William King, The, (Instance Court),	148
London Packet, The, (Prize),	- 371		
Lenox <i>v.</i> Roberts (Chancery),	- 373		
Lewis, Colson <i>v.</i> (Constitutional Law),	- 377		
Leeds <i>v.</i> The Marine Ins. Company (Chancery),	- 380		
Laird, The Union Bank <i>v.</i> (Chancery),	- 390		

CASES REPORTED IN VOL. III.

A.		J.	
ÆOLUS, The, (Instance Court),	392	Jackson v. Clarke (Common Law),	1
Atalanta, The, (Prize),	409	Jackson, Brown v. (Common Law),	449
Anne, The, (Prize),	435		
Amiable Nancy, The, (Prize),	546	K.	
B.		Kyger, M'Iver v. (Chancery),	53
Barker, Lanusse v. (Common Law),	101	L.	
Bevans, The United States v. (Constitutional Law),	336	Lanusse v. Barker (Common Law),	101
Brown v. Jackson (Common Law),	449	Lenox v. Prout (Chancery),	520
Burton v. Williams (Local Law),	529	Leslie, Craig v. (Chancery),	563
Baker, Murray v. (Common Law),	541	M.	
C.		M'Iver v. Kyger, (Chancery),	53
Clarke, Jackson v. (Common Law),	1	M'Connel, Hampton v. (Constitutional Law),	234
Campbell, Robinson v. (Constitutional and Local Law),	212	Murray v. Baker (Common Law),	541
Crates, 150, The United States v. (Instance Court),	232	M'Roberts, Cameron v. (Chancery),	591
Craig v. Leslie (Chancery),	563	Moore, Houston v. (Practice),	433
Cameron v. M'Roberts (Chancery),	591	N.	
Craig v. Radford (Chancery),	594	New York, The, (Instance Court),	59
D.		Nicholson, Patton v. (Common Law),	204
Diana, The, (Practice),	58	Neptune, The, (Instance Court),	601
Dugan v. The United States (Common Law),	172	O.	
Dunlop v. Hepburn (Chancery),	231	Olivera v. The Union Ins. Co. (Common Law),	183
E.		P.	
Evans v. Eaton (Common Law),	544	Patton v. Nicholson (Common Law),	204
F.		Prout, Lenox v. (Chancery),	520
Freundschaft, The, (Prize),	14	Palmer, The United States v.,	610
Fortuna, The, (Prize),	236	R.	
G.		Robinson v. Campbell (Constitutional and Local Law),	212
Gelston v. Hoyt (Constitutional and Common Law),	246	Radford, Craig v. (Chancery),	594
H.		Ross v. Triplett (Practice),	600
Hughes v. The Union Ins. Co. (Common Law),	159	S.	
Hampton, Shepherd v. (Common Law),	200	Samuel, The, (Practice),	77
Hepburn, Dunlop v. (Chancery),	231	San Pedro, The, (Instance Court),	78
Hampton v. M'Connel (Constitutional Law),	234	Star, The (Prize),	78
Hoyt, Gelston v. (Constitutional and Common Law),	246	Swann v. The Union Ins. Co. (Common Law),	168
Houston v. Moore (Practice),	433	Shepherd v. Hampton (Common Law),	200
		T.	
		Triplett, Ross v. (Practice),	600

CASES REPORTED.

vii

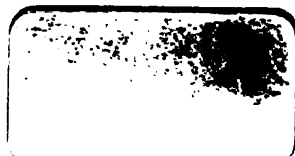
U.	W.
Union Ins. Co., The, Hughes v. (Common Law), - - - - - 159	United States, The, v. 150 Crates, (Instance Court), - - - - - 232
Union Ins. Co., The, Swann v. (Common Law), - - - - - 168	United States, The, v. Bevans (Constitutional Law), - - - - - 336
United States, The, Dugan v. (Common Law), - - - - - 172	United States, The, v. Palmer, - - - - - 610
Union Ins. Co., The, Olivera v. (Common Law), - - - - - 183	W. Williams, Burton v. (Local Law), - - - - - 529

Per. L. U. S. A. 75 d. 131

L.L.
U.S.A.

105

10



D.

Del Col. v. Arnold, 3 Dall. 333... 1 Wheat. 259
 Del Col. v. Arnold, 3 Dall. 333... 3 Wheat. 560
 Divina Pastora, The, 4 Wheat. 52, 4 Wheat. 502
 Dolden v. Bank of England, 10
 Ves. 353, 11 Ves. 283... 3 Wheat. 324
 Dougherty v. Bull, 2 P. Wms. 320, 3 Wheat. 578
 Duchess of Kingston's case, 11
 State Trials, 261... 3 Wheat. 316
 Duchess of Kingston's case, 11
 State Trials, 218... 8 Wheat. 321
 Durouse v. Jones, 4 Term. 300, 1 Wheat. 297, 461
 Dyson v. Rowcroft, 3 Bos. & Pull.
 474... 1 Wheat. 225
 Dye v. Leatherdale, 13 Wils. R. 20, 3 Wheat. 327

E.

Earl of Manchester v. Vale, 1
 Saund. R. 28, note 3... 3 Wheat. 327
 Eden v. Foster, 2 P. W. 325, 4 Wheat. 674, 676
 Edwards v. The Countess of War-
 wick, 2 P. Wms. 171... 3 Wheat. 580
 Ellis v. Marshall, 2 Mass. R. 269, 4 Wheat. 708
 Emanuel, The, 1 Rob. 396... 1 Wheat. 387
 Emblyn v. Freeman, Pre. in
 Chan. 541... 8 Wheat. 584
 Estrella, The, 4 Wh. 298... 4 Wheat. 502
 Exchange, The, 7 Cranch, 116... 1 Wheat. 252
 Eyre v. The Countess of Shaft-
 bury, 2 P. Wms. 119... 4 Wheat. 89

F.

Fairfax's devisee v. Hunter's
 lessee, 7 Cranch, 603... 3 Wheat. 599
 Fanny, The, Dodson's R. 443... 3 Wheat. 431
 Fisherwood v. Carman, cited 3
 Term. R. 297... 3 Wheat. 327
 Fletcher v. Ashburner, 1 Bro. Ch.
 C. 497... 3 Wheat. 577, 584
 Fletcher v. Peck, 6 Cranch, 87,
 136... 4 Wheat. 656, 662, 699
 Foone v. Blount, Cowp. 467... 3 Wheat. 586
 Forth v. Staunton, 2 Saund. R.
 211... 4 Wheat. 684
 Fowler v. Fowler, 8 P. Wms. 355, 2 Wheat. 40
 Franklin v. Osgood, 2 John. Cas.
 1; S. C. 14 John. R. 527... 4 Wheat. 699
 Friendship, The, 6 Rob. 420
 ... 1 Wheat. 387, 391, 393

G.

Gates v. Bayley, 2 Wils. R. 313... 3 Wheat. 327
 Geyer v. Aquilar, 7 T. R. 681,
 606... 3 Wheat. 316, 321
 Glass v. The Betsey, 3 Dall. 6... 1 Wheat. 257
 Graham v. Bickham, 4 Dall. 149, 1 Wheat. 218
 Grand Sachem, 3 Dall. 333... 1 Wheat. 260
 Grant v. Vaughan, 3 Burr. 1515... 2 Wheat. 889
 Green v. Liler, 8 Cranch, 229... 4 Wheat. 222
 Green v. Rutherford, 1 Ves.
 473... 4 Wheat. 675, 676
 Greenhow v. Barton, 1 Munf.
 598... 1 Wheat. 291
 Greenup v. Lyne, 2 Bibb, 869, 2 Wheat. 214, 219
 Grubbs v. Rice, 2 Bibb, 107... 2 Wheat. 212

H.

Haase, The, 1 Rob. 288... 1 Wheat. 387
 Hadkinson v. Robinson, 3 Bos. &
 Pull. 388... 3 Wheat. 192, 193

H.

Hard's Case, Salk. 38... 2 Wheat. 387
 Harden v. Fisher, 1 Wheat. 300... 4 Wheat. 464
 Harris v. DeBervoir, Cro. Jac. 687, 2 Wheat. 386
 Henshaw v. Pleasance, 2 W. Black.
 1174... 3 Wheat. 316
 Hepburn v. Auld, 1 Cranch 321... 1 Wheat. 184
 Hepburn v. Auld, 5 Cranch.
 262... 1 Wheat. 184, 185
 Hepburn v. Auld, 1 Wheat. 179... 2 Wheat. 299
 Hepburn v. Ellzey, 2 Cranch, 445, 1 Wheat. 94
 Hewitt v. Wright, 1 Bro. Ch. C.
 86... 3 Wheat. 583
 Hodges v. Steward, Skinn. 846... 2 Wheat. 387
 Holmes v. Lansing, 3 John. Cas.
 73... 4 Wheat. 696
 Holdip v. Otway, 2 Saund. 106... 1 Wheat. 218
 Home v. Boozey, 2 Str. 952... 3 Wheat. 310

I.

Immanuel, The, 2 Rob. 101... 1 Wheat. 387
 Invincible, The, 1 Wheat. 236... 4 Wheat. 307
 Israel v. Douglas, 1 H. Bl. 239... 2 Wheat. 388

J.

Jackson v. Jansen, 6 John. R. 73, 1 Wheat. 699
 Jackson v. Lunn, 3 John. Cas. 109, 4 Wheat. 707
 Johnson v. Collins, 1 East. 198... 2 Wheat. 73
 Jones v. Shore's Ex'rs, 1 Wheat.
 462... 4 Wheat. 75
 Jonge Margaretha, The, 1 Rob.
 189... 1 Wheat. 388

K.

Kelly v. Harrison, 2 John. Cas. 29, 4 Wheat. 707
 Kennedy v. Bruce, 2 Bibb, 371... 2 Wheat. 325
 Kinclad v. Blythe, 2 Bibb, 479... 2 Wheat. 213
 King, The, v. Passmore, 3 Term.
 R. 199... 4 Wheat. 658, 663
 Kingston v. Gerard, 4 Dall. 274... 3 Wheat. 165
 Kirby Ravensporth Hospital, ex-
 parte, 15 Ves. 304, 314... 4 Wheat. 676
 Kirkham v. Mills, 13 Ves... 3 Wheat. 579

L.

Le Caux v. Eden, Doug. Rep. 594,
 611, 612... 3 Wheat. 322
 Leggatt's case, 10 Rep. 112... 4 Wheat. 685
 Lessee of Moody v. Van Dyke, 4
 Binn. 7, 31... 4 Wheat. 699
 Locke v. The United States, 7
 Cranch, 339... 3 Wheat. 330
 Longman v. Fenn, 1 H. Bl. 541, 1 Wheat. 218
 Loyd v. Carter, 2 Atkin. 84... 2 Wheat. 40
 Lublock v. Rowcroft, 5 Esp. R.
 50... 3 Wheat. 198

M.

Maddona Del Burso, The, 4 Rob.
 169... 1 Wheat. 387
 Magrath v. Church, 1 Caines' R.
 196... 1 Wheat. 225
 Malden v. Bartlett, Park, R. 105, 3 Wheat. 310
 Manila, The, 1 Edwards R. 1... 3 Wheat. 324
 Manning v. Newnham, Park, 169, 1 Wheat. 226
 Maunsell v. L'd Masareene, 5
 Term. 87, n. 2... 1 Wheat. 218

M.

Marcadier v. Chesapeake Ins. Co.,
8 Cranch, 39..... 1 Wheat. 228
Mars, The, 8 Cranch, 417..... 3 Wheat. 311
Marshall v. Del. Ins. Co., 4
Cranch 202..... 3 Wheat. 195
Marsteller v. McLean, 7 Cranch,
156..... 2 Wheat. 324
Mary Ford, The, 8 Dall. 188, 1 Wheat. 258, 361
Maryland Ins. Co. v. Le Roy, 7
Cranch, 26..... 3 Wheat. 165, 166
Mason v. Hunt, Doug. 290..... 2 Wheat. 72
Mason v. Skurray, at N. P. 1780,
Park. 116, Marshall, Condy's
Ed. 223..... 1 Wheat. 224
Mayor, &c., of Colchester, v. Low-
ten, 1 Ves. & Beames 236... 4 Wheat. 676
Mayor, &c., of Coventry, v. Attor-
ney-General, 7 Bro. Par. Cas.
235..... 4 Wheat. 677
McAndrews v. Vaughan, cited 1
Park. 185..... 1 Wheat. 225
Meadows v. Dutchess of King-
ston, Ambler's Rep. 756, 3 Wheat. 316, 321
Meriton's case, Latch. 168; Noy.
68; Poph. 200. Bac. Abr.
Covenant 77, Com. Dig. Con-
dition [E]..... 2 Wheat. 59, 60
Merrimack, The, 8 Cranch, 317.. 1 Wheat. 314
Mills v. Duryea, 7 Cranch, 481.. 3 Wheat. 285
Milton's case, Hardres, 485..... 2 Wheat. 386
Mima Queen v. Hepburn, 7 Cranch,
290..... 1 Wheat. 8
Moggridge v. Thackwell, 7 Ves.
36..... 4 Wheat. 45, 46
Monprivat v. Smith, 2 Camp. R.
175..... 3 Wheat. 327
Morrice v. The Bishop of Durham,
9 Ves. 399; 10 Ves. 540..... 4 Wheat. 45

N.

Nason v. Thatcher, 7 Mass. R.
398..... 4 Wheat. 705
Neilson v. Col. Ins. Co., 3 Caines'
R. 108..... 1 Wheat. 225, 226
Nelson v. Sheridan, 8 Term. 393, 1 Wheat. 218
Nereide, The, 9 Cranch, 388; 1
Wheat. 171..... 3 Wheat. 415, 419, 432
Neutralitat, The, 3 Rob. 295... 1 Wheat. 387
New York, The, 8 Wheat. 59... 3 Wheat. 407

O.

Otis v. Bacon, 7 Cranch, 539.. 2 Wheat. 23, 24
Orozembo, The, 6 Rob. 430..... 1 Wheat. 391

P.

Parker v. Rule's Lessee, 9 Cranch, 4 Wheat. 83
Purviance v. Anger, cited sub.
nom. *Graham v. Bickham*, 1
Dall. 185..... 1 Wheat. 218
Pawlet v. Clark, 9 Cranch, 292.. 2 Wheat. 378
Pawlet v. Clark, 9 Cranch, 292.. 4 Wheat. 695
Philips v. Bury, 2 Term. 346; 1
Ld. Raym. 5; Holt. 715;
Carth. 180; Skin. 447;
.... 4 Wheat. 659, 668, 670, 672, 674, 675

P.

Pierson v. Dunlop, Cowp. 571, 2 Wheat. 71, 72
Pillans v. Van Mierop, 3 Burr.
1663..... 2 Wheat. 70, 71, 83
Pillans v. Van Mierop, 3 Burr.
1663..... 4 Wheat. 684
Polk v. Hill, 9 Cranch, 87..... 1 Wheat. 486
Porter's case, 1 Co. Rep. 22, b.
23..... 4 Wheat. 33, 668
Powell v. Hankey, 2 P. Wms. 84, 2 Wheat. 40
Preston v. Browder, 1 Wheat. 115, 1 Wheat. 158

Q.

Queen v. Hepburn, 7 Cranch, 290, 1 Wheat. 8

R.

Raine v. Bell, 9 East. 105..... 3 Wheat. 165
Rashleigh v. Salmon, 1 H. Bl. 252, 1 Wheat. 218
Raymond v. Squire, 11 John. R.
47..... 4 Wheat. 700
Reilly v. Lamar, 2 Cranch, 344.. 2 Wheat. 142
Rex v. Askew, 4 Bur. 2200..... 4 Wheat. 708
Rex v. Larwood, Comb. 316.... 4 Wheat. 707
Rex v. Pasmore, 8 Term. 199,
..... 4 Wheat. 675, 688, 707
Rex v. St. Catharine's Hall, 4
Term. R. 233..... 4 Wheat. 703
Rex v. Vice-Chancellor of Cam-
bridge, 3 Bur. 1656..... 4 Wheat. 707
Rex v. Watson, 2 Term. R. 199.. 4 Wheat. 676
Rhineland v. The Ins. Co. of
Penn., 4 Cranch, 29..... 3 Wheat. 195
Rising Sun, The, 2 Rob. 104... 1 Wheat. 387
Roberts v. Whitherhead, 1 Salk.
223..... 3 Wheat. 311, 314
Roberts v. Whitherhead, 12 Mod.
92..... 8 Wheat. 310, 311, 314
Roper v. Radcliffe, 9 Mod. 167,
..... 3 Wheat. 580, 584, 585, 590
Rose v. Himely, 4 Cranch, 241... 3 Wheat. 324
Roe v. Roe, Hardr. R. 185..... 3 Wheat. 310

S.

Sarah Christina, The, 1 Rob. 237, 1 Wheat. 387
Schmidt v. The U. S. Ins. Co., 1
John. R. 249..... 3 Wheat. 191
Scott v. Shearman, 2 W. Bl.
977..... 3 Wheat. 316, 321
Seely v. Jago, 1 P. Wms. 389... 3 Wheat. 586
Sheriff v. Potts, 5 Esp. N. P. Rep.
96..... 3 Wheat. 164
Short Staple, The, v. U. S., 9
Cranch, 55..... 2 Wheat. 152
Simms v. Slacum, 3 Cranch, 299, 1 Wheat. 460
Slocum v. Maynard, 2 Wheat. 1, 3 Wheat. 312
Smith v. Maryland, 6 Cranch,
286..... 1 Wheat. 359, 370
Smith v. Stowel, 1 Ch. Cas. 195.. 4 Wheat. 47
Squire v. Dean, 4 Bro. Ch. Cas.
326..... 2 Wheat. 40
St. John's Coll. v. Todington, 1
Bl. R. 84; S. C. 1 Bur.
200..... 4 Wheat. 668, 674
St. Nicholas, The, 1 Wheat. 417, 3 Wheat. 238
Stead's Ex'rs. v. Course, 4 Cranch,
403..... 4 Wheat. 82

S.		V.	
Stitt v. Wardel, 1 Esp. N. P.	Rep. 610. 3 Wheat. 164	Vallejo v. Wheeler, Cowp. 143.	3 Wheat. 170
Strawbridge v. Curtis, 3 Cranch, 267.	1 Wheat. 95	Vengeance, The, 3 Dall. 297.	1 Wheat. 14
Sturges v. Crowninshield, 4 Wheat. 122.	4 Wheat. 212	Vere v. Lewis, 3 Term. 182, 2 Wheat. 386, 389	
Sutton's Hospital, Case of, 10 Co. 28, 31.	4 Wheat. 671, 675, 691	Viveash v. Becker, 3 Maule & S. 284.	3 Wheat. 446 (n)
T.		W.	
Talbot v. Jansen, 3 Dall 183, 1 Wheat. 253, 258		Wales v. Stetson, 2 Mass. R. 143, 146.	4 Wheat. 708
Tatlock v. Harris, 3 Term. 174.	2 Wheat. 386, 389	Walker v. Denne, 2 Ves., Jun., 170, 3 Wheat. 587	
Taylor and Quarles v. Brown, 5 Cranch, 284.	3 Wheat. 597	Walsh v. Whitcomb, 2 Esp. 565, 4 Wheat. 700	
Taylor v. Cole, 3 Term. Rep. 292, 3 Wheat. 327		Weleden v. Elkington, Plowden, 522.	4 Wheat. 33
Taylor v. Cole, 1 H. Black. 555, 3 Wheat. 327		Weller v. The Governor of the Foundling Hospital, Peake's N. P. 158.	4 Wheat. 704
Terret v. Taylor, 9 Cranch, 43, 50.	4 Wheat. 663, 695, 707	Welvert, The, 2 Rob. 128.	1 Wheat. 387
Teluson v. Fletcher, Doug. 315.	1 Wheat. 218	West v. Knight, 1 Ch. Cas. 134, 4 Wheat. 32, 47	
Thomas v. Withers, cited in 5 Term. R. 112, 117.	3 Wheat. 316	White v. White, 1 Bro. Ch. Cas. 15.	4 Wheat. 44
Town of Pawlet v. Clark, 9 Cranch, 292.	4 Wheat. 695	Wilkins v. Despard, 5 Term. Rep. 112, 117.	3 Wheat. 311, 316
Trelawney v. Booth, 2 Atk. 307, 3 Wheat. 578		Y.	
U.		Yeates v. Compton, 2 P. Wms. 358.	3 Wheat. 578, 583
U. S. v. Barber, 9 Cranch, 243.	2 Wheat. 122	Young v. Bank of Alexandria, 4 Cranch, 384.	4 Wheat. 245
U. S. v. 1960 Bags of Coffee, 8 Cranch, 398.	3 Wheat. 311	Z	
U. S. v. Fisher, 2 Cranch, 358.	2 Wheat. 424	Zebach v. Smith, 3 Binn. Rep. 69, 4 Wheat. 699	
U. S. v. Hooe, 3 Cranch, 83, 2 Wheat. 143, 424			
U. S. v. Grundy, 3 Cranch, 337.	3 Wheat. 607		
U. S. v. Hudson, 7 Cranch, 32.	1 Wheat. 416		
U. S. v. Palmer, 3 Wheat. 610, 4 Wheat. 63, 502			
U. S. v. Palmer, 3 Wheat. 635.	4 Wheat. 304		

CONSTITUTION OF THE UNITED STATES, CITED.

Preamble	1 Wheat. 324	Art. 3, Sec. 2	1 Wheat. 327 et seq.
Art. 1, Sec. 8.	4 Wheat. 407 et seq.	Art. 3, Sec. 2.	1 Wheat. 387, 288
Art. 1, Sec. 8 & 10.	4 Wheat. 192 et seq.	Art. 4, Sec. 3.	4 Wheat. 422
Art. 1, Sec. 10	4 Wheat. 414 et seq.	Art. 7 of Amendments	4 Wheat. 420
Art. 1, Sec. 10	4 Wheat. 601 et seq.	Art. 10 of Amendments.	1 Wheat. 325
Art. 3, Sec. 1	1 Wheat. 327	Art. 10 of Amendments.	4 Wheat. 406 et seq.

ACTS OF CONGRESS, CITED.

Sept. 24th, 1789, (Judiciary Act.) 1 Wheat. 16, 94, 323, 351 et seq., 365 et seq.	May 8th, 1792	3 Wheat. 321
" " " (Judiciary Act.) 2 Wheat. 9, 138 et seq., 289, 368, 370	Dec. 31st, "	3 Wheat. 602 et seq.
" " " (Judiciary Act.) 3 Wheat. 221, 303, 312, 434	Feb. 18th, 1793.	3 Wheat. 311
" " " (Judiciary Act.) 4 Wheat. 511	Feb. 21st, "	3 Wheat. 503 et seq. 518
July 22d, 1790.	Mch. 2d, "	4 Wheat. 511
Aug. 4th, "	June 5th, 1794	3 Wheat. 310 et seq.
April 30th, "	June 7th, "	4 Wheat. 306, 310
	Mch. 3d, 1797	2 Wheat. 425
	July 14th, 1768	4 Wheat. 77 et seq.
	Mch. 2d, 1799	1 Wheat. 468, 474

ACTS OF CONGRESS, CITED, CON.

Mch. 2d, 1799	2 Wheat. 425	April 25th, 1808	2 Wheat. 11, 21
Mch. 2d, "	3 Wheat. 233, 311	Jan. 9th, 1809	1 Wheat. 473
Mch. 3d, 1800	3 Wheat. 41, 86 et seq. 93	Mch. 1st, "	1 Wheat. 14, 265 et seq.
April 4th, "	4 Wheat. 201	June 28th, "	1 Wheat. 264 et seq.
April 17th, "	3 Wheat. 518	April 25th, 1810	3 Wheat. 314
April 22d, "	1 Wheat. 473	Feb. 18th, 1811	2 Wheat. 393
Feb. 27th, 1801	4 Wheat. 242, 245	June 26th, 1812	1 Wheat. 58, 59
Mch. 3d, 1803	2 Wheat. 138 et seq.	June " "	3 Wheat. 86 et seq. 558
Mch. 3d, 1804	4 Wheat. 78	July 6th, "	2 Wheat. 120
Mch. 3d, 1806	4 Wheat. 246	July 24th, 1813	2 Wheat. 258
April 18th, "	3 Wheat. 533, 526	Aug. 2d, "	4 Wheat. 101
Dec. 22d, 1807	2 Wheat. 152	Mch. 3d, 1817	4 Wheat. 310
Jan. 9th, 1808	2 Wheat. 152	April 20th, 1818	4 Wheat. 310

REPORTS

OF

L. Cabot Williamson,
ATTORNEY AT LAW
690 Louisiana Ave.
WASHINGTON, D. C.

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States.

FEBRUARY TERM, 1816.

BY HENRY WHEATON,

Counselor at Law.

VOLUME I.

RULES AND ORDERS

OF THE SUPREME COURT OF THE UNITED STATES.

I.—FEBRUARY TERM, 1790.

ORDERED, That the clerk of this court do reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counselor, in this court, while he shall continue to be clerk of the same.

II.—FEBRUARY TERM, 1790.

ORDERED, That (until farther order) it be requisite to the admission of attorneys, or counselors, to practice in this court, that they shall have been such for three years past in the supreme courts of the state to which they respectively belong, and that their private and professional characters shall appear to be fair.

III.—FEBRUARY TERM, 1790.

ORDERED, That counselors shall not practice as attorneys, nor attorneys as counselors, in this court.

IV.—FEBRUARY TERM, 1790.

ORDERED, That they shall respectively take the following oath, viz.: I, do solemnly swear, that I will demean myself (as an attorney or counselor of the court) uprightly, and according to law, and that I will support the constitution of the United States.

V.—FEBRUARY TERM, 1790.

ORDERED, That (unless and until it shall be otherwise provided by law) all process in this court shall be in the name of the President of the United States.

VI.—FEBRUARY TERM, 1791.

ORDERED, That the counselors and attorneys, admitted to practice in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on this subject, made February term, 1790, viz.: I do solemnly swear (or affirm, as the case may be) that I will demean myself, as attorney, or counselor of this court, uprightly, and according to law, and that I will support the constitution of the United States.

VII.—AUGUST TERM, 1791.

The Chief Justice, in answer to the motion of the Attorney-General, informs him and the bar that this court consider the practice of the Court of King's Bench, and of Chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

U. S., Book 4

VIII.—FEBRUARY TERM, 1795.

THE COURT give notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause.

*IX.—FEBRUARY TERM, 1795. [*xv]

THE COURT declared, That all evidence on motions for a discharge upon bail, must be by way of deposition, and not *viva voce*.

X.—AUGUST TERM, 1796.

ORDERED, That process of subpoena, issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpoena, should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

XI.—FEBRUARY TERM, 1797.

IT IS ORDERED by the court, That the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII.—AUGUST TERM, 1797.

IT IS ORDERED by the court, That no record of the court be suffered by the clerk to be taken out of his office but by the consent of the court; otherwise to be responsible for it.

XIII.—AUGUST TERM, 1800.

In the case of *Courne v. Stead's Executors*,

ORDERED, That the plaintiff in error be at liberty to show, to the satisfaction of this court, that the matter in dispute exceeds the sum or value of \$2,000, exclusive of costs; this to be made appear by affidavit, and days notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

*XIV.—AUGUST TERM, 1801. [*xvi]

ORDERED, That counselors may be admitted as attorneys in this court, on taking the usual oath.

XV.—AUGUST TERM, 1801.

IT IS ORDERED, That in every cause when the defendant in error fails to appear, the plaintiff may proceed *ex parte*.

XVI.—FEBRUARY TERM, 1803.

IT IS ORDERED, That where the writ of error issues within 30 days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued.

XVII.—FEBRUARY TERM, 1803.

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment.

XVIII.—FEBRUARY TERM, 1803.

In such cases where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages.

XIX.—FEBRUARY TERM, 1806.

All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record *xviii**) shall be delivered *after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be a *superædeas* to a judgment, rendered in any court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *superædeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the District of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if error shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost; and if the

defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

XX.—FEBRUARY TERM, 1803.

ORDERED, That all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

*XXI.—FEBRUARY TERM, 1808. [*xviii]

ORDERED, That upon the clerk of this court producing satisfactory evidence by affidavit, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

XXII.—FEBRUARY TERM, 1810.

ORDERED, That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is, shall recover his costs in the Circuit Court.

XXIII.—FEBRUARY TERM, 1812.

ORDERED, That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

XXIV.—FEBRUARY TERM, 1812.

There having been two associate justices of the court appointed since its last session, It is Ordered, That the following allotment be made of the Chief Justice, and of the associate justices of the said Supreme Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered or ordered, viz.:

For the first Circuit—The Honorable Joseph Story. For the second Circuit—The Honorable Brockholst Livingston. For the third Circuit—The Honorable Bushrod Washington. For the fourth Circuit—The Honorable Gabriel Duvall. For the fifth Circuit—The Honorable John Marshall, *Ch. J.* For the sixth Circuit—The Honorable William Johnson. For the seventh Circuit—The Honorable Thomas Todd.

*XXV.—FEBRUARY TERM, 1816. [*xix]

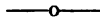
IT IS ORDERED by the court, That in all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from this court, or from any Circuit Court of the United States.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS, WITH THE DATES OF THEIR COMMISSIONS.



The Hon. JOHN MARSHALL, <i>Chief Justice</i> ,	- - - - -	January 31, 1801.
The Hon. BUSHROD WASHINGTON, <i>Associate Justice</i> ,	- - - - -	December 20, 1798.
The Hon. WILLIAM JOHNSON, <i>Associate Justice</i> ,	- - - - -	March, 1804.
The Hon. BROCKHOLST LIVINGSTON, <i>Associate Justice</i> ,	- - - - -	November 20, 1806.
The Hon. THOMAS TODD, <i>Associate Justice</i> ,	- - - - -	1807.
The Hon. GABRIEL DUVALL, <i>Associate Justice</i> ,	- - - - -	November 18, 1811.
The Hon. JOSEPH STORY, <i>Associate Justice</i> ,	- - - - -	November 18, 1811.
RICHARD RUSH, Esq., <i>Attorney-General</i> ,	- - - - -	Appointed February 10, 1814.

REPORTS OF THE DECISIONS
OF THE
Supreme Court of the United States.

FEBRUARY TERM, 1816.

[LOCAL LAW.]

NEGRESS SALLY HENRY, by WILLIAM
HENRY, her father and next friend,
v.
BALL.

The act of assembly of Maryland, prohibiting the importation of slaves into that state for sale or to reside, does not extend to a temporary residence, nor to an importation by a hirer or person other than the master or owner of such slave.

ERROR on judgment, rendered by the Circuit Court for the county of Washington, in the District of Columbia, against the plaintiff, who was in that court a petitioner for freedom.

The plaintiff being a child, and the slave of the defendant, who resided in Virginia, was, 2*] some short *time before the month of May, 1810, put to live with Mrs. Rankin, then residing also in Virginia, whose husband was an officer in the marine corps, stationed in the city of Washington. Mrs. R. was to keep the girl for a year, and was to give her victuals and clothes for her services. Some time in May, 1810, Mrs. R. removed to Washington, and brought the petitioner with her, whether with or without the permission of Mr. Ball is entirely uncertain. It was probably, though not certainly, with his knowledge. In October, 1810, Mr. Ball married, and soon after took the petitioner into his possession and carried her home, he then residing in Virginia. Mrs. R. gave her up, being of opinion, though the girl had remained with her only seven or eight months, that she was bound to give her up when required by her master. Mr. B. afterwards removed himself into the city, and brought the petitioner with him. Upon this testimony the counsel for the petitioner prayed the court below to instruct the jury that if they believed, from the evidence, that the defendant knew of the intended importation of the petitioner by Mrs. R., and did not object to it, then such importation entitled the petitioner to her freedom; and, further, that it was competent to the jury to infer, from his knowing of the importation, and not objecting to it, that such

Wheat. 1.

importation was made with his consent. This instruction the court refused to give; but did instruct the jury that if they should be of opinion that Mrs. R. was, at the time she brought the petitioner into the city of Washington, a citizen of the United States coming into the city of Washington *with a *bona fide* intention [*3 of settling therein, then her importation of said slave was lawful, and did not entitle the petitioner to her freedom, whether the said importation were or were not made with the consent of the defendant. An exception was taken to this opinion, and the jury having found a verdict for the defendant, on which judgment was rendered by the court, the cause was brought into this court by writ of error.

Key, for the plaintiff in error, and petitioner, cited the act of the assembly of Maryland of 1796, c. 67, s. 1, 2, contending that its true construction applied only to *bona fide* owners, and not to bailees or hirers.

Law, contra, stated that the domicile of the owner had been in Virginia, and that she was a *bona fide* emigrant from that state. Being a hirer of the slave, she was *pro hac vice* owner.¹ The act of assembly must be construed to refer to both species of property, qualified and absolute. He referred to the 6th section of the act to show that a property may be, in slaves, limited in point of time.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

This cause depends on an act of the state of Maryland, which is in force in the county of Washington. The first section of that statute enacts, "that it shall not be lawful to [*4 bring into this state any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state contrary to this act, if a slave before, shall, thereupon, immediately cease to be the property of the person or persons so importing or bringing such slaves within this state, and shall be free." The 2d section contains a proviso in favor of citizens of the United States coming into this state with a *bona fide* intention of settling therein, and bringing slaves with them.

1.—2 Black. Com., 254, and the civil law writers there cited.

The 4th section enacts, that "nothing in this act contained shall be construed or taken to affect the right of any person or persons traveling or sojourning with any slave or slaves within this state, such slave or slaves not being sold or otherwise disposed of in this state, but carried by the owner out of the state, or attempted to be carried."

This act appears to the court not to comprehend the case now under consideration. The expressions of that part of the first section which prohibits the importation of slaves, are restricted to cases of importation "for sale or to reside in this state." The petitioner was obviously not imported for sale, nor is the court of opinion that the short time for which she was to continue with Mrs. Rankin can satisfy the words "to reside within this state." The legislature must have intended to prohibit a general residence, not a special limited residence, where the slave is to remain for that portion of the year for which she was hired that still remained.

If on this point the first section of the act could be thought doubtful, the fourth section [5*] seems to remove that doubt. It declares that "nothing in the act contained shall be construed or taken to affect the right of any person traveling or sojourning with any slave or slaves within this state, such slave or slaves not being sold or otherwise disposed of in this state, but carried by the owner out of this state, or attempted to be carried."

This section sufficiently explains the residence contemplated by the legislature in the first section. The term "sojourning" means something more than "traveling," and applies to a temporary, as contradistinguished from a permanent residence. The court is also of opinion, that the act contemplates and punishes an importation or bringing into the state by the master or owner of the slave. This construction, in addition to its plain justice, is supported by the words of the first section. That section declares, that "a person brought into this state as a slave contrary to this act, if a slave before, shall, thereupon, cease to be the property of the person or persons so importing or bringing such slave within this state, and shall be free." It is apparent that the legislature had in view the case of a slave brought by the owner, since it is the property of the person importing the slave which is forfeited.

Upon the best consideration we have been able to give this statute, the court is unanimously of opinion that the petitioner acquired no right to freedom by having been brought into the county of Washington by Mrs. Rankin for one year's service, she having been in the course of the year carried back to Virginia by her master.

[6*] The Circuit Court appears to have considered the case as coming within the proviso of the 2d section. If in this opinion that court were even to be thought mistaken, the error does not injure the petitioner, and is, therefore, no cause for reversal. The court is unanimously of opinion that the judgment ought to be affirmed.

Judgment affirmed.

[LOCAL LAW.]

NEGRO JOHN DAVIS ET AL. v. WOOD.

Evidence by hearsay and general reputation is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own.

Verdicts are evidence between parties and privies only; and a record proving the ancestor's freedom to have been established in a suit against another party by whom the petitioner was sold to the present defendant, is inadmissible evidence to prove the petitioner's freedom.

THIS case was similar to the preceding, in which the petitioners excepted to the opinion of the court below: 1st. That they had offered to prove, by competent witnesses, that they (the witnesses) had heard old persons, now dead, declare, that a certain Mary Davis, now dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and also offered the same kind of testimony to prove that Susan Davis, mother of the petitioners, was lineally descended, in the female line, from the said Mary; and it was admitted that said Susan was, at the time of petitioning, free, and acting, in all respects, as a free woman; which evidence, by hearsay and general reputation, the court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. 2d. That they having proved that the petitioners are the children of Susan Davis, and that she is the same person named in a certain record in a cause wherein Susan Davis and her daughter Ary were petitioners against Caleb Swan, and recovered their freedom, the plaintiffs offered to read said record in evidence to the jury, as *prima facie* testimony that they are descendants in the female line from a free woman, who was born free, and are of free condition, connected with the fact that the defendant in this cause sold said Susan to Swan, the defendant in said record, which the court refused to suffer the petitioners to read to the jury as evidence in this cause.

Lee, for the plaintiffs in error, and petitioners, referred to the opinion of the court (DUVALL, J., dissenting) in the case of *Mima Queen and Child v. Hepburn*, February Term, 1813, as to the admissibility of hearsay evidence in a similar case, remarking that unless the court was disposed to review its decision, it must be taken for law, and he could not deny its authority.

DUVALL, J. The petitioners in that case were descended from a yellow woman, a native of South America. In this case they are [*8] descended from a white woman.

Lee cited the opinion of the Virginia Court of Appeals, in the case of *Pegram v. Isabel*, as to the admissibility of the record, in which a record was admitted.

Key, contra, contended, that both grounds were irrevocably closed against the other party. The first certainly; and the second equally so; as the evidence could not be admissible as *prima facie* testimony merely, but if admitted must be conclusive. The decisions in the state courts of Virginia are against the evidence of the parent's or other ancestor's freedom being conclusive in favor of a child. The case of *Pegram*

v. *Tabel* is no authority here, for it was formerly considered and repudiated by this court in the decision alluded to.

Lee and *Lowe* replied, and cited 2 Washington's Rep., 64., and Swift's Law of Evidence, 18.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and stated that, as to the first exception, the court had revised its opinion in the case of *Mima Queen and Child v. Hepburn*, and confirmed it. As to the second exception, the record was not between the same parties. The rule is, that verdicts are evidence between parties^[9*] ties and privies. The court does not feel inclined to enlarge the exceptions to this general rule, and, therefore, the judgment of the court below is affirmed.

Cited—10 Pet. 438; 24 How. 211; 1 Curt. 48; 1 Wood. & M. 174, 182; Hemp. 55.

[INSTANCE COURT.]

THE SAMUEL.

PIERCE AND BEACH, Claimants.

Prosecutions under the non-importation laws are causes of admiralty and maritime jurisdiction, and the proceeding may be by libel in the admiralty. Technical nicety is not required in such proceedings; it is sufficient if the offense be described in the words of the law, and so set forth that, if the allegation be true, the case must be within the statute.

That the deponent is a seaman on board a gunboat in a certain harbor, and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting, is not a sufficient reason for taking his deposition *de bene esse* under the judiciary act of 1789.

Where the evidences so contradictory and ambiguous as to render a decision difficult, the court will order further proof in a revenue or instance cause.

APPEAL from the Circuit Court for the Rhode Island District. The brig Samuel sailed from St. Bartholomews, an island belonging to His Majesty the King of Sweden, in the month of November, 1811, with a cargo consisting of rum, molasses, and some other articles, and arrived in Newport, Rhode Island, on the 8th of the following December, where the vessel and cargo were seized and libeled in the District Court as being forfeited to the United States, under the act of Congress prohibiting the importation^[10*] of articles the growth, produce or manufacture of Great Britain or France, their colonies or dependencies. The vessel and cargo were claimed by John Pierce and George Beach, both citizens of the United States. The District Court condemned both vessel and cargo. The Circuit Court condemned the vessel and the rum, but restored the residue of the cargo. From the sentence of the Circuit Court both the libelants and the claimants appealed to this court.

Daggett, for the claimants, made three points: 1st. The proceedings ought to have been at common law, and not in the admiralty.

2d. The information is insufficient.

3d. The testimony was insufficient to warrant a condemnation.

1. The act of the 1st of March, 1809, on which this libel is founded, directs, that the penalties and forfeitures "shall be sued for, prosecuted and recovered, with the costs of Wheat. 1.

suit, by action of debt, indictment, or information." The cases under the authority of which this proceeding was brought are *The Vengeance*,¹ *The Sally*² and *The Betsey and Charlotte*.³ But the act under which the *Vengeance* was prosecuted was the same with the collection law of the 2d of March, 1799, section 89, which prescribed a proceeding in the admiralty; the *Sally* was prosecuted under the slave-trade act of the 23d of March, 1794, which indicates no particular proceeding; *whilst *The [11] Betsey and Charlotte* was prosecuted under the act of non-intercourse with St. Domingo, of the 28th of February, 1806, wherein no method of recovering the penalties was specified. Supposing this to be a civil cause of admiralty and maritime jurisdiction, and that the District Court has jurisdiction of it as such, the proceedings may still be by information, as in the exchequer. Where a statute prescribes a particular remedy, or particular remedies, no other can be pursued.⁴ 2. The statute is penal, and requires strictly accurate proceedings. The libel alleges, generally, that the cargo was laden on board in some foreign port. The cargo was stated to have belonged, in the alternative or disjunctive, to Pierce and Beach, or to one Stillman, or some other citizen, or consigned to one of said parties; and it was alleged that the offense was committed with "the knowledge of the owner, or of the master." 3. The testimony of Oldham, a witness in the cause, was taken irregularly, and not used in the court below. The vessel and cargo were condemned upon the testimony of tasters only, against all the oral and documentary evidence. This testimony is novel; professional men and artists are credible witnesses in their own peculiar science or art; but this is matter of speculative opinion only not of known art or certain science. The witnesses can never be made responsible for perjury. Their evidence is contradicted.

The *Attorney-General*, for the libelants. 1. The *cargo could not have been the [12] produce of St. Bartholomews, a sterile and unproductive island, used as St. Eustatius was during the war of the American revolution. It is more likely it was transshipped from a British than a Spanish colony; and, therefore, the claim is clouded with improbability. The case of *The Odin*⁵ may be invoked from the law of prize to show how little the fairest documentary evidence is to be regarded in comparison with the *evidentia rei*. Strip off this veil, and the *onus* is thrown upon the claimants, from which they cannot relieve themselves but by the strongest positive testimony. As to the evidence of the tasters, all our knowledge is derived through the senses. It is not unerring, but weighty; and the revenue laws rely upon it in collecting the duties on wines. The spirit and equity of the judiciary act of the 24th of September, 1789, were pursued in taking the deposition of Oldham; he was a seaman serving in the flotilla of gun-boats at Newport, and liable to be ordered to some other place. 2. It

1.—3 Dall. 297.

2.—2 Cranch, 406.

3.—4 Cranch, 443.

4.—2 Burr. 803, *Rex v. Robinson*.

5.—1 Gallison. 85, *The Bolina*.

6.—1 Rob., 217.

is novel doctrine that this is a libel as contradistinguished from an information. It is a libel in the nature of an information; and the process of information is used in the admiralty as well as in the exchequer. In alleging the offense, reasonable certainty only was necessary; the charge is insufficiently specific to have put the claimants on their guard; and to require more would be to prevent the conviction of offenders. The case of *The Bolina* does not apply to the present question.

13*] *Daggett*, in reply. The deposition of Oldham cannot be admitted, unless it be authorized by statute or common law; prize proceedings are peculiar; soldiers and sailors are not excepted by the letter of the judiciary act, and a class of exceptions cannot be implied. The burthen of proof in fiscal causes is not thrown on the claimants unless by positive law. There can be no difficulty in convicting offenders, as these proceedings are amendable.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

On the part of the claimants it is contended, 1st. That the proceedings ought to have been at common law, and not in the admiralty. 2d. That the information, if it be one, is insufficient. 3d. That the testimony is wholly insufficient to warrant a condemnation.

In arguing the first point, the counsel for the claimants endeavored to take this case out of **14*]** the "principle laid down in *The Vengeance*, and in other cases resting on the authority of that decision, by urging a difference of phraseology in the acts of Congress. In that part of the act on which this prosecution is founded which gives the remedy, it is enacted, "that all penalties and forfeitures, arising under, or incurred by virtue of this act, may be sued for, prosecuted, and recovered, with costs of suit, by action of debt, in the name of the United States of America, or by indictment or information, in any court having competent jurisdiction to try the same." Debt, indictment, and information, are said to be technical terms designating common law remedies, and, consequently, marking out the courts of common law as the tribunals in which alone prosecutions under this act can be sustained. There would be much force in this argument if the term "information" were exclusively applicable to a proceeding at common law.* But the court is of opinion that it has no such exclusive application. A libel on a seizure, in

its terms and in its essence, is an information. Consequently, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs.

2d. The second objection made by the claimants to these proceedings is, that though the words of the act may be satisfied by a libel in the nature of an information, yet the same strictness which is required in an information at common law will be necessary to sustain a libel in the nature of an information in the court of admiralty; and that, testing the libel by this rule, it is totally insufficient. The court is not of opinion that all those **[15]** technical niceties which the astuteness of ancient judges and lawyers has introduced into criminal proceedings at common law, and which time and long usage have sanctioned, are to be engrafted into proceedings in the courts of admiralty. These niceties are not already established, and the principles of justice do not require their establishment. It is deemed sufficient that the offense be described in the words of the law, and be so described that if the allegation be true the case must be within the statute. This libel does so describe the offense, and is, therefore, deemed sufficient.

3d. The third and material inquiry respects the evidence. Is this cargo of British origin?

In the examination of this question, the first point to be decided is the admissibility of the deposition of Thomas Oldham. That deposition is found in the record of the Circuit Court, with a certificate annexed to it, in these words: "N. B.—The deposition of Thomas Oldham was filed after the trial of the case, by order of the court." Some of the judges are of opinion that this certificate of the clerk is to be disregarded, and that the deposition, being inserted in the record, must be considered as a part of it, and must be supposed to have formed a part of the evidence when the decree was made; but the majority of the court is of a different opinion. The certificate of the clerk to the deposition is thought of equal validity as if forming a part of his general certificate. It shows that this deposition formed no part of the cause in the Circuit Court, and is, therefore, liable to every exception which **[16]** could be made to it, if it was not found in the record, and was now offered for the first time to this court. On inspection it appears to be a deposition taken before a single magistrate, not on order of court on a commission, with notice to the attorney of the claimant, who did not attend. It must be sustained by the act of Congress, or it is inadmissible. The reason assigned for taking it is, "that the deponent is a seaman on board a gun-boat of the United States, in the harbor of Newport, and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting." The 30th section of the judiciary act directs, that "the mode of proof by oral testimony, and the examination of witnesses in open court, shall be the same in all the courts of the United States." The act then proceeds to enumerate cases in which depositions may be taken *de bene esse*. The liability of the witness to be ordered out of the reach of the court is

1.—1 Gallison, 22. Anonymous.

The decision cited by the counsel applies only to the power of the Circuit Court to allow amendments in revenue causes or proceedings *in rem*, before appeal to the Supreme Court. But it may be interesting to the reader to be informed that the Supreme Court may remand the cause to the court below, with instructions to amend the proceedings. Thus, in the cases of *The Caroline* and *The Emily*, at February term, 1813, which were informations *in rem* on the slave-trade act of the 22d of March, 1794, the opinion of the court was, that the evidence was sufficient to show a breach of the law, but that the libel was not sufficiently certain to authorize a decree of condemnation. The following decree was therefore entered: "It is the opinion of the court that the libel is too imperfectly drawn to found a sentence of condemnation thereon. The sentence of the Circuit Court is therefore reversed, and the cause remanded to the said Circuit Court with directions to admit the libel to be amended." *Vide infra*, *The Edward*.

not one of the causes deemed sufficient by the law for taking a deposition *de bene esse*. In such case there would seem to be a propriety in applying to the court for its aid. But, supposing this objection not to be so fatal as some of the judges think it, still the deposition is taken *de bene esse*, not in chief; and a deposition so taken can be read only when the witness himself is unattainable. It does not appear in this case that the witness was not within the reach of the court, and might not have given his testimony in open court, as is required by law. Had this deposition been offered in court before, or at the time of the trial, and used without objection, the inference [17*] *that the requisites of the law were complied with, or waived, might have been justifiably drawn. But the party is not necessarily in court after his cause is decided, and is not bound to know the fact that this deposition was ordered to be filed. For these reasons it is the opinion of a majority of the court that the deposition of Thomas Oldham ought not to be considered as forming any part of the testimony in this cause.

The deposition of Oldham being excluded, the prosecution rests chiefly on the depositions of Benjamin Fry and William S. Allen. These witnesses are both experienced dealers in rum; have both tasted and examined the rum of this cargo, and are both of the opinion that it is of British origin. In the opinion of all the judges this testimony is entitled to great respect. The witnesses say that there is a clear difference between the flavor of rum of the British and the Spanish islands, though they do not attempt to describe that difference, and that their opinion is positive that this is British rum.

To weaken the force of this testimony, the claimants have produced the depositions of several witnesses, also dealers in rum, who declare that the difference in the flavor of the best Spanish rum and that of the British islands, is inconsiderable, and that they cannot distinguish the one from the other; that they believe the best judges find great difficulty in making the discrimination. This testimony would, perhaps, have been entitled to more influence had the persons giving it tasted the rum imported in the Samuel, and declared [18*] themselves incapable of deciding *on its origin; for, although in some cases the difference may be nearly imperceptible, in others it may be considerable. The testimony, however, on which the claimants most rely is found in the deposition of Samuel Marshall and of Andrew Furnrad. Samuel Marshall, the brother of John and Joseph Marshall, merchants of St. Bartholomews, from whom the rum in question was purchased, deposes, that he has lived with them for two years, and had, at the time of giving his deposition, they being absent from the island, the care of their business. That the rum and molasses constituting the cargo of the Samuel were imported into St. Bartholomews from La Guira, in vessels which he names, and are of the growth and produce of that place. Andrew Furnrad is the collector of the port of Gustavia in St. Bartholomews, and deposes, that the quantity of rum and molasses which were laden on board the Samuel, and which cleared out regularly for New London, were regularly imported from La

Wheat. 1.

Guira in two vessels, which he names, whose masters he also names. They are the same that are mentioned by Samuel Marshall.

On this conflicting testimony much contrariety of opinion has taken place. The omission of the claimants to furnish other testimony supposed to have been within their reach, and of which the necessity would seem to have been suggested by the nature of the prosecution, impairs, in the opinion of several of the judges, the weight to which their positive testimony might otherwise be entitled. The court finds it very difficult to form an opinion satisfactory to itself. *So situated, and under [*19] the peculiar circumstances attending Oldham's deposition, the majority of the court is of opinion that the cause be continued to the next term for further proof, which each party is at liberty to produce.

*Further proof ordered.*¹

Cited—9 Wheat. 401; 4 How. 154; 6 How. 389; 5 Wall. 60; 7 Wall. 638; 8 Wall. 20; 20 Wall. 110; 1 Cliff. 535; Blatchf. & H. 15.

*[INSTANCE COURT.]

[*20]

THE SHIP OCTAVIA.

NICHOLLS ET AL., Claimants.

A question of fact under the non-intercourse act of the 28th of June, 1809.

APPEAL from the decree of the Circuit Court for the Massachusetts District, affirming the decree of the District Court condemning said vessel.

This ship was seized in the port of Boston, in October, 1810, and the information alleges that the ship, in March, 1810, departed from Charleston, S. C., bound for a foreign port, to wit, Liverpool in Great Britain, with a cargo of merchandise on board, without a clearance, and without having given the bond required by the non-intercourse act of the 28th of June, 1809, ch. 9, s. 3. The claimants admitted, that the ship proceeded with her cargo (which consisted of cotton and rice) to Liverpool; but they

1.—Revenue causes are, in their nature, causes of admiralty and maritime jurisdiction. In Great Britain all appeals from the vice-admiralty courts in those causes are within the jurisdiction of the High Court of Admiralty, and not of the privy council, which is the appellate tribunal in other plantation causes. This point was determined so long ago as the year 1754, in the case of *The Vrow Dorothea*, decided before the High Court of Delegates, which was an appeal from the vice-admiralty Judge of South Carolina to the High Court of Admiralty, and thence to the delegates. The appellate jurisdiction was contested upon the ground that prosecutions for the breach of the navigation and other revenue laws were not, in their nature, causes civil and maritime, and under the ordinary jurisdiction of the Court of Admiralty, but that it was a jurisdiction specially given to the vice-admiralty courts by stat. 7 and 8, Wm. III. ch. 22, s. 6, which did not take any notice of the appellate jurisdiction of the High Court of Admiralty in such cases. The objection, however, was overruled by the delegates, and the determination has since received the unanimous concurrence of all the common law judges, on a reference to them from the privy council. The proceeding in this case is called "a libel of information;" showing that libel and information in the admiralty are synonymous terms. (2 Rob., 245, *The Fabius*.)

alleged that the ship originally sailed from Charleston, bound to Wiscasset, in the District of Maine, with an intention there to remain until the non-intercourse act should be repealed, and then to proceed to Liverpool. That by reason of bad winds and weather, the ship was retarded in her voyage, and on the 10th of May, 1810, while still bound to Wiscasset, she spoke with a ship from New York, and was informed of the expiration of the non-intercourse act, and thereupon changed her course, ²¹ and *proceeded to Liverpool. The manifest states the cargo to have been shipped by sundries, consigned to Mr. P. Grant, Boston.

The *Attorney-General* and *Law* argued the case for the appellees on the facts, and cited the case of *The Wasp*,¹ which was an information under the same section of the same act. They contended that the burden of proof was thrown upon the claimant, inasmuch as the law requires a bond to be given, if the ship was bound to a port then permitted, conditioned that she should not go to a prohibited port.

Dexter, for the appellants and claimants, stated, that the suit was not founded on the same act with that in the case of *The Samuel*,² but that the same objection existed as to the form of the process. It is true, the judiciary act of the 24th of September, 1789, c. 20, s. 9, has declared that certain causes shall be causes of admiralty and maritime jurisdiction, but it does not, therefore, follow that a forfeiture created by a new statute shall be enforced by the same process. The arguments urged against it in the cases subsequent to that of *The Vengeance*,³ have always been answered by the mere authority of that case. But the decision in that case ought to be re-examined, because it affects the right of trial by jury, and because the argument was very imperfect. The word "including," in the judiciary act, ought to be con-

strued cumulatively. It provides that the district *courts shall "have exclusive [*22 original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas," &c. The presumption arising from the collective use of debt, information, and indictment, in the non-intercourse act, is, that they relate to a common law jurisdiction. The word information cannot be synonymous with libel, because the first is a common law, the second a civil law proceeding. A common law proceeding may be applied by statute to admiralty suits. The statute 28th Henry VIII., c. 15, prescribes a common law process (indictment) for offenses triable in the admiralty.

STORY, J. That was the High Commission Court.

Dexter answered that he was aware of it, but that a suit may be a cause of admiralty and maritime jurisdiction, and yet triable by common law process.⁴

*STORY, J., delivered the opinion of [*23 the court.

This case depends on a mere question of fact. After a careful examination of the evidence, the majority of the court are of opinion, that the decree of the Circuit Court ought to be affirmed. It is deemed unnecessary to enter into a formal statement of the grounds of this opinion, as it is principally founded upon the same reasoning which was adopted by the Circuit Court in the decree which is spread before us in the transcript of the record.

*Decree affirmed with costs.*⁵

1.—1 Gallison. 140.

2.—Ante, p. 9.

3.—3 Dall., 297.

4.—Before the statute 28th Henry VIII., c. 15, the admiralty had a very extensive criminal jurisdiction, which seems to have been coeval with the very existence of the tribunal, in which it proceeded according to the civil law, and other its own peculiar codes; but by the process of indictment found by a grand jury, and a *capias* thereupon delivered by the admiral or his lieutenant, to the marshal of the court, or the sheriff. (See Clerk's Praxis, Rough-ton's Article cited therein, 122, note, c. 16, 17. Ex-ton, 32. Selden de Dominio Maris, 1, 2, c. 24, p. 209. 4 Rob., 73.) Note (a), The Rucker. This criminal jurisdiction, independent of statutes, still exists; and all offenses within it, which are not otherwise provided for by positive law, are punishable by fine and imprisonment. (See 4 Black. Com., 233, Brown's Civ. & Adm. Law, Appendix, No. 111.) The statute 28th Henry VIII., c. 15, provides, that all treasons, felonies, &c., on the seas, or where the admiral hath jurisdiction, &c., shall be tried, &c., in the realm, as if done on land; and commissions under the great seal shall be directed to the admiral or his lieutenant, and three or four others, &c., to hear and determine such offenses, after the course of the laws of this land for like offenses done in the realm. And the jury shall be of the shire within the commission. (Stat. 33d Geo. III., c. 66.) Under this provision the sessions at the Old Bailey are now held, at which the judge of the High Court of Admiralty presides, and common law judges are included in the commission. But it is held that this statute does not alter the nature of the offense, which shall still be determined by the civil law, but the manner of trial only. (Hale's P. C. 3 Inst., 112.)

5.—Aff'g—1 Gall. 498.

Cited—6 How. 389; 7 Wall. 638; Blatchf. & H. 240.

5.—As the opinion of the court below is referred to for the grounds upon which its decree was affirmed, it may seem fit here to insert so much of that opinion as develops the principles and rules of evidence applied by the court in cases of this nature.

After stating the facts of this case, the learned judge proceeds: "Since I have had the honor to sit in this court I have prescribed to myself certain rules, by the application of which my judgment, in cases of this nature, has been *uniformly governed. [*24 1st. Where the claimants assume the *onus probandi* (as they do in this case) not to acquit the property unless the defense be proved beyond a reasonable doubt. 2d. If the evidence of the claimants be clear and precisely in point, not to indulge in vague and indeterminate suspicions, but to pronounce an acquittal, unless that evidence be clouded with incredibility, or encountered by strong presumptions of *mala fides*, from the other circumstances of the case." He also alludes to the absence of documentary evidence to support the defense set up by the claimants as affording an example of the application of these rules, as well as of another rule equally important. "What strikes me as decisive against the defense is the entire absence of all documents respecting the cargo. Bills of lading, letters of advice, or general orders, must have existed. If the cargo had been destined for Boston only, there would not have been so much difficulty. But the defense shows its destination ultimately for Liverpool. Where, then, is the contract of affreightment, the bills of lading, the letters of advice, and the correspondence of the shippers, or of Mr. P

Wheat. 1.

25*]

*[PRIZE.]

THE MARY AND SUSAN.

G. & H. VAN WAGENEN, Claimants.

Where goods were shipped in the enemy's country, in pursuance of orders from this country received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to them (the bankers), and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers. It was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

A PPEAL from the Circuit Court for the District of New York. The goods in question were part of the cargo of the ship *Mary and Susan*, a merchant vessel of the United States, which was captured on the 3d of September, 1812, by the *Tickler*, a private armed vessel of the United States. The cargo was libeled as prize of war; this portion claimed by Messrs. G. & H. Van Wageningen, and condemned in the District Court. In the Circuit Court this sentence was reversed, and restitution to the claimants was ordered; from which decree the captors appealed to this court. The cause having been heard in both the courts below, on the documentary evidence found on board, the original order for the goods does not appear. That they were shipped in consequence of 26*] *orders is, however, sufficiently proved by the letters addressed to the claimants, and the other papers which accompanied them. These are: 1. An invoice headed in the words following:

"Birmingham, 8th July, 1812.
Say 15th March, 1811.

"Invoice of fourteen casks and four baskets of hardware, bought by Daniel Cross & Co. by order, and for account and risk, of G. & H. Van Wageningen, merchants, New York, marked and numbered as per margin, and forwarded on 4th March, 1811, to care of Martin, Hope & Thornley, Liverpool, and by them afterwards transferred to the care of T. and W. Earle & Co., of Liverpool; which goods are now the property of Messrs. Spooner, Atwood & Co., bankers, of Birmingham, to whom you will please to remit the amount of this invoice."

And containing at the foot, after the enumeration of the articles and their prices in the usual form, the following charges:

"Amount of Invoice.	£1041 0 11 1-2
"Commission 5 per cent.	52 1 0 1-2
	£1093 2 0

Grant? Can it be credible that, without any authority, the master, or part owner of the ship should, on their own responsibility, have gone to Liverpool without orders or consignment? That from a mere vague knowledge of the wishes of the shippers, they should place at imminent risk the whole property, without written authority to color their proceedings? There must have been papers. They are

Wheat. 1.

"Freight to Liverpool	£12 18 0
Entry and Town Dues.	6 0
Cartage, portorage, and cooperage,	4 15 0
Bill of Lading,	3 6
Export duty 4 per cent.	40 4 0
Broker's commission for- warding,	4 3 0
	£82 9 6
Commission 5 per cent.,	3 2 6
	£85 12 0
Insurance on the <i>Mary</i> and <i>Susan</i> . Am't and premium covered by £1,300, at 21-2 guineas per cent., and policy 78 shillings.	38 0 6
Commission for effect- ing insurance at 1-2 per cent.	6 10 0
	44 10 6
	£1208 4 6
27*] *Am't brought forward,	£1208 4 6
Canal insurance to Liv- erpool 1-2 per ct. on £1,041 0 11 1-2.	5 4 0
Insurance against fire	6 15 0
Warehouse rent in Liv- erpool.	15 0 0
Twelvemonths' interest on £1,041 0 11 1-2 at 5 per cent.,	52 1 0
	79 0 0
	£1282 4 6"

2. A bill of lading in the usual form, stating that the goods were shipped by Thomas and William Earle & Co., of Liverpool, to be delivered to the claimants, or to their assigns, in New York. 3. The two following letters:

"Birmingham, 8th July, 1812.

"Messrs. G. & H. VAN WAGENEN:

"GENTLEMEN—In consequence of the revocation of the British orders in council, on the first day of August next, we have lost no time in shipping the goods sent to Liverpool so long since, agreeable to your kind order. They are in the *Mary and Susan*, a most beautiful new vessel, to sail in all this week; the freights are very high, 70s. for measurement to New York, and 80s. to Philadelphia, and at this moment nothing less will be taken. We, therefore, thought you would prefer to have the goods at this rate, rather than wait for a reduction in the freight, which, we doubt not, will soon take place. By the letter of our friends, Messrs. Spooner, Atwood & Co., herewith, you will perceive the interruption to commerce has been an inconvenience to us as young merchants; but the unneighborly conduct of the old house will only serve to prompt us to new exertion for our friends in the States, for whose interest nothing shall be omitted within our power. We shall certainly serve them as well, if not on better terms, than heretofore. We will not be undersold. In a few days we shall send Mr. Oakley, for the use of our friends, a new and complete set of patterns, which, we trust, will meet with their approbation. Mr. O. and Messrs. B. W. Rogers & Co.

not produced. The affidavits of the shippers of Mr. Grant, of the consignees in England, are not produced. What must be the conclusion from this general silence? It must be, that if produced, they would not support the asserted defense. At least, such is the judgment that both the common law and the admiralty law pronounce in cases of suppression of evidence."

will be able to give you more particulars respecting what has passed on this side. The amount of invoice herewith to your debt is £820 2 1, which, agreeable to the letter of Messrs. Spooner, Attwood & Co., you will please to remit to them on arrival of the goods: 28*] but hereafter things will move in the usual channel. Waiting your further favors,

We remain, gentlemen,

Your most obedient servants,

"DANIEL CROSS & Co."

"Birmingham, 9th July, 1812.

"Messrs. G. & H. VAN WAGENEN,

Merchants, New York:

"GENTLEMEN—In consequence of the late unfortunate state of affairs between this country and the United States of America, great inconvenience and distress have naturally been experienced by the merchants and manufacturers here. Among others, our friends Messrs. Daniel Cross & Co. have been considerably embarrassed, and have received great relief and assistance from our house. We were induced to extend this assistance, as bankers, from motives of friendship and regard, and under the hope that the unnatural state of affairs between the two countries could not possibly last long, but as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods which they had provided on account of your house, and of several others in the United States, previous to the 2d of February, 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods which Messrs. Daniel Cross & Co. had purchased for your account, and which are now forwarded to you, requesting that you will remit the amount, £820 2 2, to us at your earliest convenience. We cannot conclude this letter without expressing our satisfaction at the services we have had the opportunity of rendering to Messrs. Daniel Cross & Co., whom we consider to be persons of the greatest integrity and knowledge of business, and without earnestly recommending them to your future attention. We are convinced that their late difficulties will not at all affect their future proceedings, and that they will henceforth be enabled to carry on their business in the same regular and punctual way as they have formerly done; and we cannot but flatter ourselves, that as the orders in council are now revoked, and the British government has become alive to the true interest of the British people, the natural relations between the two countries will long continue, and that the connection between your respectable house and Messrs. Daniel Cross & Co. will be productive of permanent and mutual advantages. With best wishes for your prosperity and happiness, and that of your country,

"We are, respectfully, gentlemen,

"Your obedient humble servants,

"SPOONER, ATTWOOD & Co.,

"Bankers, Birmingham.

"Messrs. G. & H. VAN WAGENEN,

Merchants, New York."

29*] *Hoffman, for the appellants and captors. 1st. Probably a delivery from Cross & Co. to the ship-master would have been, in contem-

28

plation of law, a delivery to the claimants. But Attwood & Co. were the shippers, between whom and the claimants there was no privity. There is no proof that Cross & Co. ever accepted the order or commission sent to them by the claimants. There was a sale and delivery of the goods from Cross & Co. to Attwood & Co., and the order was executed by strangers to the claimants. Could any action have been maintained by the claimants against Attwood & Co.? None could have been maintained, even against Cross & Co. Possibly, if they had agreed to accept the commission, a special action on the case might have been brought against them as factors. But by the assignment to the bankers they disabled themselves from executing the order. The bankers did not acquire the mere lien; they would not have been secure without the absolute dominion of property. They were not obliged to ship, nor the claimants to receive. Both parties might, or not, according to their interest. Suppose the goods had been lost in their transit, could Attwood & Co. have maintained an action for the price against the consignees? I anticipate the unanimous answer of the court in the negative. Suppose the goods should be condemned as prize of war, could the bankers recover against the claimants? No! neither in consequence of a physical nor a legal loss. The case of Dunham and Randolph¹ is conclusive of the present. Attwood & Co. *30 exercised acts of ownership on the goods after the transfer to them, and until the lading on board. The claimants could not have received the goods without paying Attwood & Co. They may have had an interest in paying Cross & Co., their correspondents, who may have had their funds in possession—who may have been their debtors. They had an election precisely as the claimants in the Frances had.

Dexter, for the respondents and claimants. The possession of the goods was continued in Cross & Co. by their agents at Liverpool, Earl & Co., who shipped as their, and, consequently, as our agents, on board a general ship, to us, for our account and risk. When the goods were first put in motion, their transit to New York began, and they were, in effect, delivered to the consignees at that port. Some act of the correspondent in Europe may be necessary to show that he elects to consider the goods, after being purchased of the manufacturer, as the property of the merchant in America. But such an act existed in this case; and the property changed when the goods were delivered to the common carrier on the canal from Birmingham to Liverpool, *i. e.* in 1811. The carrier was the bailee of the consignees in law, and the goods were at their risk from that time. It may be true that the bankers cannot maintain a suit against us; but it may be true that the property, nevertheless, vests in us. The only doubt whether such a suit could be maintained, is, that the debt due to Cross & Co. being a chose in action, could not be transferred. Still, the right to it subsists in them, *who may *31 sue the claimants on account of the advances made by order from them. It is, therefore, immaterial which of the two parties in England may maintain the action. Except for the in-

1.—Case of The Frances, Feb. Term, 1814 and 1815

Wheat. 1.

tervention of the capture and prize proceedings, the goods are delivered, and the claimants are debtors for the price. A bill of lading drawn in consequence of an order to ship goods, transfers the property to the consignee. There is no copy of what is termed the assignment; but it is easy to see that its object was not to defeat the arrangement, or the subsisting relations of creditor and debtor between Cross & Co. and the claimants; but merely to enable the bankers to receive their money from the consignees. Either the assignment was a sale or a mere naked authority to receive payment from the claimants. If a sale, then was it invalid for want of delivery; if an authority only, then the right of property remains where it was, though it is possible the bankers would have been entitled, in equity, to receive the money. The expression in the heading of the invoice, "which goods are now the property of Messrs. Spooner, Attwood & Co.," only proves them to be bad lawyers and bad logicians. Probably they are ignorant of the distinction between general and special property. The *res gestæ* do not warrant a pretension of general property in them, and we deny the conclusion they have drawn. Nothing passed but a right to receive the price of the goods. They had not even a lien, or other legal right, because they never had the possession; and, in whatever way they might have enforced their claim, they meant **32***] nothing more by it than a *confident expectation, founded on mercantile courtesy, that the claimants would pay them. The original arrangement was to subsist, and Cross & Co. were, in fact, the shippers. Even supposing they have not fulfilled our order literally and strictly—suppose a right of election in the consignees to receive or reject the goods—are we not to wait for this election? Can they lose the property before this election is made? An irregularity or defect in the execution of their order may give them a right of action against their correspondents in a court of municipal law for damages; but if the rule of the prize court be, that the property must be vested in the claimants at the time of shipment, they are entitled to restitution in the present case.

Pinkney, for the appellants and captors, in reply. The question is, in whom did the property vest at the time of shipment, or at the time of capture? The claimants could not make an efficacious election after capture, because the rights of the captors interposed before any election could be made. If these rights had not thus interposed, then the power of election might be exerted. Therefore, the question stated is the only controversy in the cause. Take the transaction by its stages; break it up into its constituent parts, at what epoch—through the instrumentality of what circumstances—did the property pass to the claimants? If it did not so pass, it was, on the ocean, the property of an enemy, and, therefore, liable to capture and confiscation. The orders are not here; but will the documentary evidence, now **33***] before the *court, justify restitution? 1. Did, then, the first purchase vest the property in the claimants? In *The Frances*, it was determined that it had no such effect; and the doctrine is upheld by all principle and all analogy. 2. The goods were sent to Liverpool, and they still remained the property of Cross & Wheat. 1.

Co. The delivery in the vehicle on the canal was inland, and preparatory to the maritime delivery. The agents of Cross & Co. at the outport were not agents of the claimants, nor liable to them in an action. The claimants were not bound, nor could they take possession at this epoch. Suppose Cross & Co. had become bankrupt, would the goods have vested in them? or would they have been obliged to ship? 8. Consider the legal effect and circumstances of the assignment. Cross & Co. were the complete proprietors of the goods, and the present claimants could not have shown themselves in a court of justice. The parties considered the transfer to have changed the property, and they knew better what they had done than the court can know. It must, therefore, have been calculated and adapted to change the property; the bankers could have had no indemnity otherwise. They must have had a discretion to dispose of the goods; and had they become bankrupts, their assignees must have had the same discretion. There is always a *locus penitentiæ* in the vendor before delivery (as to the right of property I mean, not as to the right of action in the vendee); the caprice of the vendor may influence him to change the direction of the property. Had the right of the claimants been a vested right, the vendor in England might *have brought an action against them at **[34***] any stage of the transaction. At what epoch could either he or the bankers have brought such an action? The remaining question is as to the concurrent acts of both. Did those acts vest a right to the price in either? or was it in the election of the claimants to receive the commodities? The intervening assignment to the bankers sundered the merchants in England from the claimants; it deprived them of their ability to obey the original order; all privity of contract between the principal and agent was gone. There was no obligation on the part of Attwood & Co. to ship, no authority, no power, no right. How is it that the rights of war on the property are to be defeated? By showing an authority to ship? It exists not. The question is *stricti juris*; the claimants are not bound to acquiesce in the new state of this transaction; they have an election to do so or not. Had the goods arrived without interruption at their port of destination, the claimants might have accepted them, and thus adopted the new state of the transaction, and the new parties to it. But the rights of war intercept transfer. The consignees are not liable for the retrospective charges at the foot of the invoice, unless the goods had been shipped by the agent, and received by the principal. The usage of trade is, that the factor always charges these expenses; were it otherwise, it would follow that the property would always be transferred on the first purchase, contrary to the express authority of *The Frances*, with which the present case coincides in principle.

*MARSHALL, *Ch. J.*, delivered the **[35***] opinion of the court, and, after reciting the documentary evidence, proceeded as follows:

Upon these papers it is contended by the captors, that the goods remained the property of Daniel Cross & Co. until the transfer to Spooner, Attwood & Co., when they became the property of the assignees; that this change of prop-

erty so operates upon the subsequent shipment as to make it a shipment without order, and to leave it in the election of G. & H. Van Wagenen to accept or reject the goods; and that this right of election is terminated by the intervening right of the captors.

On the part of the claimants it is contended, that their right commenced with the purchase, which was made by their order, and for their account and risk, and was completed when the goods were forwarded to Liverpool; that if this point be determined against them, still the whole transaction evidences an intention to assign the claim of Daniel Cross & Co. to Spooner, Attwood & Co., so as to give them a right to receive the money, but not in any manner to affect the interests of G. & H. Van Wagenen.

Whether Messrs. G. & H. Van Wagenen became the owners of the goods on their being sent from Birmingham to Liverpool, must depend on the orders under which Daniel Cross & Co. acted. If their authority was general to ship to G. & H. Van Wagenen, the goods might, according to the circumstances of the purchase, remain the property of Daniel Cross & Co. until they were delivered to the master of the vessel for the purpose of transportation. *If they were directed to purchase the goods, and to store them in Liverpool as the goods of G. & H. Van Wagenen, to be afterwards shipped to the United States, it appears to the court that the property changed on being sent to Liverpool, and immediately vested in the American merchants for whom they were purchased. The testimony respecting the orders is found in the letter from Daniel Cross & Co. to G. & H. Van Wagenen. The words of that letter which bear particularly on this point are: "In consequence of the revocation of the British orders in council, on the first day of August next, we have lost no time in shipping the goods sent to Liverpool so long since, agreeably to your kind order." This language is not equivocal. It imports, in terms not to be misunderstood, that the goods were sent from Birmingham to Liverpool, in consequence of the orders of Messrs. G. & H. Van Wagenen. This letter is addressed to the house which had given the order, and was written without an existing motive for misrepresenting that order. There is certainly nothing in the circumstances of the transaction which would render it probable that the order must be represented in this letter, either carelessly or intentionally, in any manner different from that which was really given. The situation of this country during what has been termed our restrictive system was notoriously such as to render it an object with every importing merchant to use the utmost dispatch in bringing in his goods so soon as they should be legally admissible. Nothing, therefore, can be more probable than that orders for making purchases *which were to be executed at an inland place, by a house residing at such place, would be accompanied with orders directing them to be conveyed to a seaport, there to be held in perfect readiness for exportation. In the usual course of trade, if the purchasing and shipping merchant be the same, there would rarely be any actual change of property between the purchase and the shipment of the articles, nor could we expect to find any extrinsic evidence of ownership, other than the

mere possession; but in the state of trade which existed at the time of this transaction, such change, and the evidence of it, may be reasonably expected. In the common state of things, the whole order respecting purchase and shipment, where the same agent is employed, is executed with expedition, and is, in appearance, one transaction. In the actual state of things, the purchase was to be made immediately, but the shipment was to take place at some future indefinite period. It would depend on an event which might be very near or very remote. It became a divided transaction, or, rather, two distinct operations. We look for some intervening evidence of ownership in the person for whom the purchase was made, and are not surprised at finding it. If, in such a state of things, the goods were procured under a general order to purchase, but not to ship until some future uncertain event should occur, and were, in the meantime, to remain the property, and at the risk of the agent, they would probably be retained at the place of purchase under his immediate control and inspection. Their conveyance to a seaport, there to be stored until their importation *into the United States should be allowed, was such a fact as would scarcely have taken place without special orders, in the course of which an actual investment of the property in the person by whose order, and for whose use, the goods were purchased and stored at a seaport, is not unreasonably to be expected. The court considers this letter, then, as proving incontestably that the goods were conveyed to Liverpool, and there stored, to be shipped on the happening of some future event which it was supposed would restore the commercial intercourse between the two countries, in pursuance of specific orders from the claimants; and is further of opinion that the transaction itself furnishes strong intrinsic evidence that the goods, when stored in Liverpool, were the goods of the claimants, subject to that control over them which Daniel Cross & Co. would have as the purchasers, and intended shippers, who had advanced the money with which they were purchased. However this control and lien might be used for their own security, it could not be wantonly used to the destruction of the property of G. & H. Van Wagenen, and any conveyance to a person having notice of their rights ought to operate, and be considered as intended to operate, consistently with them, so far as the two rights could consist with each other. The words, then, in the invoice, which represent the goods as the property of Spooner, Attwood & Co., are introduced with no other object than to secure the payment of the purchase money to them. The invoice made out by Spooner, Attwood & Co. themselves, states the merchandise it specifies to have *been purchased by Daniel Cross & Co., by order, and on account and risk of Messrs. G. & H. Van Wagenen, and to have been forwarded to Liverpool more than 12 months anterior to the date of the shipment. Goods thus purchased, and thus conveyed to a seaport, and stored under the orders of the American merchant, may well be considered as leaving in the purchasing agent only the lien which a factor has to secure the payment of the money which is due to him. If this was the true state of the property at the

time of the assignment to Spooner, Attwood & Co., they having full notice that the assignment could only operate as an order for G. & H. Van Wageningen to pay the money to them (Spooner, Attwood & Co.), and would, probably, in its form and expressions, manifest this idea.

The court is much inclined to the opinion that these goods became the property of the claimants on being stored in Liverpool, if not at an antecedent time. The question, however, would, undoubtedly, be affected by the order under which Daniel Cross & Co. acted, by the deed of assignment to Spooner, Attwood & Co., and by other papers which are attainable. If, therefore, the case depended entirely upon this point, further proof might be required. But, in the opinion of the majority of the court, the case does not depend on this point alone.

If the goods were shipped in pursuance of the orders given by G. & H. Van Wageningen, the delivery on board the ship was a delivery to them; the property was vested in them by that act, and they had no election to accept or reject it.

40* In pursuing this inquiry, the legal effect of the transaction must depend, in a considerable degree, on the intent of the parties, and that intent is, in this case, to be collected chiefly from their letters, and from the circumstances in which they stood. G. & H. Van Wageningen were American merchants desirous of receiving the goods they had ordered as soon as the importation of those goods should be allowed. Daniel Cross & Co. were commission merchants of Birmingham, engaged in the American business. Spooner, Attwood & Co. were bankers, friendly to Daniel Cross & Co.; were desirous of promoting their interests, and recommending them to business, and had advanced them money while embarrassed by the difficulties consequent on the state of trade between the United States and Great Britain. Spooner, Attwood & Co. were desirous, not of purchasing the goods stored at Liverpool by Cross & Co. for the claimants; not of interrupting the shipment of those goods, or the connection between Daniel Cross & Co. and G. & H. Van Wageningen, but of permitting the shipment to proceed, and of receiving, themselves, the money to which Cross & Co. were entitled. Such was the situation, and such the objects of all the parties. Keeping this situation and these objects in view, let the testimony be examined. The letter of Daniel Cross & Co., dated the 8th of July, 1812, is in the language of men who were themselves the shippers of the goods. "We have lost no time," they say, "in shipping the goods, sent to Liverpool so long since, agreeably to your kind order." They speak of **41*** the vessel and of the freight "as if the vessel were selected, and the contract made, by themselves. "We thought you would prefer to have the goods at this rate rather than wait for a reduction in the freight." They next refer to the letter of their friends, Spooner, Attwood & Co., to show the inconvenience they had sustained as young merchants, but without any indication of an interference of that house in the shipment, and conclude with saying, "the amount of invoice, herewith, to your debit, is £820 2 1, which, agreeably to the letter of Spooner, Attwood & Co., you will please to remit to them on arrival of the goods." This is the letter of Wheat. 1.

an agent who has executed, completely, the order which had been given him; but who, having been compelled to borrow money, had transferred his pecuniary claims to his creditor. The letter of Spooner, Attwood & Co. will next be considered. It is dated the day after that written by Daniel Cross & Co. After stating their friendship for Daniel Cross & Co., and the aid afforded that house, they add: "But as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods which they had provided on account of your house, and of several others in the United States, previous to the 2d of February, 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods Daniel Cross & Co. had purchased for your account, and which we now forward to you, requesting that you will remit the amount of £820 2 1 to us at your earliest convenience." *Nothing is **42** said in this letter respecting the vessel by which the goods were sent; nothing indicating the exercise of any judgment by Spooner, Attwood & Co., respecting the time or manner of sending them; nor anything which would lead to the opinion that they interfered, in any manner whatever, in the transaction of the business. On comparing the two letters, the inference is inevitable, that Daniel Cross & Co. continued to execute the order of G. & H. Van Wageningen, in like manner as if their affairs had never been embarrassed. The contents of the two letters, in conformity with the situation and views of the parties, prove that Daniel Cross & Co. had only transferred to Spooner, Attwood & Co. their right to receive payment for the goods, and that the arrangements between them were intended only to secure that object. The assignment of the goods mentioned in the letter of Spooner, Attwood & Co. does not appear from the context, and from the nature of the transaction, to be intended to convey the idea of a sale, but to be used in rather a different sense, as an assignment of the adventure, or of the right to the debt due from G. & H. Van Wageningen. Whatever may have been the form of this assignment, it is apparent that it could not have been made, and certainly was not made, with the intention of enabling Spooner, Attwood & Co. to defeat the shipment to G. & H. Van Wageningen, or to control the proceedings of Daniel Cross & Co., under the order they had received. Why, then, are the goods, when put on board the Mary and Susan, in pursuance of the orders of the claimants, **43** to be considered not their property, but as the property of Spooner, Attwood & Co.? It is said that they were shipped by Spooner, Attwood & Co., not by Daniel Cross & Co.; that the confidence implied in the order for purchase and shipment was personal, and could not be transferred or executed by another. Allow to this argument all the weight which is claimed for it by the counsel for the captors; what part of this personal trust was transferred? What part of the order was executed by any other than Daniel Cross & Co.? The goods were purchased, sent to Liverpool, stored, and, afterwards, shipped by them. Every other auxiliary part of the transaction was performed by them. Nothing appears to have been done in pursuance of orders

from Spooner, Attwood & Co., but everything in pursuance of their own judgment, acting under the order received from G. & H. Van Wagenen. On this ground the claimants could raise no objections to the conduct of Daniel Cross & Co. But it is said that Daniel Cross & Co. might have had the funds of G. & H. Van Wagenen in their hands, in which case the claimants would have been compelled, by receiving the goods, to pay their amount to Spooner, Attwood & Co.; consequently, this assignment must be considered as creating in Spooner, Attwood & Co. new rights, which released G. & H. Van Wagenen from the obligation to receive the cargo. But Daniel Cross & Co. did not purchase with the funds of the claimants. They purchased with their own funds. They inflicted, therefore, no injury on the claimants by transferring their [44*] right to the money *to Spooner, Attwood & Co. The effect of the transaction is precisely the same as if they had drawn a bill in favor of Spooner, Attwood & Co. for the amount of the invoice. It is said that the assignment gave Spooner, Attwood & Co. an election to ship the goods, or to dispose of them otherwise, and that the necessary consequence of this power of election is a correspondent right of election in G. & H. Van Wagenen to receive or reject them. The court does not view the transaction in this light. The assignment to Spooner, Attwood & Co. is understood by the court, from the evidence furnished by the letters, and the circumstances and objects of the parties, to have been subject to the right of Daniel Cross & Co. to execute, completely, the order of the claimants. The interest of all parties were best promoted by pursuing this course, and they appear to have pursued it. The court perceives nothing which can justify the opinion that Spooner, Attwood & Co. had a right, or would have been permitted, to intercept the shipment. Certainly it was neither their wish nor their interest to interrupt it. It is not reasonable, therefore, to suppose that they would have created any difficulty in obtaining a right to claim the amount of the invoice from G. & H. Van Wagenen by insisting on such an assignment as Daniel Cross & Co. would have been unwilling to make, because it might have proved injurious to them, without benefitting the house they meant to secure. It has also been argued that the orders most probably directed a shipment of the goods when the non-intercourse should be [45*] removed, *and that a shipment before that time was without orders, and at the risk of the shipper. The court does not think this probable. It is well known that the continuance of the laws of non-intercourse was considered as depending on the continuance of the orders in council. It is, also, perfectly clear that the American merchant, who should permit his goods to remain in Great Britain until intelligence of the repeal of the non-intercourse laws could be conveyed from this country to that, would be anticipated by all others, and would bring them to a market already supplied. Nothing, therefore, would be more reasonable than to order them to be shipped on the revocation of the orders in council. This idea is supported by the letter of Daniel Cross & Co. That letter indicates no doubt of the propriety of the shipment.

Upon a view of the whole case, the majority of the court is of opinion that this is not a case in which further proof ought to be required, and that the goods by the Mary and Susan were shipped in pursuance of the orders of the claimants, and became their property when delivered, for their use, to the master of the vessel, if not at an earlier period.

Sentence of the Circuit Court affirmed with costs.

*[PRIZE.]

[*46]

THE MARY AND SUSAN.

RICHARDSON, Claimant.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize.

The fact that the commander of a private armed vessel was an alien enemy at the time of the capture made by him, does not invalidate such capture.

The President's instructions of the 28th August, 1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions.

APPEAL from the Circuit Court for the District of New York. This was a claim by Mr. Richardson for a portion of the cargo of the same ship mentioned in the preceding cause, which portion was condemned in the District and Circuit Courts. The claimant, a native of Great Britain, and a naturalized citizen of the United States, was a resident merchant of Liverpool at the breaking out of the late war, but returned to this country in the month of May, 1813, after knowledge of the capture, and pending the proceedings in the District Court. The capture was made on the 3d of September, 1812, within 18 miles of Sandy Hook, in 13 fathoms of water, where vessels are frequently passing and anchoring, and the privateer had previously spoken at sea another privateer and a pilot boat schooner from Philadelphia. *There was also [*47] contradictory testimony as to whether the commander of the privateer had knowledge of the President's additional instructions of the 26th of August, 1812, before the capture, which, as it is noticed in the opinion of the court, it is unnecessary to state. By those instructions the public and private armed vessels of the United States were not to interrupt any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council.

NOTE.—1. Claimants have no right to litigate the question whether the captors were duly commissioned, because they have no standing in court to assert the rights of the United States. Though the capture was made by a non-commissioned captor, the prize will be condemned to the United States. *The Pizarro*, 2 Wheat., 227.

Ships of war and privateers both cruise under a commission from their sovereign, and both make prizes under the authority of that commission. In both cases the sovereign is the captor, and the prize vests absolutely in him.

The Santissima Trinidad, 1 Brock. Marsh., 478; *S. C. aff'd*, 7 Wheat., 283.

Wheat. 1.

cil. but were, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes might be dealt with on their arrival as might be decided by the competent authorities.

Sockton, for the appellant and claimant, stated that this was a case of *summum jus*, where the property of a citizen, shipped without knowledge of the war, upon the repeal of the British orders in council, was condemned upon the authority of *The Venus*,¹ and the doctrine of domicile. There is here no question of proprietary interest, or of national character, independent of this particular transaction. But, unless the court thinks proper to review its decisions upon the effect of commercial domicile, the appellant is confined to three points in support of his claim:

1st. That the capture was made after the commander of the privateer had knowledge of the instructions of the 26th of August, 1812. [48*] *2d. That if he had not such knowledge, condemnation cannot take place, as the capture was made subsequent to the issuing of the instructions.

3d. That the commander of the privateer is, and was at the time of the capture, an alien enemy, and, consequently, his commission is void.

1. This is a question of fact, to be determined by the weight of testimony. 2. The instructions were certainly communicated to the commander before prize proceedings were commenced, and it was the duty of the captors to have relinquished the property, subject to the decision of government, under the non-importation act. Capture does not vest the property of the goods in the captors, but merely author-

izes them to carry in for adjudication. The prize act of the 26th of June, 1812, sect. 6, shows that the property is not vested in them until after condemnation. All laws take effect from their enactment, as to rights of property; and at common law, statutes take effect, by a fiction, from the first day of the session at which they are passed. The instructions, issued under the 8th section of the prize act, are legislative in their nature. Captors are the mere delegates and substitutes of the sovereign; their authority is derived from him, and must be exercised in conformity with the will of the state.¹ The power of the President to issue these instructions has already been recognized by the court. The rights of war and peace depend upon the fact of the existence of a state of war and peace, *not upon the knowl- [*49 edge of that fact. A prize made after a declaration of war, without knowledge of its existence, is good; and a prize made after the cessation of hostilities is bad, without regard to the circumstance of knowledge; unless, indeed, there be a stipulation in the treaty of peace to prolong hostilities at sea.² 3. The commission to Johnson, the commander of the privateer, is null. The President has been deceived in his grant; for he could never have intended to commissionate a person to commit treason against his own country. The acts of Congress, during the late war, put alien enemies under restraints which are altogether opposed to the idea of the executive being authorized to delegate to them such a power as letters of marque and reprisal import.

Hoffman, for the respondents and captors. It is supposed that the question, as to the appli-

1.—February Term, 1814.

1.—2 Azuni, part 2, c. 5, art. 3, sect. 4, 5, 7, 10.

2.—2 Azuni, part 2, c. 4, art. 1, sect. 9, 11.

It is enough that the government comes into the national court demanding the condemnation of an offender, and the court never inquires whether the party or thing proceeded against has been regularly or irregularly brought under attachment or complaint.

The Ouachita, Blatchf. Pr. Cas., 306.

2. The commercial domicile of a merchant, at the time of the capture of his goods, determines their character as hostile or neutral.

Murray v. Schooner Betsey, 2 Cranch, 64; *The Frances*, 8 Cranch, 363; *Sloop Chester*, 2 Dall., 41; *Maley v. Shattuck*, 3 Cranch, 488; *Livingston v. Mar. Ins. Co.*, 7 Cranch, 506; *The Friendship*, 4 Wheat., 105; *Young v. U. S.*, 7 Otto, 30; *The Emanuel*, 1 Rob. R., 249; *Belle v. Reid*, 1 Maule & Selw., 726; *The Venus*, 8 Cranch, 253.

Property belonging to a merchant residing and trading at an enemy's port is, when captured, liable to condemnation as enemy's property.

The Delta, Blatchf. Pr. Cas., 133.

Although the ship carries a neutral flag, if her owners reside in the country of an enemy she may be condemned as a prize.

The San Jose Indiano, 2 Gall., 268.

Property captured at sea, and owned by persons resident in an enemy's country, is hostile, and subject to condemnation, without regard to the individual opinions or sympathies of the owner; and although he is the subject of a neutral nation, or of the capturing belligerent, and has expressed no disloyal sentiments towards his native country, his residence in the enemy's country impresses upon his property engaged in commerce, and found on the high seas, a hostile character, and subjects it to penalties as such.

Wheat. 1.

U. S., Book 4.

The Amy Warwick, 2 Sprague, 123; 8 C., 14 Law Rep. N. S., 494; *The Lilla*, 2 Sprague, 277; *The Mary Clinton*, Blatchf. Pr. Cas., 559; *Hill v. U. S.*, 8 Ct. of Cl., 470; *Green v. U. S.*, 8 Ct. of Cl., 412.

The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners have a neutral domicile.

The Antonio Johanna, *infra*, 159; *The Cheshire*, 3 Wall., 231; *The Frances*, 1 Gall., 618; *The San Jose Indiano*, 2 Gall., 268; *Willson v. Maryatt*, 8 Term Rep., 31; *McConnell v. Hector*, 3 Bos. & Pul., 113; *The Indian Chief*, 3 Rob. R., 12; *The Anna Catharina*, 4 Rob. R., 107; *The President*, 5 Rob. R., 277; *Lord Stowell*, 1 Hagg. Adm. R., 103, 104.

3. The instructions of the President of Aug. 28, 1812, referred to in above case, are considered in *The Mary*, 9 Cranch, 126, 149, 150. The court there say: "When the orders in council were repealed, large shipments were made of British merchandise by American merchants, in the full confidence that the American restrictive system would fall with the orders which produced it. This opinion, and the proceedings in consequence of it, were thought excusable both by the executive and legislative departments of government." "The instructions of the President relate only to the departure of the vessel." "That the instructions were intended to protect from capture all vessels which had sailed in that confidence which was inspired by the repeal of the British orders in council, however the voyage might be protracted, is apparent from their language, and from the fact that they continued to be delivered to the armed vessels of the United States after the passage of the act of the 2d of January, 1813."

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83

cation of the law of domicile to this case, is at rest.

MARSHALL, C.J. The court considers that question completely settled, and not open for argument.

Hoffman. 1. As to the instructions. It is admitted that the former decisions of the court make them obligatory. The instructions could not, in fact, have been communicated to the commander of the privateer previous to the capture; and they are not, *ipso facto*, and *per se*, **50*** revocatory of the right to capture. *The instructions must either have been actually communicated or the privateer must have been in port after they were promulgated, in order to affect the right to capture. Such is the spirit of the former decisions.¹ Cruisers are not to act upon informal information at sea, as they might be deceived by their rivals and competitors; in port, knowledge must be implied, in law, from the certainty, publicity, and notoriety of the fact. The right of property does vest, by capture, to be subsequently consummated by condemnation; *quoad*, the belligerents the right vests; the property of the enemy is devastated as to his rights. The claimant is an enemy, *pro hac vice*. 2. The affidavits to prove the commander of the privateer an alien enemy, were irregularly taken. The cause was open, as it were, to plea and proof; but the further proof was confined to the communication of the instructions; and the simplicity of the prize proceedings forbids going out of the limits prescribed in the order for further proof.

Pinkney, on the same side. The court will not regard the particular hardship of the case, but will only be anxious to administer the law of nations and of the land, as they are applicable to the rights of the parties. 1. Knowledge of the instructions was communicated to the captor before the *deductio infra præsidia*; before the prize proceedings were commenced; before condemnation; but after the seizure, which vested an inchoate right in the captor. It is said, the written law prohibited him from **51*** making it; *but that is settled, and the court have said the instructions were not to be likened to statutes. They are merely directory from a superior to a person in a subordinate capacity; and they must be received by him, or they cannot have the binding force of instructions; they were not law until communicated: then only they rise into law. It is also said that the capture was well made, but subsequent knowledge shall overreach and vitiate it. In every case of capture of goods, in their transit to this country, after the repeal of the British orders in council, the same fact must have been known before condemnation. The instructions inhibited the capture and interruption of American vessels coming from British ports; but the President could have no authority to divest rights once vested; and there is nothing in the instructions to prohibit bringing in for adjudication after the capture was made, nor to prohibit prize proceedings after bringing in for adjudication. By the fourth section of the prize act, it is provided, "That all captures and prizes of vessels and property shall be forfeited, and shall accrue to the owners, officers, and

crews of the vessels by whom such captures and prizes shall be made; and, on due condemnation had, shall be distributed," &c.; by which an inchoate right vested on the capture, to be consummated by condemnation. The prize law of France and Spain vests the property immediately; other countries require bringing *infra præsidia* and condemnation. Capture gives, everywhere, a right to privateers, though it may not give an indefeasible right to public ships. A qualified and provisional *prop- **52** erty is vested; and it is held, both in France and England, that the crown cannot interfere to stop prize proceedings where private parties have an interest. Admit that no right of property is acquired, is no right acquired? Most certainly an incipient right is acquired, to be afterwards consummated; and the instructions cannot have the effect, retroactively, to defeat the right of the captors to proceed to adjudication. The case of a treaty of peace, stated on the other side, illustrates this idea. Belief is nothing; fact is everything. The captor exercises a belligerent right; the treaty repeals his commission and abrogates his right. Suppose a capture made the day before the treaty is signed, does it prevent his going on and perfecting his right? Certainly not; and the same is the case with the instructions: if they do not stand in the way of the capture, they do not stand in the way of condemnation. They did not stand in the way of capture, because they were unknown; they do not stand in the way of condemnation, because that is a mere consummation of the incipient right acquired by capture. 2. The court have no right to look beyond the President's commission; the captor stands everywhere upon it, especially in the prize courts of the power by whom it is issued; and there is no case where the contrary was ever maintained.

Dexter, for the appellant and claimant. 1. It is said the claimant must either prove that the privateer had been in port or that the instructions were *actually communicated to the com- **53** mander. If it were intended to make him a wrong-doer, strict proof of knowledge might be essential; without such proof, he would be excusable from paying costs and damages; but he does not thereby acquire any indefeasible right to the thing captured; and restitution must be ordered. The claimant seeks restitution only, and the first question is, whether the captor had knowledge of the issuing of the instructions, no matter how it came to him. 2. But supposing that he had not this knowledge before the seizure; it was communicated to the prize-master while he was carrying in the ship for adjudication. He was bound by the instructions "not to interrupt, but, on the contrary, to give aid and assistance" to the ship he captured. Does the right to proceed contrary to the instructions vest at the time of boarding, or manning? It undoubtedly vested when the ship was completely brought *infra præsidia*. But the acts done in the intermediate time between that and the taking possession, constituted an interruption contrary to the letter and spirit of the instructions. The right acquired by the seizure was inchoate, and was sought to be consummated after the rule of conduct prescribed by the President became known to the captor. The rule as to capture vesting the

1.—Wheaton on Captures, 48.

property is various and fluctuating in different times and nations. The distinction here is, that an inchoate right may be defeated by a knowledge of the instructions subsequently communicated; but a consummated right cannot. The President has authority, both by our municipal constitution and public law, to 54*] prosecute "a war lawfully declared; he may exempt this or that thing from attack¹ or capture, by land or by sea. Suppose an enterprise commenced before knowledge of an order from him countermanning it, could the blockade, or siege, or expedition, be continued after such revocation became known? The captor has acquired, in the present case, no private right which the instructions cannot defeat. Government may, by compact with foreign nations, divest inchoate rights; in a treaty of peace, restitution of captures on both sides may be stipulated.¹ 8. The order for further proof justifies the admission of testimony as to the alien enemy character of the commander. The President's commission is, doubtless, conclusive, wherever he acts within the authority confided to him by the laws; but he cannot commission an alien enemy, whose sovereign would have a right to punish him as a traitor; and even a naturalized citizen has no right to cruise against his native country.

JOHNSON, J., delivered the opinion of the court:

It is not necessary to go into a consideration of the national character or future designs of the claimant in this case. It has been solemnly settled, and must henceforth be considered as the positive law of this court, that shipments made by merchants, actually domiciled in the enemy's country at the breaking out of a war, 55*] partake of the nature of "enemy trade, and, as such, are subject to belligerent capture. Whatever doubts may have once been entertained on this bench, with regard to the necessity or propriety of adopting the principle into the jurisprudence of this country, they are now either dissipated or discarded; and the character, views, and even the subsequent acts of such a shipper, cannot vary the conclusion of law upon his claim.¹

56*] "Stress has been laid, in the argument before this court, on the fact that Charles Johnson, the commander of the *Tickler*, is an alien enemy; but on this point we are unanimous; 57*] mous that it makes no difference "in the case. Admitting that this circumstance should bear at all upon the decision of the court, the utmost that could result from it would be the condemnation of his interest to the government

as a droit of admiralty. The owners and crew of the *Tickler* are as much parties in this court as the commander, and his national character can in nowise affect their rights. But this court can see no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and it has been the universal practice of nations to employ foreigners, and even deserters, to fight their battles. Such an individual knows his fate should he fall into the hands of the enemy; and the right to punish in such case is acquiesced in by all nations. But, unrestrained by positive law, we can see no reason why this government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his national character.

The only grounds, then, on which the right of restitution can be contended for in this case, arise out of the President's instructions of the 28th of August, 1812. On these, three points are made: 1st. That Johnson had, in fact, or ought from circumstances to be presumed to have had, notice of those instructions. 2d. If he had not at the time of the capture, yet, having received them before the arrival of the prize in port, he was bound then to have discharged her. 3d. That notice of the instructions was, in fact, unnecessary, as the instructions of the President had, "as to the 58 conduct of privateers, all the operation of laws.

On the second and third of these points there exists but one opinion in this court. Although some doubt may be entertained relative to the form or nature of the notice necessary, yet we all agree that some notice is necessary, and that notice must precede the capture. Instruction, *ex vi termini*, is individual. Instruction to A, independent of legal privity or identification, is not instruction to B. Not so with laws; their power floats on the atmosphere we breathe. Necessity, or convention, or power, has given them a legal ubiquity co-extensive with the legislative power of the government that enacts them. Notice here is altogether unnecessary, unless made so by the law itself. It is the *sic volo, sic jubeo*, of sovereign power, of which every individual subject to its jurisdiction is presumed to have notice, though time and distance stamp absurdity on the supposition. Unquestionably, the same operation might by law have been given to instructions emanating from the President; but this has not been done; on the contrary, the clause itself which vests the power in the executive holds out the idea of the necessity of notice. That this notice must necessarily precede or accompany capture we are induced to infer from this consideration. By capture the individual acquires an inchoate statutory right, an interest which can only be

1.—*Vide* Convention of 1800, between the United States and the French Republic; by the 30th article of which, restitution of public ships captured on both sides was stipulated.

2.—The effect of domicile or commercial inhabitancy, upon national character was recognized by the Continental Court of Appeals in prize causes during the war of the revolution. (2 Dallas, 42, *Claim of Mr. Vantelenger*.) It was determined by the Supreme Court, during the hostilities with France, that a citizen residing in a foreign neutral country acquired the commercial privileges attached to his domicile, and was, consequently, exempt from the operation of the law of his own country suspending the intercourse with the French dominions. (2 Cranch, 65, *Murray v. The Charming Betsey*.) The national legislature have adopted the Wheat. 1.

same principle in the act of the 3d of March, 1800, applying the rule of reciprocity in cases of salvage to "the vessels or goods of persons permanently resident within the territory, and under the protection, of any foreign government." &c.; and, finally, before the case of *The Venus*, the Supreme Court applied the same principle to the law of insurance, and held a warranty of neutrality to be satisfied by the residence of the party as a merchant in a neutral country. (*Livingston and Gilchrist v. The Maryland Insurance Company*, February Term, 1813.) This was an action on a policy of insurance, containing a warranty that the property was neutral. That war-

defeated by the supreme legislative power of the Union. Condemnation does nothing more than ascertain that each individual case is within the prize act, and thus throws the individual **59***] upon his right acquired by *belligerent capture. Should the prize act, in the interim, be repealed, or its operation be suspended by the provisions of a treaty, there no longer exists a law to empower the courts to adjudge the prize to the individual captor. We can see nothing in the objects of the law authorizing the President to issue his instructions, nor in the instructions themselves, which can support the idea, that that which was lawfully prize of war at the time of capture should cease to be so upon subsequent notice of the instructions. Both the act itself and the instructions, in their plain and obvious sense, may well be construed so as to arrest the arm of hostility before it has given the blow. But not only is there nothing either in the act or instructions to which an ulterior operation can be given, but the policy of the country, as well as the fair claims of the prowess, perseverance, and expenses of the individual forbid our giving an effect either to the act or the instructions which will deprive the captor of the just fruits of his bravery and enterprise. The fact of notice, then, alone remains to be considered; and this must either be inferred from circumstances or received upon the evidence of confession. On this point, computation of time becomes material. The capture was made, as we collect from the officers and crew, on the 3d of September; but as the nautical calculation of time commences at noon, this may mean on the morning of the 4th of September. The additional instructions bear date the 28th of August, and were, probably, forwarded by the mail of the 29th. It cannot, therefore, be supposed that they were published **60***] in Philadelphia before the 31st *of August, nor in New York before the 2d; at any rate, not before the 1st of September. This certainly leaves time enough for the information to have been communicated from New York, but renders it impossible that it could have been received either from the Eagle or the pilot boat, as they were both spoken off

Charleston, and the latter was seven days out; whereas the Tickler left St. Marys, in Georgia, on the 24th. Whether such information was not in fact communicated off New York, is a point on which the evidence would leave us little room for a contrariety of opinion, were it not for the loss of the log-book and journal. For this circumstance, taken in conjunction with the evidence of confession, some of the court are inclined to entertain an unfavorable idea of the captor's cause. But the majority are of opinion that they cannot attach so much importance to it. The evidence of Paine, Ferris, and Warren, all officers of the privateer, and, at the time of testifying, divested of all interest in the capture, positively negatives the only fact from which notice could be implied, to wit, the speaking of any vessel beside the Eagle and the pilot boat, previous to the capture of the Mary and Susan. And this, we think, is supported by probability, when it is considered how very few vessels at that time could venture to leave our ports; that there is no probability the Tickler could have ventured to lie off and on the port of New York any length of time; and that, from her leaving the port of St. Marys to her arrival at New York, there elapsed no more than the ordinary time of performing that voyage. In addition to which considerations *we cannot but **61**] think that a copy of the journal of this voyage was, as it ought to have been, deposited in the custom-house; and this circumstance, whilst it was calculated to make the captor less careful in preserving the original, enabled the claimant to avail himself of every advantage which could have been derived from the original. On the evidence of confession, we are not inclined to enter into the consideration of the depositions, intended on the one hand to support, and on the other to impugn, the credibility of Waldron and Garnsey. Nothing can be more painful than the necessity of entering upon such investigations; nothing more unsatisfactory than to found a legal decision as to the credibility of a witness upon oral testimony, unsupported by the *evidentia rei*. In this case we are induced to conclude that these wit-

ranty was determined to be satisfied by the emigration of the party, a Spanish subject, to the United States, and residing there before the breaking out of the war in 1804, between Great Britain and Spain, the property having been captured by a British cruiser, and condemned in the Prize Court at Halifax as Spanish property. A majority of the court were of opinion that the insured was to be considered as a merchant of the United States, whether he carried on trade generally or confined himself to a trade from the United States to the Spanish provinces.

See, also, 1 Johns. Cas., 363; Arnold v. The United Insurance Company; 1 Calnes' Rep., 60; Jenks v. Hallett; 2 Johns. Cas., 481; Johnston v. Ludlow; 1 Calnes' Cas. in error, 29, 2 Johns. Cas., 476; Duguet v. Rhinelander *et al.* It is much to be lamented, that we have not printed reports of the decisions in the British Supreme Court of prize, as many interesting points have been decided before the Lords of Appeal, of which we have no other account than occasional loose references to them. Among these is the case of Mr. Dutilith, mentioned by Dr. Robinson in *The Indian Chief*, 3 Adm. Rep., 21, which is more particularly stated by Sir John Nicholl, in a manuscript report, in the possession of the editor, of the hearing of the case of *The Harmony*, Bool, before the lords, 7th of July, 1808. "The case of Dutilith, also, illustrates the present. He

came over to Europe, as it is stated, in 1793, about the end of July, a time when there was a great deal of alarm on account of the state of commerce in Europe. He went to Holland, then not only in a state of amity, but also of alliance with this country; he continued there until the French entered. During the whole time he was there he was without any establishment. He had no counting-house; he had no contracts nor dealings with contractors there. He employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland he applied for advice, to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilith applied to Mr. Adams, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and having wound up his concerns he came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him (*The Fair American*, Adm., 1796), but that part which was taken while he was there was condemned, and that because he was in Holland at the time of the capture." (*The Hannibal and Pomona* Lords, 1800.)

Wheat. 1.

nesses misunderstood Johnson; that the knowledge of which the latter spoke was that acquired subsequent to the capture; that it could not have related to any other knowledge we think incontestible, from the single consideration that the evidence in the case proves it to have been inconsistent with the fact. It was not possible, under the circumstances of the case, that such knowledge could have been communicated for want of the means of communication, and that it was not, is positively sworn to by three witnesses whose testimony stands wholly unimpeached.

Sentence of the Circuit Court affirmed with costs.

Cited—Blatchf. Pr. 78.

62*]

*[PRIZE.]

THE RUGEN. BUHRING, Claimant.

A question of proprietary interest, and of trading with the enemy.

APPEAL from the Circuit Court for the District of Georgia. The schooner Rugen and cargo were libeled in the District Court for that district, as a prize of war, either as belonging to the enemies of the United States or as the property of citizens who had been trading with the enemy. A claim was interposed by Mr. Buhring, a subject of the King of Sweden, on the ground that both vessel and cargo belonged to him, and were *bona fide* neutral property. This claim was rejected by the District Court; which sentence was affirmed by the Circuit Court, and thereupon the claimant appealed to this court.

Charlton, for the appellant and claimant, stated that the ship was formerly British, had been captured, condemned as prize of war in the District Court, and sold by the marshal to one Bixby, who sold to Buhring, the present claimant. 1. He cited the case of *The Sisters*¹ as to the proprietary interest, and argued that the regularity of the papers is *prima facie* evidence of neutrality, and conclusive, unless rebutted by contradictory proof. The primitive **63*** national character of the ship was changed by condemnation, and the sale to a neutral was legal.² Testimony was irregularly admitted, which was neither taken in *preparatio* nor found on board, nor invoked from any other captured vessel. 2. The voyage was strictly within the range of neutral rights. If the neutral character of the ship and cargo was established, the destination was immaterial, whether to an enemy or neutral port. But the ship was, in fact, destined to a neutral port, and diverted from her course by the enemy's vessel *La Decouverte*. False papers may be used, if not to cover enemy's property, or evade belligerent rights;³ and this court is not bound

to take notice of, or enforce, the revenue laws of other countries. 8. The property ought to be restored with costs and damages, because the documentary evidence proclaimed the neutral character of the ship and cargo.

The *Attorney-General* and *Pinkney*, for the respondents and captors, stated that this was one of the plainest cases for condemnation that ever came into a court of prize, upon two grounds:

1st. That the real property was not in the claimant, but in a citizen of the United States.

2d. That it was taken trading with the enemy.

1. In *The Odin*,⁴ where the papers were complete, and *res gesta* similar to the transactions in this case, confiscation was decreed. **64** The conduct and resources of the claimant were the same as those of *Kreffting*, *The Dane*. According to the doctrine of Sir William Scott, exercising ownership by the same master is conclusive;⁵ but here the former owner continued to exercise dominion over the thing pretended to be transferred in his own proper person. The ship also continued in her originally-intended employment, which was another badge of fraud.⁶ The cases cited were of a transfer by the enemy to a neutral, and the former master continued; but here the citizen wishing to trade with the enemy takes a foreign garb to deceive, not a foreign, but his own government. This case is to be arranged under that branch of public law which depends upon the municipal laws of allegiance; and the presumption is more irresistible than in the other, where the property is taken and proceeded against as enemy's property. The *vis major*, by which it is alleged the ship was compelled to enter an enemy's port on the outward voyage, is not such as would be admitted as an excuse for deviation, even in a fiscal case, or in an action on a policy of insurance. The indorsement of a ship's papers by the enemy's vessel might have produced a certain effect; but in the view of the law of nations, a parol order could have no effect, tending to confiscation in a prize court, or even detention for trial. The falsification and spoliation of papers, in this case, would alone be sufficient to justify condemnation.⁷ *Spoliation of papers may be explained **65** by the preparatory examinations so as to affect the question of costs only; but here, taken in connection with the simulated papers, the false destination, and the other circumstances of *mala fides*, it is conclusive. Much of the evidence in the case, according to the strict regularity of prize practice, is inadmissible; but the proceedings may be considered as equivalent to an order for further proof. The case of *The Sisters* was before the Court of Admiralty as an instance court; an equitable title, conflicting with a legal, and there being no *constat* of property, the court, according to the notions which prevail in England, could not interfere. 2. Supposing the property to be in the claimant, it cannot be restored; he was a resident in the United States, and carried on a trade with the

1.—5 Rob., 141.

2.—1 Rob., 104, *The Welvaart*.

3.—1 Rob., 139, *The Vrow*; 3 Rob., 147, *The Flora* and *Commercium*; 4 Rob., 166, *The Conventientia*; 1b., 87, *The Caroline*.

Wheat. 1.

4.—1 Rob., 208.

5.—1 Rob., 217, *The Odin*.

6.—6 Rob., 71, *The Omnibus*; 4 Rob., 28, *The Jenny*.

7.—1 Rob., 111, 131, *The Two Brothers*.

enemy, contrary to the obligations of his temporary allegiance.' And supposing the ship to have been compelled to enter the enemy's port by *vis major*, the purchase of a return cargo would import confiscation, being a voluntary act of trading with the enemy. Costs and **66*** damages ought to be awarded to the captors, it being a fraudulent case, and the property delivered to the appellant upon bail.

Charlton, for the appellant and claimant, in reply. A national character is impressed by the flag and pass. If the property is neutral, the master had a right to clear out with a false destination, according to the authority of *The Neptunus*, since it is not usual to clear out from one hostile port to another. The simulated papers were not intended for the purpose, and could not have the effect of defrauding this country of its rights as a power at war. The destruction of papers was accidental, and the circumstances of the case are not like those of *The Odin*.

LIVINGSTON, *J.*, delivered the opinion of the court:

It has been contended that this vessel and cargo were *bona fide* the property of the appellant, a subject of Sweden, who had a right to trade with the enemy of the United States; and that having done nothing to forfeit his neutral character, both the sentences below were erroneous, and ought to be reversed. To entitle himself to such reversal, the claimant has undertaken to show, and insists that he has shown, that at the time of, and previous to, the departure of the *Rugen* from the United States, she, as well as the cargo on board, was his property, and that he was then, and still is, a subject of the King of Sweden, with whom the United States were at peace.

The court will now proceed to inquire how **67*** far Mr. *Buhring* has succeeded in establishing the facts on which he relies for a restitution of this property. In pursuing this inquiry it may become unnecessary to decide whether the papers which were on board were sufficient to entitle the *Rugen* to the privileges or national character of a Swedish vessel; because, whatever may be their regularity and effect, yet, if the court shall be of opinion that they were only colorable, and that an American citizen, and not the claimant, was owner of the vessel and cargo, it will not be pretended that belligerent rights can be eluded in this way, or that the subject of a state at war can, under cover of neutral muniments, however regularly procured, or formal they may be, violate with impunity, his duty and allegiance to his own country. So far from such documents, when intended only as a cover, affording any protection to the property, they render the party resorting to them doubly criminal, by the scene

9.—A neutral subject domiciled in the belligerent state, is considered as a merchant of that country, so as to render his property taken in trade with the enemy liable to capture and confiscation. In the same manner as that of persons owing permanent allegiance to the state. (3 Rob., 26, *The Indian Chief*.) The converse of the rule is also applied to subjects or citizens of the belligerent state resident in a neutral country, whose trade with the enemy is considered as lawful; except in contraband of war, which is deemed inconsistent with their permanent allegiance, and, it may be added, is equally prohibited to them in their character of neutral merchants. (*vide* 6 Rob., 408, *The Neptunus*.)

of fraud and perjury which must be waded through in order to obtain them; and then, in case of disaster, to make a court believe that such papers disclosed nothing but the real truth of the case. The whole controversy will then be resolved into the single question, whether, in point of fact, Mr. *Buhring*, or Messrs. Samuel & Charles Howard, who are citizens of the United States, were owners of the *Rugen* and her cargo at the time of her sailing from Savannah, and on her return to the United States. It must ever be a painful task to investigate testimony where a result unfavorable to the claimant can only proceed from a conviction that the principal agents in the transaction have acted either fraudulently or con- **68** trary to their known duty as good citizens. Such is the duty now imposed on the court.

The claimant is said to be a Swede. If this be admitted, and it seems not to be denied, we are compelled, by the very suspicious circumstances of this case, to look beyond his national character, and to inquire very particularly into his situation at the time he embarked, or became connected with this adventure. Had he ever been a merchant in his own country, or elsewhere? Had he ever resided in any of our seaports, or carried on business of any kind there, or in any other place? Had he, at any time, means to purchase this vessel and cargo; or was he sufficiently known to have acquired a credit to that extent? These questions were all asked by the advocate of the captors, to which no satisfactory answer was given on the argument; and it is in vain that the proceedings are searched for a solution of either of them at all favorable to the present claim. On the contrary, easily as every difficulty on these points might have been dispelled, if this were a fair proceeding, no attempt of the kind has been made, or if it has, it has terminated in establishing that Mr. *Buhring's* situation and circumstances were such as preclude all reasonable doubt of his being any other than the ostensible owner of the vessel and cargo. He was a young man, only twenty one years old, residing, as well as his brother William, in South Carolina, with Mr. Scarborough, Vice-Commercial Agent of the King of Sweden, for the state of Georgia. From this retirement he is drawn, and, for the first **69** time, introduced to the notice of the mercantile world by the Messrs. Howard, who appear to be merchants of considerable property and credit, residing at Savannah, in the state of Georgia. Between these gentlemen and Mr. *Buhring* there could have been but very little previous acquaintance; for the latter arrived at Savannah from Europe only two or three months before we find him engaged in the concerns of the *Rugen*; and after remaining not more than three or four days in that city he went to reside in the country of South Carolina, whence he did not return to Savannah until he came back with Mr. C. Howard, a very few days before the *Rugen* sailed. It is not, then, harsh to presume that the strongest and only recommendation of Mr. *Buhring* was his national character. The Messrs. Howard appear, at the time, to have been in search of a Swede, and were not long in meeting with one whose youth and inexperience well fitted him for the purposes for which, there is so much reason to believe, he was wanted. A feeble attempt, however, has been made to show

that Mr. Buhring was not without credits as well as funds. To the former point one witness has been examined, and to establish that he was not entirely destitute of property, it has been shown that he actually gave two notes, amounting, together, to about \$4,300, for the Rugen and her cargo, in the month of May, 1813, payable in four months after date; that these notes, as they became due, were taken up by him with great punctuality at one of the banks in Savannah. Whether these notes were really made at the time [70*] when they bear date may well be doubted; but it admits of no doubt that they were discharged with the proper moneys of the Messrs. Howard, which had almost the moment before been drawn, by one of them, out of the bank, and put into the hands of Mr. Buhring for that purpose. With the funds, then, of Mr. Howard, and now with those of Mr. Buhring, were these notes taken up; and a contrivance, which was intended to make Mr. Buhring appear as a man of property, has not only altogether failed, but has added very considerable weight to the suggestion of the captors, that he was a young man totally destitute of the means of purchasing and paying for the property which, it is now alleged, belonged to him. But we now find Mr. Buhring at Savannah; and what is done with him? or what does he do with himself, on his arrival there? Does he go about to purchase a vessel? Does he, when he is told that the Rugen belongs to him, take any measures to fit her out? Does he provide a crew? Does he agree for their wages? Does he purchase a cargo? Does he see to its being put on board? Does he effect insurance? or is he found doing any one act which might naturally be expected from an owner? All this trouble had already been most kindly taken off his hands by his new friend and acquaintance, Mr. Howard. This gentleman had already (if we are to believe the history of this transaction as it is narrated by the claimant) provided him with a vessel and cargo, although it does not appear that he had instructions or funds of Mr. Buhring for the purpose. It is true, that with a caution that was very excusable, considering the circumstances of Mr. Buhring, the bill of sale which had been executed by the marshal, with a blank for the name of the vendee, was not put into the possession of Mr. Buhring, but carefully retained by the Messrs. Howard, they executing to him one in their own names, although they now say they never were the owners of the vessel. And even this bill of sale, it is very probable, remained in the custody of Mr. Samuel Howard during the whole of the voyage to Jamaica and back to the United States. Everything being now in readiness for their departure from Savannah, Mr. Buhring appears on board, and is introduced to the mate and crew, not merely as owner of vessel and cargo, but as master for the voyage. Whether any surprise was excited on board by the new character in which the claimant appeared, or whether they expressed any reluctance at placing themselves under his command, we know not; nor is it a fact very necessary to ascertain, because they must soon have discovered that Mr. Samuel Howard, whose friendship for Mr. Buhring seems to have had no limit, and in whose seamanship they may have had full confidence, intended to go with the vessel, and relieve Mr. Buhring from the

Wheat. 1.

troublesome task, if he were equal to it, of navigating the Rugen. For this conduct, on the part of Mr. Howard, no other reasonable motive can be assigned than an interest in the vessel and cargo. The allegation of his going after certain funds in Carthagena is not at all made out. The Rugen leaves Savannah on the 5th or 6th of May, bound, as is alleged, for Carthagena, but arrives at Kingston, in the Island [72*] of Jamaica. The court is not at all satisfied with the excuses which have been made for her going there. It does not appear that a *vis major* of any kind existed. She was neither forced in by adverse winds, nor was she under any restraint from capture. When within only four leagues of the island she was boarded by a British brig of war called *La Decouverte*, whose commander ordered her into Kingston. He put no prize-master on board; nor did he indorse any of her papers; nor did he keep company with her; and yet we find her doing exactly what she was verbally directed to do. It is faintly pretended that if she had attempted, after that, to go to Carthagena, she could not have escaped the British cruisers which swarmed about the island. But what greater danger, if the property were neutral, would ensue on a capture by any other British vessel than by her going to a British port as prize to the *Decouverte*, or by her orders? It is believed, then, that her going to Jamaica was voluntary, and formed part of the original plan; which opinion derives considerable support from the fact of insurance having been made, not only for Carthagena, but also for a port in the West Indies; from the nature of the outward cargo; from the readiness with which they consented to dispose of it at that place, and procured another for this country promising a much greater profit than any which at that time could have been imported from Carthagena. There is yet a still stronger circumstance to prove that the destination of the Rugen to Carthagena was fictitious; and that is, her meeting at Kingston a ship called the *Wanschop*, which had sailed from [73*] Savannah but a little before the Rugen. On board of that vessel we find Mr. William Buhring, a brother of the claimant, and we have every reason to believe that she belonged, with her cargo, to the same concern. The *Wanschop*, it is also said, was destined for Porto Bello, on the Spanish Main; but by a strange coincidence of events, which can scarcely have been the effect of chance alone, she also gets out of her course, falls in with the same British vessel of war which afterwards boarded the Rugen; receives the like order to proceed to Kingston, which she also very promptly, and without any apparent reluctance, complied with. The business of these two vessels is managed by the same house in Kingston, and the proceeds of both of their cargoes are invested in molasses, rum, &c., which composed the return cargo of the Rugen. If the property claimed were *bona fide* Swedish, it would be superfluous to inquire whether the Rugen's going to Jamaica were voluntary or by coercion, a subject of Sweden having, for aught that appears, as good right to trade there as at Carthagena. But if it belonged to the American gentlemen, who have had an agency so conspicuous in the whole of this business (and that it did is our unanimous opinion), it will not be pretended that they could go to

Kingston unless by compulsion, or that they had any right during the late war to purchase and bring a cargo from any British port to this or any other country.

The court having already expressed its opinion that this vessel and cargo did not belong [74*] to the claimant, but to citizens of the United States, the latter having been purchased at Kingston, as is believed, with their funds, it becomes quite unnecessary to inquire what was the real destination of the *Rugen* on her leaving Kingston; whether she were bound, in fact, to Amelia Island, or to the United States; although it might not be very difficult to come to a satisfactory conclusion that Hardwicke, in Georgia, was her real port of destination. But this examination is unnecessary; for the owners, being American citizens, are equally guilty of trading with the enemy, whether that trade were carried on between a British port and the United States or between such port and any foreign nation; and in the present case, if the court be correct in the view which it has taken of the evidence, the offense of trading with the enemy was complete the moment the *Rugen* sailed from Savannah with an intention to carry her cargo to Kingston, in Jamaica. Upon the whole, without taking notice of many of the arguments urged by the advocates of the captors in favor of condemnation, and which are entitled to great consideration, the court is unanimously of opinion that the decree of the Circuit Court, rejecting the claim of Mr. Buhring, was correct, and must, in all things, be affirmed.

Sentence affirmed with costs.

75*]

*[COMMON LAW.]

THOMPSON v. GRAY.

Where R. G. agreed with the managers of a lottery to take 2,500 tickets, giving approved security on the delivery of the tickets, which were specified in a schedule, and deposited in books of 100 tickets each, thirteen of which books were received and paid for by him, and the remaining twelve were superscribed by him, with his name, in his own handwriting, and indorsed by the agent of the managers, "Purchased and to be taken by Robert Gray," and on the envelope covering the whole, "Robert Gray, 12 books;" on the second day's drawing of the lottery, one of the last-designated tickets was drawn a prize of \$20,000, and between the third and fourth day's drawing, R. G. tendered sufficient security, and demanded the last 1,200 tickets, and the managers refused to deliver the prize ticket; it was held that the property in the tickets changed when the selection was made and assented to, and that they remained in the possession of the vendors merely as collateral security, and that the vendee was entitled to recover the amount of the prize.

ERROR to the Circuit Court for the county of Alexandria.

This was an action of trover, instituted by the defendant in error, against Jonah Thompson, agent for the managers of the Potomac and Shenandoah Navigation Lotteries, to recover a ticket in the 2d class of said lotteries, against which had been drawn a prize of \$20,000.

On the trial, evidence was offered to prove that the president and managers of the Potomac Company had been created a corporation, under that corporate name; that they had been authorized by law to raise the sum of \$300,000 by lot-

teries, *under which authority they had [*76 drawn one class, and had arranged and published a scheme of a second class.

That the plaintiff below, and one Joseph Milligan, projected another scheme, which they sent in to the president and managers, accompanied by a proposition in writing, in the words and figures following:

"If this scheme is adopted, we engage to take 2,500 tickets each, in the second class of the P. and S. Navigation Lottery: Provided the ten-dollar prizes we now hold, and may hereafter receive, deducting 15 per cent., shall be taken in liquidation of our joint bond; and we engage to place in the hands of Mr. Carlton all the funds we receive for new tickets, until it amounts to a sum equal to that which we now owe the company, as fast as we receive them; on the balance we shall expect the usual credit. It is understood that the discount of 5 per cent. is to be made from the above 5,000 tickets; approved security to be given on the delivery of the tickets.

(Signed) "JOSEPH MILLIGAN.
"R. GRAY."

It was admitted that this scheme was approved of and adopted by the president and managers, and their own scheme was abandoned; that the proposition of the plaintiff and Milligan was accepted by them, and became a binding contract between the parties. Evidence was also offered to prove that under the contract a schedule specifying the numbers of certain tickets, by books containing one hundred *each, to [*77 the extent of 2,500, selected by the plaintiff, and to be set apart for his use, had been delivered by him to the former agent of the lottery; that two of the books mentioned in the said schedule having been disposed of, or put out of the reach of the agent, another schedule was handed in by the plaintiff to the defendant, then, and at present, agent, in which two other books, containing the same number of tickets, were substituted in lieu of the two last-mentioned, the schedule, in respect to the others, being the same as the first. That the plaintiff had, at different times, received 13 books, of 100 tickets each, part of those specified in the schedule, and that he had paid for the 13 books, partly in certain promissory notes, received and approved of by the agent, and partly in cash, and had afterwards paid \$108.80, on account of tickets in the 2d class, over and above the said 13 books. On the requisition of the plaintiff, the defendant produced on the trial a bundle containing twelve books of tickets of one hundred each (the residue of the numbers specified in the schedule), and, amongst others, the ticket in the declaration mentioned. On each of which books the name of the plaintiff was superscribed in his own handwriting; and on one of them (not that containing the ticket in the declaration claimed) was indorsed in the defendant's handwriting: "Purchased and to be taken by Robert Gray." And on the envelope covering the whole twelve books in one bundle was superscribed, in the hand and figures of the defendant, the words and figures following:

"ROBERT GRAY, 12 books."

*Similar proceedings took place as to [*78 W. Milligan, to whom only a part of the tickets selected by him had been delivered.

Wheat. 1.

That the drawing of the lottery was commenced on the 17th day of November, 1812, and that, on the 27th of that month, the second day's drawing, a prize of \$20,000 was drawn against the number in the declaration mentioned. The plaintiff also offered evidence to prove that on the 4th day of December, 1812, subsequent to the third and before the fourth day's drawing, the plaintiff tendered to the defendant a bond for the payment of dollars, executed by himself and two sureties, who were fully sufficient for that sum, and demanded from him the twelve books of tickets which had been selected and set apart for him. To which the defendant replied that he was ready to deliver 1,200 of any undrawn tickets, but would not deliver the high prize. The drawing of the lottery had been continued only fifteen days.

On which the counsel for the defendant below moved the court to instruct the jury,

"1st. That it is not competent for the jury to find, from the evidence so produced as aforesaid, that the twelve books of tickets including the said prize ticket, had been, prior to the commencement of the drawing of the said lottery, appropriated by plaintiff and defendant to the satisfaction of said contract, and delivered to plaintiff under and in fulfillment of said contract, and deposited by the plaintiff with the defendant, as collateral security for the payment of the purchase money until other security **79*** should be *given, (as was contended and insisted upon by the plaintiff's counsel to the jury,)" which instruction the court refused to give.

"2d. That the facts so given in evidence by the plaintiff, as aforesaid, do not import an absolute sale and delivery of the twelve books of tickets, including the prize ticket, but a selection and setting apart of such tickets as were to be delivered to the plaintiff, when he should comply with his contract in giving the stipulated security." Which instruction the court gave, but also directed the jury, "that such selection and setting apart, aforesaid, was sufficient delivery to the plaintiff to vest the property of the said tickets in him upon his giving or tendering approved security, according to the terms of the contract, in a reasonable time thereafter; and that the tender of the security, as before stated, was in reasonable time."

"3d. That the selection and laying apart of the twelve books of tickets, as aforesaid, and the said indorsements upon the said books, and upon the envelope of the same, did not vest in the plaintiff the property of said tickets, under the said contract, so as to entitle plaintiff to prizes drawn against those tickets before any security was given or offered, and whilst said tickets remained in the hands of defendant, awaiting the completion of said contract on the part of the plaintiff in respect of the stipulated security." Which instruction the court gave, but also instructed the jury, "that upon tendering the security, as before stated, if the jury should find such security to be sufficient, such **80*** selection and laying *apart of the said tickets did, under the said contract, entitle the plaintiff to all the prizes drawn by such tickets in the intermediate time between such selection and the tender of security, as aforesaid;" to Wheat. 1.

which refusal and several instructions the defendant excepted, and a verdict and judgment having been rendered for the plaintiff below, the defendant in the Circuit Court brought the cause into this court by a writ of error.

Jones, for the plaintiff in error. 1. The ticket was at the risk of the vendors, and drawing the prize is equivalent to any physical change in the thing. It was not left in the hands of the vendors as collateral security, for the pledge of the ticket would have thrown upon the vendors the whole risk of the drawing of these tickets, the essence of their value consisting in the chance. On the contrary, the thing was to remain in the vendors' possession, and as their property, until a condition of the sale had been accomplished. 2. There is a repugnancy between refusing the first instruction and granting the second. The court below admit that the right of property was not complete in Gray, until the security stipulated; and that, when given, it would retroactively vest the property. The title was then clearly incomplete.¹

Swann, contra. The contract was consummated and binding on both parties. Gray's proposition *was accepted; some of the [***81**] tickets were actually delivered; there was a payment of what may be considered as earnest. The thing sold was specifically designated by the vendors. The vendee had the right of property and the right of possession. All he wanted was the actual possession. The thing sold may be designated in various ways.² Property is transferred by the contract of sale without delivery, if the article is specifically designated.³

Jones, in reply. There is a distinction between this case and the authorities relied upon by the other side. The question is, whether the contract be executory or executed. It was not executed by specifying the particular ticket; the security to be given by Gray was a condition which preserved the original executory nature of the contract. Delivery, either actual or symbolical, is essential to a sale; and neither took place here. The cases cited are of contracts self-executory, and where the parties stipulated to waive delivery.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The question on which the correctness of the opinions given by the Circuit Court depends, is this: Was the purchase and sale of the twelve books not delivered so complete that the tickets had become the property and were at the risk of Robert Gray?

*In pursuing this inquiry it becomes [***82**] necessary to decide whether the clause respecting security forms a condition precedent, on which the sale is made to depend, or a condition subsequent, the performance of which may be suspended until it shall be convenient to the vendee, or required by the vendor. It is

1.—6 East, *Hanson v. Myer*; 1 Campbell's N. P. R., 427; *Palne v. Shadbolt*.

2.—2 Black. Com., 447; Salk., 113.

3.—1 Campbell's N. P. R., 513, *Phillemore et al. v. Barry et al.*; 7 East, 558, *Hinde v. Whitehouse et al.*

apparent that a contract for the sale of 5,000 tickets was one of very considerable interest to the managers of the lottery. This is not only self-evident from the nature of the transaction, but is also proved by the fact that they changed the scheme of the lottery for the purpose of securing it. As the time of commencing the drawing must necessarily have depended on the sale of the tickets, it is reasonable to suppose that, in the calculations made on this subject, they must have considered the books selected and set apart for Mr. Gray either as sold or unsold. The indorsements on the books selected lead strongly to the opinion that they were considered as sold. If the proposition which forms the basis of the contract be inspected, it will be perceived that the contract was intended to be entire, not divisible. The scheme of the lottery was changed, not for the purpose of inducing Gray and Milligan to take any number of tickets less than 5,000, but on their engaging to take 5,000 absolutely; and the clause respecting the security is annexed to the delivery of the tickets. The delivery of some of the books was an execution in part of an entire contract. All the circumstances show, that the obligation of the contract was complete; but the examination of these circumstances *is dispensed with by the admission on record, that it "became a binding contract between the parties."

What, then, was this binding contract?

That the scheme proposed by Milligan and Gray should be adopted, and certain facilities of payment allowed, on their bond to the company for tickets taken in the first class. That they should, on their part, take 2,500 tickets each in the second class, and that approved security should be given on their delivery. Certainly Milligan and Gray were absolutely bound to take 2,500 tickets each. A refusal to do so would have been a breach of contract, for which they would have been responsible in damages. When the parties proceed one step further; when the vendee, in execution of this contract, selects the number of tickets he has agreed to purchase, and the vendor assents to that selection; when they are separated from the mass of tickets, and those not actually delivered are set apart and marked as the property of the vendee; what, then, is the state of the contract? It certainly stands as if the selection had been previously made and inserted in the contract itself. An article purchased in general terms from many of the same description, if afterwards selected and set apart with the assent of the parties as the thing purchased, is as completely identified, and as completely sold, as if it had been selected previous to the sale, and specified in the contract. After this selection, the parties stood in the same relation to these tickets as if the 25 books, afterwards agreed upon, had been named in the contract as containing the numbers purchased [§4*] by Gray. The *contract, then, amounts to this: The managers agree to sell Gray 2,500 tickets, which are specified, and he agrees to, give approved security for the purchase money on the delivery; in the meantime the tickets remain in possession of the vendors, who proceed to draw the lottery, without having received or required security for the whole

number of tickets sold. The stipulation respecting security could not in such a case be considered as a condition precedent, on the performance of which the sale depended. Certainly, the managers could have required, and have insisted on this security; but they might waive it, without dissolving the contract. They were, themselves, the judges, whether they would consider the contract of Robert Gray, with the collateral security furnished by the possession of the tickets, as sufficient for their protection; and their conduct shows that they thought it sufficient.

The majority of the court is of opinion that the property in the tickets changed when the selection was made and assented to; and that they remained in possession of the vendors merely as collateral security. Had the tickets been all blanks, Gray was compellable to take them.

*Judgment affirmed with costs.*¹

*[LOCAL LAW.]

[*85

ANDERSON v. LONGDEN.

Where a bond was given by the agent of an unincorporated jointstock company, to the directors for the time being, for the faithful performance of his duties, &c., and the directors were appointed annually, and changed before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees after they had ceased to be directors.

ERROR from the Circuit Court for the County of Alexandria.

This was an action of debt instituted by the defendants in error (plaintiffs in the Circuit Court), as directors of the Domestic Manufacture Company of Alexandria, against Robert Anderson (the plaintiff *in error) on a bond [*86 given by him and others as sureties for John MacLeod, agent of the said company, to the said directors, to recover the amount of money and merchandise which the said agent had re-

1.—When commodities are sold by the bulk, for a gross price, the sale is perfect, for it is known with certainty what is sold; but if the price is regulated at the rate of so much for every piece, pound or measure, the sale is not perfect, except only as to so much as is actually counted, weighed, or measured; for, till then, it is not known with certainty what is sold. (3 Johns. Cas., 254, *Coit v. Houston*; *Domat*, l. 1, tit. 2, s. 4, art. 7; *Code Napoleon*, liv. 3, tit. 6, ch. 1, art. 1585; 2 *Erskine's Inst.*, 480, 481.) This distinction is recognized by Pothier, who remarks that the contract of sale is usually perfected by the agreement as to the price; and that this rule applies where the sale is of a specific article, for a gross price. *Sic ut quod venterit apparcat quid quale quantumve sit, et pretium, and pure venit; perfecta est emptio*, l. 8; *Dig. de peric and comm. R. vend.* But, if the commodity be of that description of articles, which consist in *quantitate*, and which are sold by the weight, number, or measure, the sale is imperfect until it is weighed, counted or measured. In the first case, the goods sold are at the risk of the vendee, from the moment the contract is made; in the last case, they remain at the risk of the vendor, until they are designated by the act of weighing, counting or measuring. But, in both cases, the contract is so far completed from the time of its being entered into, as to give the vendee a right of action for the delivery of the thing on tendering the price, and the vendor an action for the price, on tendering a delivery of the thing sold. *Contrat de Vente*, No. 308. See also 6 *East.*, 625.

ceived for the use of the company, and for which he had failed to account.

On the 17th of November, 1809, a number of persons in Alexandria associated together, and formed a company, for the purpose of encouraging the manufacture and use of domestic merchandise. They entered into articles for their government, of which the following extracts are all that are material in this case:

"Art. 2. As soon as the whole, or 1,000 shares of the said capital stock, shall have been subscribed for, and the first payment made thereon, a meeting of the stockholders shall be called by public notice in the Alexandria and Washington newspapers, to meet in the court house of Alexandria, either in person or by proxy duly authorized, at which meeting the stockholders, either personally or by proxy, shall elect by ballot seven of their own body to act as directors of the said company for one year."

"Art. 3. The affairs of the said company shall be carried on in the town of Alexandria, under the superintendence and control of the said directors, of whom any four shall form a board or quorum. They shall choose a chairman from among themselves, and in case of vacancy by death, resignation or otherwise, such vacancy shall be immediately filled by themselves from among the stockholders. And the said directors shall in no case whatever **con-87*** tract debts *or engagements, by bill, bond, or otherwise, for, or on account of, the company, but all dealings under their superintendence and control aforesaid, shall be for cash or barter, except goods on deposit, which may be sold by the direction of the consignor. The said directors shall also exhibit, at the annual meeting of stockholders, for their inspection, a statement of the affairs of the company for the year preceding."

"Art. 4. The directors, when elected, shall proceed, without delay, to appoint an agent and such other officers as may be requisite, all of whom shall hold their offices during the pleasure of the board, and who shall, before they enter upon their functions, give bond, with sufficient security, to the said directors, and their successors in office, for the faithful discharge of their duties, as prescribed by the board of directors."

The company having proceeded to elect directors, John MacLeod was appointed agent by them; and on the 18th of February, 1810, the said agent, with the plaintiff in error and others, his sureties, executed and delivered to the defendants in error, directors of the said company, their joint and several bond, in the penalty of \$10,000, the condition of which was, "that the said John MacLeod should, in all respects, faithfully execute and perform the duties assigned to him as agent, according to the terms and meaning of the articles of association, and also such other duties as are, or from time to time should be, assigned to the office of agent by the board of directors, and should, from time to time, when called upon, render a just and true account of all money, **88*** goods, &c., of the said company which should come to his hands, and should apply the same as he should be directed; and should, in all respects, whilst he held the office, conduct himself with honesty, and fidelity, and attention to the interest of the company."

The said agent continued in the service of the company, without any new appointment, until June, 1812, when he was dismissed; and having gone out in arrears to the company, this suit was brought against the plaintiff in error to recover the amount due to the company. To this suit the defendant in the Circuit Court, taking oyer of the bond, pleaded: 1st. "Conditions performed;" to which the plaintiff replied, specially setting forth, as the breaches relied on, "that money and merchandise, the property of the company, had come to the hands of J. MacLeod, as agent, &c., to the amount of \$4,000, for which he had failed to account, though required by the directors, and which he did not deliver over to his successor, as ordered by the directors. On this replication issue was taken. The defendant in the Circuit Court pleaded: 2d. That the plaintiffs (Longden and others) ceased to be directors at the expiration of one year from the time of their appointment, and were not directors when the suit was brought: To this plea the plaintiffs demurred generally.

In his third plea the defendant states that John MacLeod was appointed agent on the 18th February, 1810, and that for one year from the time of such appointment, and during the time the plaintiffs acted as directors, he had faithfully executed and performed his duty, &c.

*To which the plaintiffs (protesting [**89** that he had not faithfully performed his duties for one year) replied that J. MacLeod had continued in office for more than one year from the 18th of February, 1810, under the said appointment, and after the plaintiffs ceased to be directors; during which time merchandise, &c., to the amount of \$4,000, came to his hands, &c., which he had failed to account for; to which the defendant demurred.

The defendant pleaded: 4th. That the plaintiff had not instituted any suit at law against MacLeod for the breach of the condition of the bond; to which the plaintiff demurred generally.

The law on the demurrers was adjudged by the court for the plaintiffs (Longden and others), and on the trial of the issue the jury found for the plaintiff, and assessed damages, &c.

The record presents a bill of exceptions, which states that the defendant offered in evidence to the jury the books of the company, from which it appeared that the agent had been in the habit of selling merchandise on credit, from the month of January, 1810, until June, 1812; which books were open to the examination of the directors; that it appeared from the books that sales on credit had been made to three of the directors, plaintiffs in this suit; that the defendant also offered a copy of the report of a committee of directors made on the 19th of September, 1812, in pursuance of an order of the 6th of June, preceding.

Evidence was also offered to prove that the directors, to the number required by the articles, held *meetings, at which they [**90** gave directions for the management of the affairs of the company; that their proceedings were regularly reduced to writing, and signed by the chairman.

On which evidence the defendant's counsel moved the court to instruct the jury, "that if from the evidence aforesaid they should be of

opinion that the directors of the company had permitted the said credits to be given, and had acquiesced in the same, the defendant would not be liable for the merchandise sold on credit, and appearing on the books of the company;" which instruction the court refused, and instructed the jury, "that the evidence did not, in law, justify an inference that the directors, acting as a board under the articles, had authorized the agent to sell the merchandise aforesaid, on credit, and that the agent could not, in law, be justified in selling on credit by any direction of the directors, individually made, when not acting as a board under the articles;" to which opinion and instruction the counsel for defendant excepted.

Seann, for the plaintiff in error, argued that the bond must conform to the articles of association, which was not incorporated. He cited the case of the *Commonwealth v. Fairfax et al.*, where the words "so long as he shall continue in office," in the condition of a sheriff's bond, were construed not to extend to a second and new appointment.

Lee, for the defendant in error, was stopped by the court.

91* *MARSHALL, Ch. J.* The case of the sheriff's bond is very different. The commission of sheriff, in Virginia, is annual; of course, his sureties are bound for one year only. It is true, the directors of this company are elected annually; but the company has not said that the agent shall be for one year only; his appointment is during pleasure. The sureties do not become sureties in consequence of their confidence in the directors, but of their confidence in the agent whose sureties they are. The court is unanimously of the opinion that the judgment of the Circuit Court ought to be affirmed.

Judgment affirmed.

[CONSTITUTIONAL LAW.]

THE CORPORATION OF NEW ORLEANS

v.

WINTER ET AL.

A citizen of a territory cannot sue a citizen of a state in the courts of the United States, nor can those courts take jurisdiction by other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed.

ERROR from the District Court for the District of Louisiana. The defendants in error commenced their suit in the said court to recover the possession and property of certain **92*** lands in the city of New Orleans; claiming title as the heirs of Elisha Winter, deceased, under an alleged grant from the Spanish government, in 1791; which lands, it was stated, were afterwards reclaimed by the Baron de Carondelet, governor of the province of Louisiana, for the use of fortifications. One of the parties, petitioners in the court below, was described in the record as a citizen of the state of Kentucky, and the other as a citizen of the

Mississippi territory. The petitioners recovered a judgment in the court below, from which a writ of error was brought.

Winder, for the plaintiffs in error. The court below had no jurisdiction of the cause. The case of *Hepburn & Dundas v. Ellzey*¹ determined that a citizen of the District of Columbia could not sue a citizen of the state of Virginia in the courts of the United States. The subsequent case of *Strawbridge et al. v. Curtis et al.*,² shows that all the parties on the one side, and all the parties on the other, must be authorized to sue and be sued in those courts, or there is a defect of jurisdiction. The right of action was joint, but they might have severed it, which they did not, and they are incompetent to join in point of jurisdiction.

Key, contra. A citizen of the Mississippi territory has a right to sue in the courts of the United States. This point was left open in the decision of *the case of Sere v. Pitot*.³ **93** There is a manifest distinction, in this respect, between the right of a citizen of the District of Columbia and of the Mississippi territory. The jurisdiction of the District Court of Louisiana is the same with that of Kentucky. These several territories are "members of the American confederacy." The constitution puts the citizens of the District of Columbia on the same footing with inhabitants of lands ceded for the use of dockyards, &c.; they are not "members of the American confederacy." The district has no legislative, executive, nor judicative authority, power, or privileges. The territories have them all. They are in a sort of minority and pupilage; have the present right of sending delegates to Congress, and of being hereafter admitted to all the immunities of states, in the peculiar sense of the constitution. In this case, each party takes an undivided interest, and has a right to a separate action, whether the inheritance be of moveable or of real property.

Harper, in reply. There is no distinction, in this particular, between the District of Columbia and the territories. Congress might give to the district a delegate, with the same privileges as the delegates from the territories. The United States are the common sovereign of all these communities; and may grant or refuse this, or any other privilege, at their pleasure. The action is brought jointly, not each claiming his several part; and the court cannot **94** disconnect the parties. The petitioners **94** complain under the civil law, by the rules of which it is not competent for them to sever. Spanish law, which prevailed in Louisiana before its acquisition by this country, is a modification of the Roman. By the civil law, inheritances of real, as well as personal property, are joint. What is the mode of proceeding? Though ambiguous and mixed, it is chiefly the civil law process, like our chancery proceedings. All parties must, therefore, regularly have been before the court.

MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The proceedings of the court, therefore, is arrested *in limine*, by a question respecting its

1.—2 Cranch, 445.

2.—3 Cranch, 262.

3.—4 Cranch, 336.

jurisdiction. In the case of *Hepburn & Dundas v. Ellzey*,¹ this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

It has been attempted to distinguish a territory from the District of Columbia; but the court is of opinion that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a territory. Gabriel Win-^[95*]ter, then, *being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge et al. v. Curtis et al.*,² it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The Circuit Court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.

Cited—2 How. 22; 5 How. 377; 16 How. 340; 6 Wall. 287; 4 Wash. 346, 508; 2 Sumn. 347, 360; 1 Dill. 300; 2 Wood. & M. 231; 2 Blatchf. 164; 3 Blatchf. 87; 12 Blatchf. 290; 16 Blatchf. 153.

96*]

*[INSTANCE COURT.]

THE AURORA. WALDEN ET AL., Claimants.

A hypothecation of the ship by the master is invalid, unless it is shown by the creditor that the advances were necessary to effectuate the objects of the voyage, or the safety of the ship, and the supplies could not be procured upon the owner's credit, or with his funds, at the place.

A bottomry bond given to pay off a former bond, must stand or fall with the first hypothecation, and the subsequent lenders can only claim upon the same ground with the preceding, of whom they are virtually the assignees.

APPEAL from the Circuit Court for the District of Pennsylvania. The brig *Aurora*, commanded by Captain Owen F. Smith, and owned by the claimants, sailed in July, 1809, from New York, on a trading voyage to the Brazils, and from thence to the South Sea Islands, for the purpose of procuring a cargo for the market of Canton or Manilla; with liberty, after completing this adventure, to continue in this trade, or engage in that between Canton and the north-west coast of

America. The brig duly arrived at Rio Janeiro, where the principal part of her outward cargo was sold, and from thence proceeded to Port Jackson, in New Holland. At this port, the brig underwent considerable repairs; on account of which, advances and supplies were furnished by Messrs. Lord & Williams, who were merchants there. The original objects of the voyage seem here to have *been lost sight of, [*97 and the brig was chartered by the master, to Messrs. Lord & Williams, for a voyage of discovery, and was actually retained in their service for about a year, under this engagement. At the end of this time the brig had returned to Port Jackson, and Captain Smith was here put in jail, by some persons whose names are unknown, for debts contracted, as it was asserted or supposed, on account of the vessel, and was relieved from imprisonment by Messrs. Lord & Williams. About this time, viz., in July, 1811, the brig was again chartered to Messrs. Lord & Williams, for a voyage from Port Jackson to Calcutta, and back to Port Jackson; and a bottomry bond was executed for the same voyage by Captain Smith, in favor of Messrs. Lord & Williams, for the sum of £1,482 6 1, and interest at nine per cent., being the amount, as the bond expresses it, of "charges incurred for necessaries and stores, found and provided by Messrs. Lord & Williams, of, &c., at various times and places, for the use of the said brig." The vessel duly proceeded to Calcutta, and landed her cargo there; but being prevented, as it was alleged, by the British government in Calcutta, from returning to Port Jackson, the voyage was broken up. In December, 1811, Captain Smith entered into a contract with the libelants, Messrs. Chamberlain & Co., at Calcutta, by which he engaged to charter the brig to them, to carry a cargo on their account to Philadelphia, for the gross freight of 12,000 sicca rupees, to be paid to him in advance in Calcutta; and also, to give the charterers the appointment of the master for the voyage. *He further agreed, in [*98 consideration of the libelants paying the bottomry bond of Messrs. Lord & Williams, and advancing any sums necessary for the repairs and supplies of the ship, to execute a bottomry bond to them for the same voyage, for the principal sum thus paid and expended, and 20 per cent. interest. In pursuance of this agreement, on the 17th of December, a certain captain George Lee, with the assent of Smith, was appointed by the libelants to superintend the repairs, equipments, and loading of the brig, and afterwards sailed as master on the voyage. A bottomry bond, for 18,000 sicca rupees, was formally executed by Captain Smith on the 23d, and a charter-party on the 26th December. In the latter part of January, 1812, Captain Smith resigned his nominal command of the ship to Captain Lee, and delivered to him the ship's papers and letters for the owners. The ship duly sailed on the voyage, and arrived at Philadelphia, and there safely delivered her cargo. The advance freight was paid to Captain Smith, according to the contract, and he remained behind at Calcutta, under the pretense that, with this advance freight, it was his intention to prosecute the plan of his original voyage, and to endeavor to repair the losses sustained by his former conduct. It also appeared in evidence

1.—2 Cranch. 445.

2.—3 Cranch 262.

Wheat. 1.



that Captain Smith was, during the whole voyage, much addicted to intoxication, both at sea and on shore; and Messrs. Lord & Williams, and the libelants, seem to have been fully apprized of his incapacity to manage the concerns of the voyage. The owners refused to pay the bottomry bond executed at Calcutta, and the 99*] present libel was brought to enforce it. The District Court, at the hearing, decreed the full amount of the principal and interest of the bond, deducting the 12,000 sicca rupees advanced at Calcutta. Upon an appeal, the Circuit Court reversed this decree, and upon the merits dismissed the libel.

Harper, for the appellants and libelants. 1. As to the first hypothecation at Port Jackson, a bottomry bond may be taken after debts are incurred necessarily, in order to secure the person advancing the moneys. 2. The hypothecation at Calcutta was to discharge the first loan, and for further repairs. The master was not, in effect, changed before the second bond was executed. But, suppose he was, how is that to affect the first hypothecation? It attached until discharged by the new loan. The instrument passes by delivery, and the new lenders became invested with all the rights of the former holders of the bond. The present holders ought, at least, to receive so much of their money. All that lenders upon bottomry are bound to do, is to see that a necessity actually exists at the time. How came the ship enabled to prosecute her voyage and earn freight? By the loan. The payment of the freight in advance to the master, subsequently, could not, by relation back, affect the lien acquired by a previous loan.

Sergeant, for the respondents and claimants. The power of a master to hypothecate the vessel, though necessary for the purposes of commerce, would, without limitations, be ruinous to the owner, and destructive of the purposes it was intended to subserve. It is conferred by no express delegation, but is the offspring of necessity. This necessity must be shown, to warrant the master's conduct. The owner's interest is the object of the power; the master has no authority to bind the owner or his property, contrary to his orders and his interest. 1. The master can hypothecate only in case of clear necessity, which must be clearly shown.¹ It is incumbent upon the party who claims to have a right under the bond, to show this necessity. A contrary doctrine would make the bond, which is nothing unless the master has the power, evidence of that power. To allow it the force even of *prima facie* evidence, would be to invert the law; for, then, instead of saying, that the state of necessity must be clearly shown, we should be obliged to say, the absence of necessity must be shown. 2. The master can hypothecate only when the hypothecation is the condition of the loan. The money ought to be advanced solely on the faith of the bond, and the hypothecation cannot be taken after the advances are made, without stipulating for such security. If the loan has been once made on personal credit, for the use of the ship, it cannot be afterwards secured by hypothecation; for there is, then, no existing

necessity. A menace against the master, or the power of attaching the ship, by the [*101 creditor, will not legalize such a contract.² If the master can obtain funds by any other means, he is not authorized to hypothecate. The master can hypothecate only for the interest of the owner, and for the purpose of prosecuting the voyage.³ This is a case which requires the application of the strictest principles of law, and, at the same time, illustrates the wisdom and policy of those principles, as essential to the security of trade. The hypothecation at Calcutta, so far as it is founded upon that at Port Jackson, was given, in part, at least, for a pre-existing debt; and it is not for us to separate what the obligees have confounded and mixed together. As to the expenditures at Calcutta, the freight received ought to have been applied to pay them.

Harper, in reply. The principles advanced on the other side are too narrow to subserve the interests of trade; and the authorities cited do not warrant them. Any condition of a ship, disabling her from performing her usual service to the owner, if money cannot be raised in any other way to refit her, creates such a necessity as will justify a hypothecation by the master. Do not the claims of material men, of tradesmen who have furnished supplies upon the credit of the ship, of merchants who have advanced moneys for her repair, and who may all proceed *in rem*, or by process of attachment, imply such a condition of the ship? By the universal law of the civilized world, the master is the agent of the owner, unless notice of his special instructions to the party contracting with him can be proved. The lenders in this case had no such notice.

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

Such are the material facts of the case, and the question to be decided is, whether, under all the circumstances, the bottomry bond executed at Calcutta constitutes a valid lien upon the ship.

The law in respect to maritime hypothecations is, in general, well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessities furnished for her use. This rule is established as well upon the implied assent of the owners as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby, indirectly, bind the owners to the value of the ship and freight, so, it is held that he may, for the like purposes, expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same, for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and, if he transcend the prescribed limits, his acts become, in legal contemplation, mere nul-

1.—2 Marshall on Insurance, (Condy's edit.) 741, d. *Ross v. The Active*; Bee's Adm. Rep., 159, *Putnam v. The Polly*; 2 Marshall, 741, c. *The Lavinia*.

2.—2 Marshall, 741, a. *Liebart v. Emperor*; 1b. *Rucker v. Connyngnam*; Bee's Adm. Rep., 341.

3.—2 Marshall, 741, c. *Ross v. Active*; *Parke on Ins.*, 413.

103*] lities. Hence, to make *a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor that the master acted within the scope of his authority; or, in other words, it must be shown that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption should arise that such repairs and supplies could be procured upon any reasonable terms, with the credit of the owner, independent of such hypothecation. If, therefore, the master have sufficient funds of the owner, within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument.

Let us now, with these principles in view, proceed to the consideration of the validity of the bottomry bond executed at Port Jackson, which enters so materially into the subsequent one executed at Calcutta. This bond purports, on its face, to have been given for advances, or supplies, furnished for the ship's use, not immediately before its date, but at various times and places; and, from the other evidence in the case, it distinctly appears that the greater part was furnished before and during the voyage of discovery in which she was engaged, under the contract with Messrs. Lord & Williams, and for their immediate benefit. Not the slightest account is given of the earnings of the ship during this long voyage of a year, nor of the terms or stipulations of the charter. This silence would be wholly unaccountable **104*]** if it were not in proof, that Captain Smith was guilty of the most shameful misconduct, and either fraudulently sacrificed, or grossly neglected, the interests of his owner.

The advances made by Messrs. Lord & Williams do not appear to have been originally made upon a stipulation for an hypothecation of the ship. On the contrary, there is the strongest reason to believe that they were originally made upon the general credit of the owner, or master, or both. If there had been a stipulation for an hypothecation, it must have been carried into effect by the parties on the next ensuing voyage; and, as this was not done, there arises an almost irresistible presumption that Messrs. Lord & Williams looked for their reimbursements out of the freight of the voyage in which the ship was then engaged by them. If, indeed, there had been a stipulation, originally, for an hypothecation, it must be deemed, in point of law, to have been waived by the omission to have had it attached to the first voyage then next to be prosecuted; and the party who thus waives his right cannot be permitted, at a subsequent time, and under a change of circumstances, to re-instate himself in his former condition to the injury of the owner. It is said that the ship might have been arrested for these advances; and that, in point of fact, the captain was put in jail on account of debts contracted for the ship, and was relieved from imprisonment by Messrs. Lord & Williams. That Captain Smith was imprisoned on account of some debts appears in the evidence, but it is by no means **105*]** clear that these *debts were contracted for the use of the ship. The presumption is repelled by the consideration that the necessities

and supplies are expressly stated in the bond to have been furnished by Messrs. Lord & Williams; and the only other creditors who are alleged to have furnished stores, are admitted not to have instituted any suits. It is undoubtedly true that material men, and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right. And it must be admitted that, in such a case, a *bona fide* creditor who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity or the occasion will justify the master in giving it, if he have no other sufficient funds, or credit, to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship, for a pre-existing debt, would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat, which the creditor might never enforce; and until enforced the peril would not act upon the ship itself. And even supposing a just debt might, in such a case, be a valid consideration to sustain a bottomry interest in favor of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship, might uphold an hypothecation in favor of a third person, that a general creditor would be entitled *to acquire a like interest. It [**106** would seem against the policy of the law to permit a party, in this manner, to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practice gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country.

These are not the only difficulties which press upon the claim of Messrs. Lord & Williams. The terms of the charter-party, entered into by them on the voyage to Calcutta, as well as on the voyage of discovery, are nowhere explained. It was certainly their duty, in the first instance, to apply the freight in their hands, earned in these voyages, to the discharge of the debt due to them for advances. What was the amount of this freight, and what was the manner in which it was to be paid, and how, in fact, it was paid or appropriated, are inquiries which have never been answered. These inquiries are at all times, and in all cases, important, but are emphatically so in a case where there is but too much reason to suspect that the interests of the owner were wilfully abandoned by the fraud or the folly of the master.

It is incumbent upon the creditor who claims an hypothecation, to prove the actual existence of the necessity of those things which give rise to his demand; and if, from his own showing, or otherwise, it appears that he has had funds of the owners in his possession which might have been applied to the demand, *and [**107** he has neglected or refused so to do, he must fail in his claim. So, if various demands are mixed up in his bond, some of which would sustain an hypothecation and some not, it is his duty so to exhibit them to the court that they

may be separately weighed and considered. And it would be perilous indeed if a court were called upon to grope its way through the darkness and intricacies of a long account without a guide, and decide upon the interests of the ship-owner by obscure and doubtful lights which here and there might cross the path.

Upon the whole, it is the opinion of the court that the bottomry bond of Messrs. Lord & Williams cannot be sustained as a valid hypothecation upon the proofs now before the court. It appears to have been founded, to a very large amount, upon advances made by Messrs. Lord & Williams, in previous voyages; and if some portion of the debt might have been immediately applicable to the necessities of the ship at the time of the voyage to Calcutta, that portion is not distinctly shown, and no reason as yet appears why the freight in their hands, if the transactions were *bona fide*, might not have been applied in discharge of these necessities.

As the bottomry bond of Messrs. Lord & Williams has not been established, the subsequent bottomry bond executed at Calcutta, so far as it includes and covers the sum due on the first bond, cannot be sustained. The plaintiffs, in this respect, can claim only as the virtual assignees of Messrs. Lord & Williams, with the assent of the master, and the same defects which infected the original title pass along with the **108*** muniments of that title under the assignment.

And this observation leads to the consideration of the validity of the bottomry bond executed at Calcutta, as to the sum remaining, after deducting the amount of the first bond. Notwithstanding some obscurity in the testimony, it must be taken as true, from the express acknowledgments of Captain Smith, that the whole sum expended in repairs and supplies of the ship in Calcutta, including the sum of ten thousand seven hundred and thirteen sicca rupees, paid on account of the first bottomry bond, did not exceed the sum of eighteen thousand sicca rupees. It follows, therefore, that a sum, a little more than six thousand rupees, was expended in these supplies and repairs. By their charter-party with the master, the plaintiffs agreed to pay an advance freight to Captain Smith of twelve thousand sicca rupees for the

voyage to Philadelphia. There was, therefore, within their own knowledge, an ample fund provided for all the repairs and supplies necessary for the voyage; and this fund absolutely within their own control, if they were disposed to act for the interest of the owners, instead of lending their aid still farther to involve them in difficulty and distress. There is, therefore, but too much reason to believe that the plaintiffs were not unwilling to derive undue advantages from the intemperance and negligence of the master, whatever might be the sacrifices brought upon the owners. The plaintiffs expressly stipulated, in their charter-party, for the right to appoint a new master for the voyage, obviously *from a total want of confidence in [109] Captain Smith. They would not even suffer the repairs and loading of the ship to be made, except under a master specially in their own confidence. They retained Captain Smith in the nominal command of the ship until all their own purposes were answered, and then discarded him with as little ceremony as any indifferent personage. Yet, at the very moment that they were withdrawing their whole confidence from him, they advanced the whole freight of the voyage, to be applied at his own pleasure to any objects disconnected with the voyage. They could not be ignorant that the master was not about to return to the home of the owner, and that the ship was; and the argument which imputes to them a collusive combination with the master, is certainly not without considerable weight. At all events, here funds are shown to exist sufficient to meet the necessities of the ship, and, consequently, a resort to the extraordinary expedient of an hypothecation was not justified in point of law.

On the whole, it is the opinion of the court, that the decree of the Circuit Court ought to be affirmed with costs.

*Decree affirmed.*¹

Cited—4 Wheat. 444; 5 How. 459; 6 How. 390; 18 How. 67; 9 Wall. 139, 457; 10 Wall. 200; 6 Otto. 648; 2 Sumn. 177; 8 Sumn. 224, 258; 2 Wood. & M. 53, 99, 97, 107, 323; 3 Wood. & M. 249, 251, 259; Blatchf. & H. 73, 78, 178, 324; 4 Blss. 238; 1 Cliff. 43, 314; Olcott, 36, 60, 62, 64, 348; Gilp. 9; 1 Ware, 255; 2 Ware, 31, 74; 2 Gall. 349; 3 Story, 473, 496; 1 Paine, 576; 4 Wash. 454, 456; Taney, 64; 14 Blatchf. 36.

1.—It is stated by Blackstone in the Commentaries, vol. 2, p. 457, that the contracts of bottomry and *respondentia* took their rise from the practice of allowing the master to hypothecate the ship in a foreign country in order to raise money to refit. This opinion is doubted by Mr. Abbott, in his Law of Shipping, part 2, c. 3, s. 15, p. 163 (Story's ed.), who remarks, that there is no mention in the text of the civil law, of this contract entered into by the master of the ship in that character. This remark does not appear to have been made with the usual accuracy of that excellent writer; for, in the law, *De exercitoria actione* in the Pandects, the master is authorized to take up money upon the credit of the ship when necessary; and Bynkershoek attributes the origin of maritime hypothecation to the Roman law, and states that it was originally confined to hypothecation by the master, from necessity, in foreign parts, and by degrees came to be entered into by the owners of the ship and cargo for more general purposes. Q. J. Priv. l. 3, c. 15, *De Contractu quid dicitur*, Bodemery. The same great jurist also states in his Q. J. Pub., c. 19, p. 151, of Du Ponceau's translation, that the lender is entitled to the benefit of his security, even if the moneys advanced be misapplied by the master, and not laid out in the refitting the ship. This, however, must be understood of a *bona fide* case, where there is no fraud on

the part of the lender, nor collusion between him and the master.

Roccus lays down the following rules on this subject: "Verum adverte, quia quatuor requiruntur, ut dominus navis teneatur ad restitutionem pecunie mutuatae. Primum, ut causa sit vera, et in illam causam pecunia sit versa, licet precise creditor non teneatur habere curam, ut in illam causam pecunia expendatur. Secundo, quod mutuum solat magistratum ad id esse propositum. Tercio, ut non plus mutuetur, quam sit navi necessarium dicte refectioni, vel causae. Quarto, ut in eo loco comparari possint res illae necessariae, ubi mutuum fuit factum." He adds, that if the master deceive the lender, either in the repairs or the price of the articles purchased, the owner is responsible, and also for money borrowed to repay other moneys advanced to refit the ship; nor is he discharged even if the master converts the money to his own use. *Notabilia de Nav. et Naul*, note 23, 24. The *Consolato del Mare* recognizes the power of the master to bind the owners in this manner, excepting in cases of fraud and misconduct, c. 245. By the ancient law of France, the master might hypothecate the ship when abroad, with the consent of the mate and pilot, who were required to certify upon the ships' journal the necessity of the loan, and its applica-

112*)

*[PRIZE.]

THE VENUS. JADEMEROWSKY, Claimant.

A case of further proof.

APPEAL from the decree of the Circuit Court for the District of Georgia. This ship having taken in a cargo at London, proceeded to Portsmouth, and from thence, on the 12th of April, 1814, sailed for St. Bartholomews, under convoy of a British ship of war. From St. Bartholomews she sailed for the Havannah, but on her passage thither was captured and sent into the island of St. Thomas, for adjudication, by a British cruiser. Upon being released from this detention, she abandoned her destination for the Havannah, and was proceeding to Amelia Island, when she was captured by the flotilla under the command of Commodore Campbell, and sent into the port of Savannah, where the vessel and cargo were libeled as prize. The ship was restored by consent, in the court below, as Russian property; the cargo was condemned as prize of war, and an appeal entered from that sentence by the claimant. The proofs of property consisted: 1. Of a recital in a power of attorney, from one Jones, the alleged agent, in London, of the claimant (who was stated to be a Russian merchant domiciled at St. Petersburg), to Mr. Diamond, the supercargo. 2. A certificate of property from the Russian Consul-General in London. 3. The testimony of Mr. Diamond, and other witnesses, taken *in preparatorio*, expressing their belief that the property was as claimed.

Charlton, for the appellant and claimant, offered to read affidavits in the nature of further proof.

STORY, J. Until the cause is heard, further proof cannot be admitted.

MARSHALL, Ch. J. If, upon the opening, it appears to be a case for further proof, then it may be admitted *instantly*, unless, indeed, the court should be of the opinion that the captors ought to be allowed to produce further proof also. The cause is before us as if in the inferior court.

Charlton. We contend that it is a case entitled to further proof, and that there is no circumstance of fraud or *mala fides* to preclude it.

The Attorney-General, contra. It is incumbent upon the claimant to make out his title by competent testimony, according to the rules of

the prize court; and if the court should be of opinion, that the property does not belong as claimed, the captors will be entitled to condemnation, without specifically proving to whom it does belong.¹ The recital in the power from Jones to Diamond cannot be sufficient to show the interest of Mr. Jademerowsky. *The recital in a deed binds only the [*114 parties, and those claiming under it; we are entitled to the production of the original power, duly authenticated.² The certificate of the Russian Consul-General is no proof of the real property.³ The failure on the part of the supercargo to testify, positively, as to the property, is, in the prize court, always held strongly against the title of the claimant. The cargo was purchased and loaded in a British port, and the ship had an alternative destination to a British colony. The voyage is different from that authorized in the original power from Mr. Jademerowsky to Jones; and, therefore, such power either never existed or it is falsified by the evidence, and must be repudiated by the court.

Pinkney, in reply, agreed that, in a suspicious case, restitution could not be demanded upon the original evidence; but, this is a case of further proof, and there is no evidence of fraud or unneutral conduct to preclude it. The documentary evidence expresses neutral account and risk. By the law of nations, the papers must be supported by the examinations *in preparatorio*; but, there is no determination which warrants the position, that the supercargo must swear to anything more than belief. He is, in this respect, in the same predicament with the master. In both cases, it is matter, not of positive knowledge, but of inference from the circumstances which *come to his knowl- [*115 edge. The consular certificate is a part of the ship's papers, and, as such, is necessarily a part of the documentary evidence in the cause. The recital of the procuration is said not to be admissible at common law; but, this court is now sitting as a court of prize.

The cause was this day ordered to further proof on the part of the captors and claimants.

Further proof ordered.

Cited—5 Wheat. 127; 2 Wood. & M. 540.

1.—1 Rob., 227, The Odin; 3 Rob. 68, The Neptunus.

2.—1 Rob., 133, The Argo.

3.—1 Rob., 19, The Endraught.

4.—1 Rob., 68, The Neptunus.

tion. *Ordonnance de la Marine*, liv. 2, tit. 1, du Capitaine, art. 19. Usage also required that a *proces verbal* of the transaction should be copied from the journal, and signed by the parties, whose consent was necessary. But Valin informs us that these formalities were merely required in order to disculpate the master; that they were not of the essence of the contract, and the omission of them did not invalidate the security of the lender, who was not obliged to prove that the sums advanced had been appropriated to the use of the vessel; and he cites a sentence of the tribunal at Marseilles, of the 9th of August, 1748, in support of his exposition, which decision (he states) is founded upon the first law, s. 2, Dig. de exercitoria actione. He remarks that Loccenius, de Jure Maritimo, l. 3, c. 8, n. 7 and 8, Vinnius in Peckium, fol. 183, n. A., and Casaregis, Disc. 71, n. 15, 33 and 34, hold, that the lender should prove the necessity of the loan in order to prevent ship-owners from being the victims of the frauds and malversations of masters. But Valin alleges that this rule had been rejected by the usage of trade as too refined and subtle; and that to enable the lender to enforce his claim, it is sufficient to

show that he had acted with good faith; that is to say, that there is no proof or sufficient presumption of collusion between him and the master. Valin sur l'Ordonnance, tom. 1, p. 442. See also Pothier, de Pret a la Grosse, n. 62. In the new Commercial Code of France, the further precaution is added of requiring that the master should obtain the consent of a tribunal of commerce, or justice of the peace, if the loan be made in France; if abroad, by the French Consul, or if there be no consul, by the magistrate of the place. Code de Commerce, liv. 2, tit. 4, Du Capitaine, art. 234. This amendment to the ancient law was made upon the suggestion of the Tribunal and Chamber of Commerce of Caen, who remarked, in their observations upon the original plan of the Code, that it but too often happened that ship-masters, in the course of their voyage, put into port upon the most frivolous pretexts, and incurred expenses ruinous to the owners; which required the interposition of judicial authorities, who would certainly authorize no other expenses than those really urgent and necessary to the prosecution of the voyage. *Espriu du Code de Commerce*, par J. G. Loere, tom. 3, p. 112.

[LOCAL LAW.]

PRESTON v. BROWDER.

The act of assembly of North Carolina, of November, 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July, 1777. The act of April, 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws.

ERROR to the Circuit Court for the District of East Tennessee. This was an action of ejectment commenced by the plaintiff in error in that court. On the trial of the cause, the plaintiff produced and read in evidence an entry ***116*** made on the 25th of February, ***1778**, in the name of Ephraim Dunlap, for 400 acres of land in the point between Tennessee and Holston rivers. Also, a grant to said Dunlap, issued in virtue of, and founded upon, said entry, under the great seal of the state of North Carolina, dated the 29th of July, 1798; which grant was duly registered. The plaintiff also produced, and read in evidence, a deed of conveyance, with the certificates of probate and registration indorsed, from Dunlap, the grantee, to John Rhea. Also, a deed of conveyance from said Rhea to the lessor of the plaintiff. It was also proved that the land lies within the boundaries of what was the state of North Carolina at the time of making said entry, and within the county of Washington; likewise, within the territory ceded by the state of North Carolina to the United States, in 1789, and within the now county of Blount, in the District of East Tennessee; that it lies on the south side of Holston River, and between Big Pigeon and Tennessee River, and west of a line described in the 5th section of the act of the general assembly of North Carolina, passed in April, 1778, chap. 3. Also, within the tract of country secured to the Indians in 1791, by the treaty of Holston, and that the Indian title thereto was relinquished in 1798, by the treaty of Tellico. The defendant produced, and gave in evidence, a grant from the state of Tennessee to himself, made out and authenticated in the manner prescribed by the laws of Tennessee, and dated the 18th of May, 1810, which covers and includes the whole of the land in his possession, and for which this suit was brought. ***117*** The plaintiff, by his counsel, moved the court to charge and instruct the jury, "that an entry was actually made with the entry-taker of Washington county, within which the land lay; that the entry was evidence that the consideration money was paid as required by law; that paying the consideration money, and making the entry, created a contract between the state of North Carolina and the said Dunlap, which vested a right in him to the land in dispute, and that it was not in the power of the legislature, at a subsequent period, to destroy the right thus vested, or rescind said contract, without the consent of the said Dunlap. That having the same land afterwards surveyed and granted, in the manner prescribed by the laws of North Carolina, vested in the said Dunlap and his heirs a complete title both at law and

in equity; and, that the conveyance from Dunlap to Rhea, and from Rhea to the lessor of the plaintiff, vested a complete legal title in him, and, therefore, he was entitled to a verdict." Which charge and instruction the court refused to give to the jury; but, on the contrary, charged and instructed them, "that the said entry and grant were both null and void, and vested no title whatever in the said Dunlap, because, at the time of making said entry, and obtaining said grant, the land included therein lay in a part of the country where the laws of North Carolina had not authorized their officers to permit lands to be entered, or to issue grants therefor; and although the entry and grant might have been made in the form required by law, yet no interest whatever passed ***118** from the state of North Carolina to Dunlap thereby, and, therefore, they ought to find a verdict for the defendant." A verdict was rendered accordingly, and a judgment pronounced thereon. To which charge and instruction the plaintiff's counsel excepted, and the cause was brought into this court by writ of error.

Key, for the plaintiff in error. The question in this cause turns upon the validity of an act of assembly of North Carolina of April, 1778, repealing a former act of November, 1777, c. 1, s. 3, under which the plaintiff's entry was authorized. It is an *ex post facto* law, which the state is incompetent to pass; its own courts have decided, that a law depriving a university of its lands was unconstitutional and void.¹ This court has determined that a law in the nature of a convention or contract cannot be so repealed as to divest rights of property previously acquired under it.² As to the Indian title, the usufruct only of this waste land was reserved to them; and the legislature might grant lands subject to the extinguishment of their title to the domain of property. This was a mere temporary arrangement, and the title of the natives was extinguished by the treaty of Tellico. There was, therefore, nothing to prevent an entry of lands anywhere within the territorial limits of North Carolina.

Pickens and Jones, contra.* 1. The *119** correct mode of ascertaining the nature and effect of the contract (as it has been called) between the state and the plaintiff, is by a reference to the plain interpretation of the act of 1777, connected with the local history of that period, and the circumstances of the entry. The law provides that entries may be made in the several counties of the state of all lands therein, not previously granted, and which shall have accrued to the state by treaty or conquest; most manifestly implying the necessity of a previous extinguishment of the Indian title. By the treaty of the Long Island of Holston, of the 20th of July, 1777, art. 5th, a boundary between the Indians and the whites is defined; and, by art. 6th, the Indians are guaranteed against all intrusion. The whole system of local laws establishes a police over the territory in question, with the express view of preventing the natives from being disturbed in the enjoyment of their rights. In 1778, finding that individuals, in the situation of the plaintiff,

1.—Heywood, Trustees of the University v. Foy.

2.—6 Cranch, 87, Fletcher v. Peck.

either wilfully or through mistake, had made entries within the Indian reservation, the legislature passed an act recognizing the limits fixed by the treaty of the year preceding, prohibiting future entries, and avoiding those already made within those limits. 2. But supposing the entry to have been valid as a claim, or right of pre-emption, against other citizens, it was not lawfully consummated by a subsequent survey and patent. Is the entry of such stern, unbending authority, as, by relation back, to dispense with the necessity of subsequent steps? Certainly not. By the act of 1783 the Indian [120*] boundary was changed, in conformity with the treaty of Hopewell, and the issuing of grants for lands within the reservation was prohibited. The land in question continued by that treaty, and by a subsequent treaty made in 1791, between the United States and the Cherokees, within the limits of the latter. The survey and grant were made in opposition to all these treaties and laws; and, in 1789, North Carolina ceded to the United States this territory, in which the state of Tennessee was erected. In 1791 the treaty of Holston once more guaranteed the Indians against intrusion. So that the plaintiff's counsel has to bear up, not only against the municipal laws of the country, but against the most solemn pacts and conventions.

Key, in reply. The plaintiff's right, commenced by a valid entry, could never be impaired by subsequent laws and treaties. The primitive Indian title was merely subordinate, and subject to extinction.¹ If, by the payment of the fees upon his entry, the plaintiff acquired an incipient right under the law then in force, it cannot be affected by any subsequent act. His grant is dated 1793, and a presumption thence arises that he had complied with all preceding requisites. The cession of 1789 contains a reservation for perfecting titles where entries had been made. The act of 1778 shows that the former law had allowed and countenanced entries in Washington county: it is not [121*] a declaratory, but a repealing statute, showing that the first law had not been mistaken nor misconstrued.

TODD, *J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The question now to be decided by the court is, whether the charge and instructions required by the plaintiff's counsel ought to have been given, and whether the one given was correct.

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes. It will be found, by a recurrence to the history of North Carolina, at the time of passing this act, that she had, but a short time before, shaken off her colonial government and assumed a sovereign independent one of her own choice; that, during the colonial system, by instructions and proclamations of the governor, the citizens were restrained and prohibited from

extending their settlements to the westward, so as to encroach on lands set apart for the Indian tribes; that these encroachments had produced hostilities; and that, on the 20th of July, 1777, a treaty of peace had been concluded at Fort Henry, on Holston River, near the Long Island, between commissioners from the state of North Carolina and the chiefs of that part of the Cherokee nation called the Overhill Indians; and that a boundary between the state and the said Indians was established. When [122*] the legislature of North Carolina were passing the act of November, 1777, establishing officers for receiving entries of claims for lands in the several counties within the state, it is improbable that the foregoing circumstances were not contemplated by them; and hence must have arisen the restriction in the act, as to lands "which have accrued, or shall accrue, to this state, by treaty or conquest." If this be not the ground or reason of the provision, it will be difficult to find one on which it can operate. It may be asked, where was the land which was to accrue by treaty or conquest, if not within the chartered limits of that state? If it was in a foreign country, or from a sister state, the restriction was unnecessary, because, in either case, it was not within the limits of any county within that state, and, of course, not subject to be entered for. The restriction must apply, then, to lands within the chartered limits of the state, which it contemplated would be acquired, by treaty or conquest, from the Indian tribes, for none other can be imagined. It is not, to be presumed that the legislature intended, so shortly after making the treaty, to violate it, by permitting entries to be made west of the line fixed by the treaty. From the preamble of the act, as well as other parts of it, it is clearly discernible that the legislature intended "to parcel out their vacant lands to industrious people, for the settlement thereof, and increasing the strength and number of the people of the country, and affording a comfortable and easy subsistence for families." Would these objects be attained by permitting settlements encroaching on the lands lately [123*] set apart, by treaty, for the use of the Indian tribes? By provoking hostilities with these tribes, and diminishing the strength of the country by a cruel, unnecessary, and unprofitable warfare with them? Surely not. However broad and extensive the words of the act may be, authorizing the entry-takers of any county to receive claims for any lands lying in such county, under certain restrictions, yet, from the whole context of the act, the legislative intention, to prohibit and restrict entries from being made on lands reserved for Indian tribes, may be discerned. And this construction is fortified and supported by the act of April, 1778, passed to amend and explain the act of November, 1777, the 5th section of which expressly forbids the entering or surveying any lands within the Indian hunting-grounds, recognizes the western boundary as fixed by the above-mentioned treaty, and declares void all entries and surveys which have been, or shall thereafter be made within the Indian boundary.

It is objected that the act of April, 1778, so far as it relates to entries made before its passage, is unconstitutional and void.

If the reasoning in the previous part of this

1.—6 Cranch, 57, *Fletcher v. Peck*.
Wheat. 1.

opinion be correct, that objection is not well founded. That reasoning is founded upon the act of 1777, and the history and situation of the country at that time. The act of 1778 is referred to as a legislative declaration, explaining and amending the act of 1777. It is argued that there is no recital in the act of 1778 declaring that the act of 1777 had been misconstrued *or mistaken by the citizens of the state; or, that entries had been made on lands, contrary to the meaning and intention of that act; and, that the 5th section is an exercise of legislative will, declaring null and void rights which had been acquired under a previous law. Although the legislature may not have made the recital and declaration in the precise terms mentioned, nor used the most appropriate expressions to communicate their meaning, yet it will be seen, by a careful perusal of the act, that they profess to explain, as well as to amend, the act of 1777. Upon a full review of all the acts of the legislature of North Carolina, respecting the manner of appropriating their vacant lands, and construing them *in pari materia*, there is a uniform intention manifested to prohibit and restrict entries from being made on lands included within the Indian boundaries. Therefore, this court unanimously affirms the decision of the Circuit Court with costs.

Judgment affirmed.

Cited—1 Wheat. 158; 9 Wheat. 677; 1 Otto, 79.

125*]

*[PRIZE.]

THE ASTREA.

An enemy's vessel was captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for adjudication. It was held that the prize vested in the last captor. An interest acquired in war, by possession, is divested by the loss of possession.

APPEAL from the Circuit Court for the District of Georgia. This was an enemy's vessel, captured by the privateer *Ultor*, in sight of Surinam, on the 17th of May, 1818; and on the 18th of June, 1818, recaptured by an enemy's vessel of war, about two leagues from the coast of Georgia, and, on the same day, recaptured by the privateer *Midas*, and brought into the port of Savannah for adjudication. The prize was adjudged to the last captors, by the decree of the court below, from which the first captors appealed to this court.

Charlton, for the appellants, contended that the prize interest vested in the first captors. He argued that the opinions of eminent civilians, and the practice of the continental nations of Europe, ought to prevail, rather than the decisions of the British courts of prize; which last are founded on reasons of commercial and naval policy, peculiar to England. Sir William Scott himself admitted that there is no general *rule,¹ but adopted the rule of condemnation, as most convenient for his own country: because, by protracting the period for the divestiture of British interests, it places the property of British subjects upon a better and

more secure footing than the rule adopted by any other nation. It gives a wider range to the *jus postliminii*, and enlarges the probability of recapture; a probability which is converted almost into a certainty by the maritime strength of Great Britain. Other nations, not having the same means of giving protection and security to captures, have adopted rules requiring a less firm and shorter possession, in order to divest the property. These rules are: 1st. That of immediate possession. 2d. That of pernotation and twenty-four hours' possession. 3d. The bringing *infra præsidia*.² The first is held sufficient by Azuni;³ and though his own opinion is entitled to but little weight, it deserves consideration how far he is supported by authorities. It is the maxim of the civil law, that things taken from the enemy immediately become the property of the captors. *Quæ ex hostibus capiuntur statim capientium fiunt*. Grotius and Vattel are guilty of great inconsistencies in expounding the rule in question. Burlamaqui is clear and explicit, that mere possession immediately vests a title.⁴ Bynkershoek does not require a sentence of condemnation; and *he enumerates "fleets" among the *præsidia*,⁵ under the protection of which the thing taken may be considered as safe; so that a bringing into the territorial limits is not indispensable, because the fleet into which the captor brings his prize may be remote from the coasts of his country. It results, then, that the loss of the *spes recuperandi* is the true foundation of the rule established by jurists; it is this which consummates the title of the captors, and destroys the *jus postliminii* of the law of nations; it is the municipal code of England alone which requires a sentence of condemnation to perfect the title. 2. But, supposing the *jus postliminii* still to continue, it is a right to be asserted by the subjects of the state from whom the property has been captured. But is it competent for one citizen of the belligerent state to divest another of the incipient inchoate title he had acquired by the first capture? The recapture by the enemy might, indeed, enable the original owner to reclaim his property; if a sentence of condemnation be necessary, it might affect the title of a neutral purchaser; but the *jus postliminii* can have no operation as between the first and second captors.

Harper, contra, was stopped by the court.

MARSHALL, *Ch. J.* An interest acquired by possession, is divested by the loss of possession from the very nature of a title acquired in war. The law of *our own country, as to sal-[*128] vage, settles the question, and the case of *The Adventure*⁶ is directly in point and conclusive. *Sentence of the Circuit Court affirmed.*

2.—Wheaton on Captures, c. 8, s. 14, 15, 17, 18.

3.—2 Azuni, 236.

4.—Burlam. Nat. and Pol. Law, 222.

5.—Bynk. Q. J. Pub., c. 3, p. 29, of Du Ponceau's Translation.

6.—February term, 1814, 8 Cranch, 221; Rev'g 1 Brock 225. This was the case of a British ship captured by two French frigates, and, after a part of the cargo was taken out, presented to the libellants in the cause, citizens of the United States (then neutral), whose vessel the frigates had before taken and burnt; by whom she was navigated into a port of this country, and, pending the suit instituted by them, war was declared between the United States and Great Britain. A question arose,

1.—1 Rob., 50, *The Santa Cruz*.

[LOCAL LAW.]

MATSON v. HORD.

The law of Kentucky requires, in the location of warrants for land, some general description designating the place where the particular object is to be found, and a description of the particular object itself.

The general description must be such as will enable a person intending to locate the adjacent readuum, and using reasonable care and diligence, to find the object mentioned in that particular place, and avoid the land already located. If the description will fit another place better, or equally well, it is defective.

"The hunter's trace, leading from Bryant's Station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." is a defective description, and will not sustain the entry.

A PPEAL from a decree in chancery in the Circuit Court of Kentucky. This cause was argued by *Hughes* and *Talbot* for the appellants, and *Hardin* for the respondents. It was, principally, a question of fact arising under the local laws of real property in Kentucky, for an outline of which the general reader is referred to the Appendix, note I., where [131*] *will be found an exposition of the elementary principles applicable to this class of causes.

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

whether this was a case of salvage. Johnson, *J.*, by whom the opinion of the court was delivered, stated that "the fact of the gift was established by a writing under the hand of the commander of the squadron of frigates, in these words, *Je donne au capitaine, &c.*, in the language of an unqualified donation, *inter vivos*. In this case, the most natural mode of acquiring a definite idea of the rights of the parties in the subject-matter will be, to follow it through the successive changes of circumstances, by which the nature and extent of those rights were affected: the capture, the donation, the arrival in the neutral country, and the subsequent state of war. As between belligerents, capture undoubtedly produces a complete divestiture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals as the only practical means of furnishing documentary evidence to accompany vessels that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not of mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship originally British. (1 Rob., 135, *The Flad Oyen*.) Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master, navigating the prize in pursuance of orders from his commander. The [129*] *vessel remained liable to British recapture on the whole voyage; and on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing in possession which the municipal law (civil and common) gives for care and labor bestowed upon it. The question then recurs, is this a case of salvage? On the negative of the proposition it was contended that it is a case of forfeiture under the municipal law, and, therefore, not a case of salvage as against the United States; that it was an unneutral act to assist the French belligerent in bringing the vessel *infra præsidia*, or into any situation where the rights of capture would cease; and, therefore, not a case of salvage as against the British claimant. But, the court entertains an opinion

This is an appeal from a decree of the Circuit Court of Kentucky, by which the plaintiff's bill was dismissed.

The object of the suit is to enjoin the proceedings of the defendant at law, and to obtain from him a conveyance for so much of the land contained in his patent as interferes with the entry and survey made by the plaintiff.

The plaintiff claims by virtue of an entry made on the 17th of January, 1784, the material part of which is set forth in the bill in these words: "Richard Masterson enters 22,277½ acres of land, on treasury warrant No. 19,455, to be laid off in a parallelogram twice as long as wide, to include a mulberry tree marked thus, "F," and two hickories, with four chops in each, to include the said three marked trees near the center thereof; the said trees standing near the hunter's trace, leading from Bryant's Station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." This entry has been surveyed, he states, according to location, and that part of it which covers the land in controversy has been assigned to him.

The validity of this entry constitutes the most essential point in the present controversy. If it cannot be sustained, there is an end of the plaintiff's title; *if it can, other points [*132 arise in the case which must be decided.

This question depends on the construction of that clause in the land law which requires that

unfavorable to both those objections. This could not have been a case within the view of the legislature when passing the non-importation act of March, 1809. The ship was the plank on which the shipwrecked mariners reached the shore; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury, by taking away the chance of recovery, subject to which they took it into their possession. Besides, bringing it into the United States does not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as the court is of opinion it did, legal provision existed for disposing of it in such a manner as would comport with the policy of those laws. At last, they could but deliver it up to the hands of the government, to be reshipped by the British claimants, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival they delivered it up to the custody of the laws, and left it to be disposed of under judicial authority. The case has no feature of illegal importation, and cannot possibly have imputed to it the violation of municipal law. As to the question arising on the interest of the British claimants, it will, at this time (war having supervened), be a sufficient answer, that they who have no rights in this court cannot urge a violation of their rights against the libelants. But there is still a much more satisfactory answer. To have attempted to carry the vessel *infra præsidia* of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But where every exertion is made to bring it into a place of safety, in which the original right of the captured would be revived, and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the British claimant." A salvage of one-half [*130 was allowed by the court, and as to the residue, it was determined that it must stand on the same footing with other property found within the territory at the declaration of war, and might be claimed upon the termination of war, unless previously confiscated by the sovereign power. The court, therefore, made such order respecting it as would preserve it, subject to the will of the court, to be disposed of as future circumstances might render proper.

warrants shall be located so specially and precisely as that others may be enabled, with certainty, to locate other warrants on the adjacent residuum.

In the construction of an act so interesting to the people of Kentucky, it is of vital importance that principles be adhered to with care, and that as much uniformity as is practicable be observed in judicial decisions. This court has ever sought, with solicitude, for the true spirit of the law, as settled in the state tribunals, and has conformed its judgments to the rules of those tribunals whenever it has been able to find them established.

In the cases which have been, on different occasions, examined, that absolute certainty which would remove every doubt from the mind of a subsequent locator appears never to have been required. The courts of Kentucky have viewed locations with that indulgence which the state of the country, and the general character of those who first explored and settled it, would seem to justify; and have required only that reasonable certainty which was attainable in such a country, and might be expected from such men as were necessarily employed. The effort has been to sustain rather than to avoid entries; and, although the motives which led to this course of adjudication are inapplicable to late entries, made on land supposed to be previously appropriated, yet it is not understood that different rules of construction ^{*have} ever been applied to entries of different dates.

By these rules, a certainty to a common intent, a description which will not mislead a subsequent locator, which will conduct him, if he uses reasonable care and diligence, to the place where the objects are to be found, will satisfy the law, and sustain the entry; but such a certainty must exist, or the entry cannot be sustained.

A location usually consists of some general description which designates the place in which the particular object is to be found, and of a description of the particular object itself. The general description must be such as would enable a man intending to locate the adjacent residuum, by making those inquiries which would be in his power, and which he would naturally make, to know the place in which he was to search for the particular or locative call, so nearly that, by a reasonable search, he might find the object mentioned in that particular or locative call, and avoid the land located. If the description will fit a different place better, or equally well, it is too defective, because, if it does not mislead the subsequent locator, it leaves him in doubt where to search.

The general description in this case is, "the hunter's trace, leading from Bryant's Station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn."

Will this description designate the place in which the trees called for in the location are to be found?

134*] ^{*}Bryant's Station is a fixed place of public notoriety. It is on the great road leading from Lexington to Limestone, on the Ohio, which road crosses the dividing ridge between the waters of Elkhorn and Licking, which is the ridge mentioned in Masterson's entry. This

road had been traveled by hunters, but seems to have been known by the name of the Blue Lick, or buffalo trace, and not by the name of the hunter's trace.

A trace which was, at the time, called the hunter's trace, leaves this great road at Bryant's Station, and proceeds in a direction west of north, until it crosses North Elkhorn, where it divides; the left-hand, or more western trace, after entering a road leading from Lexington to Riddle's Station, on Licking, or that branch of Licking called Hinkston, crosses the dividing ridge about the head waters of a creek now called Townsend, which empties into the stream running by Riddle's Station a little above that station. This creek was, in the year 1784, known by the name of Hinkston Creek, or, perhaps, Hinkston's Mill Creek.

The right, or more eastern fork, again divides nearly two miles before it reaches the dividing ridge. Each of these traces crosses the dividing ridge to the head waters of Cooper's Run, which empties into Stoner's Fork. The more eastern of them crosses Stoner's Fork, and, passing Mastin's Station, terminates very near that place. Cooper's Run empties into Stoner's Fork, which either empties into Hinkston, and then passing by Riddle's Station, empties into Licking; or, uniting with Hinkston, forms the ^{*south} **[135]** fork of Licking, and passes Riddle's Station with that name. The river, from the junction between Stoner and Hinkston, seems to have been known both by the name of the South Fork and of Hinkston's Fork.

All these traces were, in fact, hunters' traces; but each of them, except that leading to Mastin's Station, was distinguished by some name peculiar to itself, generally by the station or place to which it led, as Riddle's trace, the Blue Lick trace, &c.; and no one of them, except that leading to Mastin's, was notoriously and pre-eminently called "the hunter's trace." There is some testimony that this was also known by the name of Mastin's trace; but the great mass of testimony in the cause proves, incontrovertibly, that this trace was known and distinguished, generally, by the peculiar appellation of "the hunter's trace." It is on this trace that the location was made.

The hunter's trace, then, used in such a manner as to satisfy those interested in the inquiry, that it was intended to be employed as the name of some particular trace, would have been considered as designating the trace leading from Bryant's to Mastin's Station, and would have been sufficient to show that the lands located by Masterson were on that trace. Had no further description of it been attempted, but the trees called for had been said to stand on "the hunter's trace," where it crosses the dividing ridge between the waters of Hinkston and Elkhorn, it would have been clear that the trace was referred to by its name of greatest notoriety, by a name ^{*which} no other trace received; and, both the trace and the part of the trace where the objects specially called for must be found, would have been designated with sufficient certainty. There is no evidence in this cause, nor is the court apprised that any other trace, distinguished as "the hunter's trace," led from any other place than Bryant's Station, over the dividing ridge between the waters of Elkhorn and Hinkston, and, conse-

Wheat. 1.

quently, a reference to this trace, by its name, was all that was necessary for its designation, and would have designated it most unequivocally. But a further description has been attempted, and this has produced the difficulty felt in deciding this cause.

It will not be pretended that the locator was confined to this reference to the name, or might not add to the description, and make it more minute; but if, in doing so, he has destroyed its certainty, if he has created doubts with respect to the trace intended, which may mislead subsequent locators, the validity of his location becomes questionable.

The words added to "the hunter's trace" are, "leading from Bryant's Station over to the waters of Hinkston."

These words are not unmeaning, nor does the court feel itself authorized to reject them as surplusage; nor do they form any part of the name of the trace. Why, then, are they introduced? Subsequent locators might consider them as explanatory of the words "the hunter's trace." If they are so explanatory, there is, certainly, much plausibility afforded to the conclusion that the locator did not **137*** mean to refer to the trace by its name; for if such was his intention (there being no other trace of the same name), a further description would be unnecessary, and a more particular description would be impossible. Perplexity and confusion may be introduced, but an object cannot be rendered more certain than by bestowing on it its particular and appropriate name, if that name be one of general notoriety. The court felt the force of the argument, that "the hunter's trace," leading from Bryant's Station over to the waters of Hinkston, might be understood in the same sense with the words, "the hunter's trace," or, "that hunter's trace which leads from Bryant's Station over to the waters of Hinkston." Understood in that sense, the additional and explanatory part of the description might be considered as its essential part, and might control the words "the hunter's trace," which, connected as they are in this description, are not incapable of application to other hunters' traces, though not usually designated by that particular name. If this were to be received as the true construction, there are so many other traces leading across this dividing ridge, from Bryant's Station to the waters of Hinkston, that all pretension to certainty, in this location, must be surrendered.

On this part of the case, the court has felt considerable difficulty; and it is not without hesitation that it has finally adopted the opinion that "the hunter's trace" is to be considered as referred to by its name; and, that the additional words, "leading from Bryant's Station over to the waters of Hinkston," **138*** are nearly an affirmation that "the hunter's trace" does lead from that station to those waters. It leads to Stoner's Fork, which empties into, or unites with, Hinkston's Fork, which afterwards empties into the main Licking. These branches are, all of them, called Forks of Licking, and, therefore, it would seem to the court reasonable (as is indeed indicated by much of the testimony) that this ridge was rather considered as dividing the waters of Elkhorn from those of Licking than from those of Wheat. 1.

Hinkston. But Stoner's Fork, to which this trace leads, may, without impropriety, be denominated, as it sometimes has been denominated, "the Waters of Hinkston."

It cannot escape notice, that if this trace had been designated as that leading to Mastin's Station, it would have been freed from all ambiguity. But it has been decided in Kentucky, and necessarily so decided, that a locator ought not to be held to the most certain description of which the place is susceptible. A description which distinguishes it from any other, although a better or still more certain description might be given, is all that is required.

Having, with much difficulty, ascertained the trace, the next inquiry is, on what part of this trace the land entered by Masterson ought to lie. The location says, generally, "on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." It has been objected that neither the side of the ridge nor the side of the trace is specified; and that, to search both sides of the ridge and of the trace, is imposing an unreasonable labor on subsequent locators. The court does not think so. ***The ridge is not of such breadth [*139]** as to render the search on both sides the trace, from the foot of the ridge on one side, to the foot of the ridge on the other, a very unreasonable one. But the trees must be found on the ridge, and a subsequent locator is not bound to search for them elsewhere. The trees having in themselves no notoriety, it is the more necessary that the place on which they stand should be correctly described, and so described that persons interested in discovering them might know how to find them. Let us then examine the testimony to this point.

Richard Masterson, who made the location, proves the place where the trees stood. They are now cut down, but a mulberry stump remains, which is the stump of the tree he marked, is No. 33, west three poles from a white oak, now standing. He gives no description of the place.

Henry Lee was with Masterson when he marked the trees, and saw him mark them. They had been hunting on the trace on Cooper's Run; and, on their return, he says, "on the aforesaid trace, or path, after crossing the dividing ridge, near a small branch, waters of Elkhorn, Richard Masterson marked," &c.

This testimony would rather indicate that, in the opinion of the witness, the trees did not stand on the ridge.

Simon Kenton describes the crooked oak mentioned by Masterson and Jay: "It does not stand on the dividing ridge." On being further interrogated he says, "he well believes that the crooked oak stands on ground which is a spur of the dividing ***ridge which [*140]** leads down to the junction of the branches," which unite a small distance below the mulberry stump.

In the course of his examination, this witness says, that if he could not have found these trees on the ridge, and had found them where they stood, he should have taken them for the trees called for in Masterson's entry; but in no part of his testimony does he indicate that he would have searched for them on the spur where they stood.

Zachariah Easton, the surveyor, gives a very

accurate description of the place. The mulberry stump stands between two branches, three poles from the eastern, thirty poles from the western, and forty-one poles from their junction. Along the trace, which crosses the branch several times, the stump is one hundred and ninety poles from the top of the ridge. The stump stands, not on the dividing ridge itself, but on a spur of the ridge, which does not continue along the trace, but takes a direction west thereof, and unites with the main ridge, as would seem from the plat, sixty or seventy poles west of the point at which the trace crosses it.

Not a single witness deposes that the stump is on the ridge.

No testimony has been offered to the court to induce the opinion that, in Kentucky, a spur of a ridge is considered as the ridge itself, and the contrary seems reasonable. Spurs sometimes extend for considerable distances, and are certainly distinguishable from the ridge from which they project. If, in this case, the trace had led up this spur, a subsequent locator might have considered it as a continuation of the ridge. But the trace does not lead up the spur. It crosses a branch after passing the spur, and then comes to the ridge. The court is of opinion that subsequent locators could not be expected to continue their search after reaching the foot of the ridge, and that the description fails in stating the marked trees to be on the dividing ridge, instead of stating them to be on a spur of the dividing ridge.

The decree, therefore, dismissing the plaintiff's bill, is affirmed with costs.

Decree affirmed.

[LOCAL LAW.]

TAYLOR v. WALTON AND HUNDLY.

A question of fact respecting the validity of the location of a warrant for land under the laws of Kentucky.

APPEAL from a decree in chancery in the Circuit Court of Kentucky. The cause was argued by *Key* for the appellants, and *Talbot* and *Hardin* for the respondents.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

142* This is an appeal from a decree rendered in the Circuit Court of Kentucky, directing the appellant to convey to the appellees lands lying within his patent, which the appellees claimed by virtue of a junior patent.

In all such cases the validity of the entry which is the foundation of the title of the junior patentee is first to be examined.

This entry was made on the 4th of December, 1783, and calls to begin "in the fork of Chaplin's Fork, and the Beech Fork, and to run thence up Beech Fork to the mouth of the first large creek, which is called, &c., thence to run up the creek and up Chaplin's Fork till a line run straight across will include the quantity to exclude prior legal claims."

The places called for being proved to have

been places of notoriety which could not be mistaken, no want of certainty can be ascribed to this location, unless it be produced by the words "to exclude prior legal claims." These words are obviously attached to the quantity, not to the beginning, or to the lines bounded by the creeks. They can then affect only the back line, which is to extend from one creek to the other. The locator seems to have supposed that this line might approach towards, or recede from, the point of junction between the two creeks, as the amount of prior legal claims might require; that a location could adapt itself to circumstances, could assimilate itself to an elastic substance, and contract or expand as might secure the quantity of land it sought to appropriate. In this he was mistaken. The boundaries of an entry must be fixed precisely by its own terms, and cannot depend [*143] on previous appropriation. So much of this entry, therefore, as would so extend the back line as to comprehend, in one event, more land than the quantity mentioned in the location, is utterly void. The back line must run as it would run if all the land was vacant. But it would be unreasonable that this futile attempt to extend the back line further than it is by law extendible, should destroy an entry, in all other respects certain. Accordingly, the courts of Kentucky, so far as their decisions are understood, have rejected such words as surplusage.

The entry of the appellees being good, it obviously comprehends, and has been surveyed to comprehend, the land of the appellant, and this brings us to the consideration of his title.

The appellant claims under an entry made by John Pinn, the 18th of May, 1780, in these words: "John Pinn enters 2,000 acres of land by virtue of a treasury warrant, on the dividing ridge between Chaplin's Fork and waters of the Beech Fork, about one and a half miles north of a buffalo lick, on a creek, water of the Beech Fork, about 25 miles from Harrodsburgh, and to extend eastwardly and westwardly for quantity."

The plaintiffs below allege, in their bill, that this entry is void on account of its uncertainty, that the survey is unlawful and contrary to the location, and, therefore, pray that the land so surveyed and patented may be conveyed to them. The Circuit Court determined that the entry was void, and decreed according to the prayer of the bill. From this decree the defendant has appealed to this court, and [*144] the validity of Pinn's location forms the principal question in the cause.

The report of the surveyor, which is found in the record, is defective and unsatisfactory. He has neither placed Harrodsburgh nor the dividing ridge on the plat; the court is under the necessity of supplying these defects, as far as they can be supplied, from other testimony which appears in the record. From that testimony it appears that the ridge must extend from some point below Pinn's entry, up the creek near which it is made, now called Long Lick Creek; and that the trace leading up that creek was a trace leading from Cox's Station to Harrodsburgh. The inference seems inevitable that Harrodsburgh lay eastward from this location, since the trace leading up the creek to Harrodsburgh took that direction. The testimony must be understood as showing that in

Wheat. 1.

going up the Long Lick Creek you approach Harrodsburgh.

This is a material fact in the inquiry we are making. Harrodsburgh is admitted to have been a place of general notoriety, as are Chaplin's Fork, and the creek called for in Pinn's location. The dividing ridge between Chaplin's Fork and the waters of Beech Fork is also, of necessity, a place of notoriety, since the waters it divides are so.

The first call of Pinn's entry is for this dividing ridge; a general call for the ridge would be certainly too vague; but the land must lie on some part of it, and we must look to other calls of the entry to ascertain on what part. It is to **145*** be about one and a half miles north of a buffalo lick, on a creek, water of the Beech Fork.

The question, whether this buffalo lick was, on the 13th of May, 1780, a place of such notoriety as to instruct a subsequent locator how to find Pinn's beginning, is one of some doubt. The degree of proof which can now be adduced, and ought now to be required, respecting such a fact, must be affected by many circumstances. The contiguity of stations, the number of persons who frequented that particular part of the country, and, above all, the lapse of time, will have their influence.

Richard Stephens deposes that he had traveled Powell's trace, which leads up the Long Lick fork, three times; understood there was a lick at the place, and thinks he was at it, but was not much acquainted with it.

Edward Willis became acquainted with this lick in 1781 or 1782; there were several other licks on the same creek, but this was the largest and most frequented. Its reputed distance from Harrodsburgh was better than twenty miles.

Joseph Willis hunted a good deal in that part of the country, and knew this lick; never knew but one buffalo lick, though there are a number of small licks. Its reputed distance from Harrodsburgh was upwards of twenty miles, but does not recollect whether it was a place of notoriety in 1780.

John Gritton calls it a buffalo lick, and has been acquainted with it ever since the month of June, in the year 1780. Its reputed distance from Harrodsburgh was from twenty to **twenty-five miles**. There **are** several other small licks on the creek, and one, a tolerably large one, lying on the south fork, a different creek from Long Lick; but no other than this was called a buffalo lick. In a subsequent part of his deposition he is asked whether this lick was a place of notoriety in 1780, and answered that he knew nothing about it at that time. This must be intended for the month of May, 1780, one month sooner than the date of his knowledge, or is a positive contradiction to his first assertion.

James Raig says that this lick was generally known by the hunters about Harrodsburgh, prior to the month of May, 1780; that he encamped at it with three hunters in the summer of 1776, and hunted about there; that there are several other licks in the neighborhood, but no other buffalo lick; that its reputed distance from Harrodsburgh, in 1781 or 1782, was about 25 miles.

This is all the testimony respecting the notoriety of the buffalo lick called for in Pinn's entry. Did the validity of this entry depend solely on the notoriety of the lick, a court would find some difficulty in pronouncing it too obscure an object to be noticed by subsequent locators.

But, admitting that the lick wants sufficient notoriety to fix of itself the place of Pinn's entry, still, it must be allowed to be an object easily found and easily distinguished, by those who are brought into its neighborhood by the other descriptive parts of the entry. Let us, then, inquire whether this entry does contain such description as would conduct a subsequent locator into its neighborhood.

*The lick is within a mile and a half **[*147]** of the dividing ridge, on the south side of that ridge, and on a creek, water of Beech Fork. This description, which, though not expressly, is substantially given, precisely fits Long Lick Creek, and fits no other creek. The location calling to begin a mile and a half north of the lick, which lies on the creek, it is sufficiently apparent that no creek is crossed between the lick and the place on the dividing ridge, called for by Pinn's entry; consequently, the lick must lie on the creek nearest this dividing ridge. This is what has been since called Long Lick Creek, but which was then without a name, and could be designated only by description. A subsequent locator searching for this lick, would look for it, then, on Long Lick Creek. He is informed by the entry, that it lies on a creek so described as to be completely ascertained, about twenty-five miles from Harrodsburgh. The part of that creek, then, which lies about twenty-five miles from Harrodsburgh, is the place where he must search for this lick. Walton and Hundly state in their entries that Powell's trace, which leads from Cox's Station to Harrodsburgh, and which arrives at Long Lick Creek a short distance above this lick, goes up the creek five or six miles. James Ray says that the trace leads nearly to its head; and the surveyor in his report states that it leads quite to its head. Long Lick Creek, then, heads between Harrodsburgh and this lick, and is the creek on which the buffalo lick must lie. The entry tells us it lies twenty-five miles from Harrodsburgh.

*If an object be called for as lying on **[*148]** a creek, so described as to be distinguished and ascertained, twenty-five miles from a given place of general notoriety, which object has disappeared or cannot be found, it is understood to be settled, in Kentucky, that such location is not void for uncertainty, but is to be surveyed at the distance of twenty-five miles along the creek, from the place of departure. If the object be found and be identified, especially if it be such an object as would readily attract attention, and be easily distinguished, exactness in the distance is not required. On such occasions the distance was, in fact, seldom measured by the locator, and could not be measured in a straight line without the aid of a surveyor. The locator, in estimating distances, where they are considerable, is governed by general computation; and this is known to subsequent locators. Exactness of distance, then, is introduced for the purpose of giving certainty to locations, which can by no other means be rendered certain. Where the object called for is easily found and

identified, the want of precision in distance will not defeat the location, unless the difference between the actual and estimated distance be such as to mislead subsequent locators.

James Ray says that the estimated distance from Harrodsburgh to the mouth of Hanger Run was 27 or 30 miles, and that the lick was about three miles nearer than the mouth of Hanger Run to Harrodsburgh. James Ray says, that the estimated distance from Harrodsburgh to the lick was about 25 miles, and that it lies **149*** three or four miles above the junction* of the Beech and Chaplin forks. Several witnesses depose that the estimated distance from Harrodsburgh to this lick was upwards of twenty miles. The distance has been measured, and is in a straight line twenty miles and one quarter of a mile.

If this difference of distance could in such a case, when unaided, affect the entry, yet there are other circumstances which relieve it from this difficulty.

From the lick to the mouth of the creek on which it must lie, cannot in a straight line, amount to two miles. Measured along its meanders, the distance is about three miles. This fact is ascertained by the surveys made of the two entries. The farthest point, then, of this creek from Harrodsburgh, cannot, in a straight line, exceed twenty-two miles. But the lick lies, not at the mouth of the creek, but on the creek. The locator must, then, search for it up the creek, and nearer to Harrodsburgh. The extent of this search for such an object as a buffalo lick, an object to which he must be led by traces of the buffalo, which are in themselves so visible, so distinguishable, so readily found, cannot, without totally disregarding the whole system of Kentucky decisions, be pronounced too great a labor to be imposed on a subsequent locator. He is brought to the mouth of a creek, on which the object for which he searches lies; the object must lie up that creek, and cannot lie far from its mouth. It is an object discernible and distinguishable at a distance, and calculated from its nature to engage attention. He is within two miles of it on a straight line, and within three miles pursuing the meanders **150*** of the creek; if he does not find *it, it is to his own indolence, not to the obscurity of the object or the difficulty of the search, that the blame attaches.

The lick being found, there is no difficulty in ascertaining its identity. The witnesses certainly say that there are many other licks on the same creek, and the surveyor has laid down two others; but they also say that no other lick was a buffalo lick. It has been stated and argued at the bar that, although licks are of very different dimensions, and the difference is immense between the extremes, yet the gradations approach each other so nearly that the exact line between them can scarcely be drawn. Admitting this to be true, yet there are licks which are indubitably buffalo licks, there are others which are as indubitably deer licks. Now, the witnesses pronounce, positively, that this is a buffalo lick, and that the others are deer licks. In addition to this, it is nearest to the mouth of the creek, and farthest from Harrodsburgh; consequently, it is nearer the distance required by the location. There is no doubt, then, respecting the identity of this lick.

The lick called for in Pinn's entry being found and identified, there can be no difficulty in finding his land. It lies one and a half miles due north of this lick, on the dividing ridge. The place at which the mensuration is to commence being ascertained, the rules established in Kentucky will give form to the land, and direct the manner of making the survey.

It is the opinion of this court that the decree of the Circuit Court is erroneous, and ought to be reversed; *and that the cause be re-**[*151]** mandated to that court, with directions to order the land claimed by the appellant to be surveyed conformably to his location. In doing this, a point will be taken one mile and a half due north of the buffalo lick mentioned in Pinn's entry, from which a line is to be extended east and west, to equal distances, until it shall form the base of a square to contain 2,000 acres of land, which is to lie north of the said line.

Decree reversed.

[CHANCERY.]

J. & T. BARR v. LAPSLEY ET AL.

A question under a bill in equity, to obtain a specific performance of an alleged agreement to receive a quantity of cotton bagging, at a specified price, in satisfaction of certain judgments at law. Bill dismissed.

APPEAL from the Circuit Court of the District of Columbia. This cause was argued by *Jones* for the appellants and complainants, and *Harper* for the respondents and defendants.

JOHNSON, J., delivered the opinion of the court:

The object of this bill is to obtain a specific performance of an alleged agreement to receive a quantity *of cotton bagging, at a **[*152]** specified price, in satisfaction of certain judgments at law. The defendants deny that the circumstances proved ever rendered the agreement final and obligatory upon them; and this is the principal, perhaps the only, question the case presents.

It appears that the complainants were indebted to one West, who assigned this debt (then unliquidated), together with the residue of his estate, to Lapsley *et al.*; that Lapsley liquidated the debt with the Barrs, and took their notes payable at different periods, making up, together, the amount due. These notes having become due, and judgment being recovered on some of them; in October, 1811, the Barrs addressed a letter to Lapsley, in which they offer to pay him in cotton bagging, at thirty-three cents per yard, by instalments, at certain periods. On the 17th of December, in the same year, Lapsley answered their communication, and the following words, contained in that let-

Wheat. 1.

ter, are all that the court deem material to the point on which they propose to found their decision: "We are willing to take cotton bagging in liquidation of the three last notes, delivered at the period you propose, but not at the price you offer it." "We expect that you give us satisfactory accounts for the punctual performance of your engagements, and to this effect we shall direct Mr. M'Coun, to whom we propose to write by the next mail." On another passage of this letter, and a letter written by West, on the 18th of December, it has been contended that certain conditions were imposed [153*] upon the Barrs, which it was "incumbent upon them to comply with before they could claim the benefit of the offer contained in Lapsley's letter. But, as the opinion of this court is made up on a ground wholly unaffected by this question, we deem it unnecessary to notice this point. It appears that Lapsley never, in fact, instructed M'Coun on the subject of this letter of the 17th of December. But Warfield, the agent of the Barrs (who were absent from home on the receipt of that letter), supposing his principals to be referred to M'Coun as the authorized agent of Lapsley, notified to him the acceptance of Lapsley's offer, and remained under the impression that the agreement had become final, notwithstanding M'Coun's declining, altogether, to act, for want of instructions. Lapsley, on the other hand, alleges that the notification of acceptance ought to have been made to himself, and assigns the want of an answer from the Barrs as his reason for never having given instructions to M'Coun.

This state of facts presents an alternative of extreme difficulty. On the one hand, Lapsley, by writing that he shall direct M'Coun by the next mail, plainly pointed to a mode of expediting the conclusion of the agreement, through the agency of a representative on the spot, and when he intimated his intention to write by the next mail, showed that it was not his intention to await Barr's answer. This was well calculated to delude Barr into the idea that Lapsley would recognize no notification but that which should be made to M'Coun. On the other hand, how far could M'Coun, [154*] unempowered, uninstructed *as he was, legally act, to bind Lapsley by his acceptance of the notification? Or, if he had received instructions from Lapsley what obligation was he under to have undertaken the agency? Under the pressure of this dilemma, there is but one principle to which the court can resort for a satisfactory decision. Something remained for Barr to do. The notification of his acceptance was necessary to fasten the agreement upon Lapsley. For this purpose, he very rationally addressed himself, in the first place, to M'Coun; and the reference to Lapsley's letter would have been a sufficient excuse for not returning an answer until a reasonable time had elapsed for M'Coun to receive the expected communication from Lapsley. But when he found M'Coun uninstructed, and unwilling to act under the letter addressed to Barr, his course was plain and unequivocal. A letter to Lapsley, transmitted by the mail, would have put an end to all doubt and difficulty. This is the method he ought to have pursued, and for not having pursued this course, we are

Wheat. 1.

of opinion that the bill was properly dismissed below.

*Decree affirmed.*¹

Cited—9 Otto, 200.

*[LOCAL LAW.]

[*155

DANFORTH'S LESSEE v. THOMAS.

The act of assembly of North Carolina, passed between the years 1783 and 1789, avoids all entries, surveys, and grants of land set apart for the Cherokee Indians, and no title can be thereby acquired to such lands.

The boundaries of the reservation have been altered by successive treaties with the Indians, but it seems that the mere extinguishment of their title did not subject the land to appropriations, unless expressly authorized by the legislature.

ERROR to the Circuit Court for the District of East Tennessee. This cause, depending mainly on the same principles with the preceding case of *Preston v. Browder*,² was argued by *Key* for the plaintiff, and by *Jones* for the defendant in error. The facts are fully stated in the opinion of the court.

*TODD, J., delivered the opinion of [*156 the court as follows:

This was an action of ejectment brought by the plaintiff in error against the defendant in error. On the trial of the cause in the Circuit Court, it appeared from evidence that the land in controversy was situate in the tract of country lying south of Holston and French broad river, and between the rivers Tennessee and Big Pigeon, the Indian title to which was extinguished by the treaty of Holston. The plaintiff claimed by virtue of a grant, issued by the state of North Carolina, bearing date the 26th of December, 1791. The defendant claimed under a grant from the state of Tennessee, bearing date the 2d of January, 1809. The defendant, by his counsel, objected to the grant under which the plaintiff claimed title being admitted in evidence, on the ground that it was for land which the laws of North Carolina had prohibited from being entered, surveyed, or granted. The court sustained the objection, and prohibited the grant from going in

1.—In England the Court of Chancery will not, in general, entertain a bill for a specific performance of contracts for the sale of chattels, or which relate to merchandise, but leaves the parties to their remedy at law, where it is much more expeditious. One exception to this general rule is where the agreement is not final, but is to be made complete by subsequent acts, without which it would be deemed imperfect at law. (3 Atk., 383; *Burton v. Lister et al.*; 1 Pere. Will., 570; Bunb., 135; 10 Ves., Jun., 161.) The ground upon which a specific performance is refused, in these cases, is, that an adequate remedy exists at law, where damages may be recovered, and that the value of merchandise varies so much at different times, and under different circumstances, as to render it frequently unjust to compel a specific performance. But where the question was, upon what terms a party should be relieved against the penalty of a bond which had been forfeited, for not transferring stock at a given day, according to his agreement, the English Court of Chancery decreed him to transfer the stock in specie, and to account for all dividends accrued since he ought to have transferred it. (2 Vern., 394; 1 Bro. Parl. Cas., 183.)

2.—Ante, p. 115.

evidence to the jury; whereupon a verdict and judgment was rendered in favor of the defendant. A bill of exceptions was taken to the opinion of the court, and the cause was brought up to this court by writ of error.

The correctness of the opinion of the Circuit Court depends on the sound construction of the act of the general assembly of the state of North Carolina, passed in 1788, c. 2, s. 5 and 6, whereby the lands, within certain limits therein designated (including the lands in controversy), are reserved for the Cherokee Indians, **157*** and the citizens prohibited from entering and surveying lands within those limits. It is contended, on the part of the plaintiff, that this act cannot be construed, nor did the legislature mean to give the Indians a right of property in the soil, but merely the use and enjoyment of it. That the succeeding legislatures, by the acts of 1784, 1786 and 1789, have changed this reservation for the use of the Indians, and given unlimited access, for the purposes of making entries and surveys "to all lands not before specially located," and to "all vacant lands" within the limits of the state. Consequently, locations could be made, and grants issued to perfect titles of lands lying within the limits of the Indian reservation.

Whether the legislature had the power, or intended to give the Indians a right of property in the soil, or merely the use and enjoyment of it, need not be inquired into, nor decided, by this court; for it is perfectly clear that the 5th section of the act of 1783, c. 2, prohibits all persons from making entries or surveys for any lands within the bounds set apart for the Cherokee Indians, and declares all such entries and grants thereupon, if any should be made, utterly void. They had the power, and have declared, unequivocally, an intention to prohibit entries from being made within those reservations. The several acts of 1784, 1786 and 1789, although they contain general expressions, which, if taken singly, might seem to sanction entries and surveys for "all lands not before specially located," or to "all vacant lands," yet, when taken together, these general **158*** expressions must be controlled by the restrictions and prohibitions as to the reservations for the Indian tribes. The reasoning used in the case of *Preston v. Brouder*,¹ applies with equal, if not greater, propriety, to this case. And, although at different periods different sections of these reservations have been subjected to appropriation by entries and surveys, it has been in consequence of the several treaties with the Indians, by which the boundaries of the reservations have been altered, and the Indian claim extinguished; but it is believed that the mere extinguishment of the Indian title did not subject the land to appropriation, until an act of the legislature authorized or permitted it. Whatever doubts this court might entertain on this subject, were they now construing these laws upon the first impression, that doubt would be removed on a view of the case of *Avery v. Strother*, in the Reports in Conference, p. 431, decided by the judges of the Supreme Court of North Carolina. This is a decision directly in point, made by the Supreme Court of the state, construing the laws brought

into the view of this court, and is decisive of this case. And, as this court have been uniformly disposed to pay great respect to the decisions of the state courts respecting titles to real estate, this decision has its full influence on the present question; and, therefore, the judgment of the Circuit Court is unanimously affirmed with costs.

Judgment affirmed.

Cited—9 Wheat. 676, 677; 12 Pet. 746.

*[PRIZE.]

*159

THE ANTONIA JOHANNA.

A neutral ship was chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and back to London, at the freight of 1,000 guineas. On her passage to St. Michaels she was captured and brought into the port of Wilmington, N. C., for adjudication. A part of the cargo was condemned, and part restored.

The freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned.

Quere, Whether more than a *pro rata* freight was due to the master. It seems that the property of a house of trade in the enemy's country is confiscable as prize of war, notwithstanding the neutral domicile of one or more of its partners.

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3d. As to the order respecting the freight.

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and that without regard to the national character of the individual. Thus, the produce of an estate in the enemy's country, belonging to a person domiciled in a neutral country, is liable to capture and condemnation.¹ This principle was adopted and confirmed by this court in the case of *Mr. Bentzen*, a Danish subject, resident in Denmark, whose claim to 80 hogs-^{161*} heads of sugar, the produce of an estate belonging to him, in a West India Island possessed by the enemy, was rejected, and the property condemned.² So a vessel purchased *bona fide* in the enemy's country, by a neutral, continuing in her former trade, is good prize.³ And the property of a house of trade established in the enemy's country, though some of the parties may be domiciled in a neutral country, is prize of war.⁴ Apply these authorities to the present case: the share of *Mr. Ivens* cannot escape the same fate with that of his partner domiciled in London; the partnership is domiciled there, and his interest is so mixed up with hostile interests that it cannot be separated. These principles were recognized by a learned judge of this court, in the first circuit, in the case of *The St. Jose Indiano*,⁵ the decree in which was acquiesced in by the counsel. Their general spirit was adopted by that venerable tribunal, the Continental Court of Appeals in prize causes, and applied even to a treaty stipulation, that free ships should make free goods, which was held not to extend to a trade carried on by a neutral, but hostile in its nature.⁶ 2. As to the other portions of the cargo, the evidence to restore or condemn must come, in the first instance, from the documentary^{162*} evidence and *the examinations in *preparatorio*. In this case, that is neither sufficient for condemnation, nor does it afford satisfactory grounds for immediate restitution; further proof ought, therefore, to be ordered. 3. The neutral master is undoubtedly entitled to his freight; but this is not to be charged, exclusively, upon the property condemned and ordered to be sold, whilst the property specifically restored escapes the burden which is imposed, solely upon the ground of an implied performance of the contract on the part of the master. The law says that capture is equivalent to delivery; it does not say that condemnation only is equivalent to delivery, and that, therefore, the portion of the cargo restored shall be charged with no part of the freight. On the contrary, in a case where the cargo had been unlivered, and the whole was restored upon the original evidence, the freight was held to be a charge upon the cargo, though it was not carried to the port of destination.⁷ But, here, a *pro rata* freight only ought to be allowed; but a small part of the whole voyage, for which the 1,000 guineas was stipulated to be paid,

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**Gaston*, contra. 1. The captors can- [¹⁶³ not now object that the freight, decreed in the court below to be paid to the master, was unreasonable in itself, or not chargeable to them. They have acquiesced in this part of the decree, and it has been definitively carried into execution. 2. The goods shipped to Messrs. Ivens & Burnett, of St. Michaels, were shipped by order, and on account and risk of that house of trade. The claim, the documentary proof, and the preparatory examinations, are perfectly consistent, and establish that a moiety of this shipment is the property of that house, the partners of which are domiciled in a neutral country; they must, therefore, be regarded as neutral by both belligerents, with reference to the trade which they carry on with the adverse belligerent, and with all the world. In the case of *The St. Indiano* it was insisted that the principle of condemnation applied in cases where a partner of a neutral house is domiciled in the enemy's country, and ships to such house, goods, the manufacture of that country; but the position was expressly overruled. Even if the hostile and the neutral house here consisted of the same partners, and the shipment was made from the hostile to the neutral partner, for their joint concern, it would, nevertheless, be contended that the share of the hostile partner was alone subject to condemnation. However sincere and profound a respect is felt for the learned judges, who are said to have decided that the belligerent character of one partner shall avail to condemn, and the neutral character of the other shall not avail to save, where the house has a *domicile both in [¹⁶⁴ the neutral and belligerent country; these supposed decisions cannot be reconciled with the dictates of justice, or the principles of reason, and it is, therefore, believed that they will not receive the sanction of the highest judicial tribunal of this country. 3. No specific ground has been taken by the captor's counsel to support the appeal as to the remaining portions of the cargo. The claims are verified by the documentary evidence showing the goods to have been shipped by order, and for the account and risk of persons, subjects of, or domiciled in, a neutral country.

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8.—6 Rob., 231, *The Hoffnung*; 1 Edwards, 246, *The Friends*; 1 Rob., 239, *The Copenhagen*; 4 Rob., 77, *The Isabella Jacobina*.

evidence to the jury; whereupon a verdict and judgment was rendered in favor of the defendant. A bill of exceptions was taken to the opinion of the court, and the cause was brought up to this court by writ of error.

The correctness of the opinion of the Circuit Court depends on the sound construction of the act of the general assembly of the state of North Carolina, passed in 1788, c. 2, s. 5 and 6, whereby the lands, within certain limits therein designated (including the lands in controversy), are reserved for the Cherokee Indians, **157*** and the citizens prohibited from entering and surveying lands within those limits. It is contended, on the part of the plaintiff, that this act cannot be construed, nor did the legislature mean to give the Indians a right of property in the soil, but merely the use and enjoyment of it. That the succeeding legislatures, by the acts of 1784, 1786 and 1789, have changed this reservation for the use of the Indians, and given unlimited access, for the purposes of making entries and surveys "to all lands not before specially located," and to "all vacant lands" within the limits of the state. Consequently, locations could be made, and grants issued to perfect titles of lands lying within the limits of the Indian reservation.

Whether the legislature had the power, or intended to give the Indians a right of property in the soil, or merely the use and enjoyment of it, need not be inquired into, nor decided, by this court; for it is perfectly clear that the 5th section of the act of 1788, c. 2, prohibits all persons from making entries or surveys for any lands within the bounds set apart for the Cherokee Indians, and declares all such entries and grants thereupon, if any should be made, utterly void. They had the power, and have declared, unequivocally, an intention to prohibit entries from being made within those reservations. The several acts of 1784, 1786 and 1789, although they contain general expressions, which, if taken singly, might seem to sanction entries and surveys for "all lands not before specially located," or to "all vacant lands," yet, when taken together, these general **158*** expressions must be controlled by the restrictions and prohibitions as to the reservations for the Indian tribes. The reasoning used in the case of *Preston v. Brouder*,¹ applies with equal, if not greater, propriety, to this case. And, although at different periods different sections of these reservations have been subjected to appropriation by entries and surveys, it has been in consequence of the several treaties with the Indians, by which the boundaries of the reservations have been altered, and the Indian claim extinguished; but it is believed that the mere extinguishment of the Indian title did not subject the land to appropriation, until an act of the legislature authorized or permitted it. Whatever doubts this court might entertain on this subject, were they now construing these laws upon the first impression, that doubt would be removed on a view of the case of *Avery v. Strother*, in the Reports in Conference, p. 431, decided by the judges of the Supreme Court of North Carolina. This is a decision directly in point, made by the Supreme Court of the state, construing the laws brought

into the view of this court, and is decisive of this case. And, as this court have been uniformly disposed to pay great respect to the decisions of the state courts respecting titles to real estate, this decision has its full influence on the present question; and, therefore, the judgment of the Circuit Court is unanimously affirmed with costs.

Judgment affirmed.

Cited—9 Wheat. 676, 677; 12 Pet. 746.

*[PRIZE.]

*159

THE ANTONIA JOHANNA.

A neutral ship was chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and back to London, at the freight of 1,000 guineas. On her passage to St. Michaels she was captured and brought into the port of Wilmington, N. C., for adjudication. A part of the cargo was condemned, and part restored.

The freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned.

Quere. Whether more than a *pro rata* freight was due to the master. It seems that the property of a house of trade in the enemy's country is confiscable as prize of war, notwithstanding the neutral domicile of one or more of its partners.

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claimants, who may ultimately prove to be neutral; it was an inconvenience to which the latter subjected themselves by lading their goods in the same vessel with enemy's property; and it is not for the captors to indemnify them by paying the freight of the neutral claimants' goods, as well as those which have become the property of the captors *jure belli*. 2. According to the claimant's counsel, the shipments by **165*** Messrs. Burnett & Co. were *made by the hostile house, as the agents, and *bona fide*, exclusively on the account and risk of the neutral house. On no other ground whatever can this case be extracted from the principle of the *St. Indiano*; and, upon that ground, the whole of the property ought to be restored, according to the limitations of the principle stated by the learned judge in the case of *The St. Indiano*. It is the domicile of the house, and the nature of its trade, and not the belligerent character of one of the partners, that avails to condemn. And it is a doctrine that may be vindicated upon every principle of reason and justice. Upon what principle is the property of a neutral subject, personally domiciliated in the enemy's country, liable to condemnation? Not upon the ground that his original national character is lost, but that his property is undistinguishably incorporated with that of the enemy, and employed exclusively in carrying on his trade, and strengthening his resources. Is not the property of a house of trade, established in the enemy's country, wheresoever the partners may reside, in the same predicament? It is believed that the decisions cited to support these principles will be sanctioned by this tribunal; that they are corollaries from the rules of prize law which have already been sanctioned by it; that they are supported by all the analogies of that law, and are essential to its perfection as a system of jurisprudence impartially administered between belligerents and neutrals. The interest which a power at war has in maintaining the principles of these decisions, is obvious. What interest has a fair **166*** and just neutral *in contesting it? His subjects may carry on their usual trade through its accustomed channels, untouched by the flames of war spreading on every side. Do they wish to export their commodities to the enemy's country, they may consign them to commission merchants there, or to their own supercargoes on board. Do they wish to import the productions of the enemy's country into their own, they may purchase them by the same instrumentality. Do they wish to become the carriers of both to every region of the globe, they may do it with impunity. A neutral merchant cannot, therefore, wish to be a partner in a house of trade in the enemy's country, unless for the purpose of lending his national character as a shield against the just rights of the other belligerent. It is by a more remote application of the same principle now contended for that the property of persons taken in breach of blockade, as contraband of war, or sailing under an enemy's license, is liable to be considered as enemy's property, *pro hac vice*. It is taken adhering to the enemy, clothed with his character, and inseparably blended with his interests. This rule is precisely settled by the positive adjudications of the British prize courts, and there is reason to

believe is practiced in those of France and other countries. It is not one of those interpolations into the code of public law of which that great civilian by whom it is expounded has been accused. This is not like the rule which prohibits to neutrals, in the time of war, all trade not open in peace; nor like the rule which declares whole coasts and countries in a state of blockade, *without investing or **167** besieging a single port; nor like that which extends the infection of contraband to a return voyage; nor that which swells the list of contraband, with every article however remotely useful in war. Nor is it a rule of recent invention; at least, there is no evidence that the cases mentioned in *The Vigilantia*, were decided contrary to the practice and opinions maintained by the British courts of prize, when this country was a portion of the British empire. 3. The remaining claims are said to be verified by the papers found on board. But how are these papers verified? It is well known that papers are a mere dead letter, unless supported by the testimony of living witnesses. When it is considered that the cargo was laden in the enemy's country, and the papers put on board by enemy shippers, only one of whom the master knows anything about, so as to be able to swear, even as to his belief, it is not too much to say that this part of the case requires further proof to justify restitution of the goods as claimed.

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

Upon the argument no specific objection was taken to the restitution of any of the property claimed, excepting that included in the claim of Messrs. Ivens & Burnett. This shipment was made by Messrs. Burnett & Co., of London, to Messrs. Ivens & Burnett, of St. Michaels, and the invoices declare the goods to be by order, and for account and risk, of the latter gentlemen. It is contended, in behalf of the *captors, that both houses are com- **168** posed of the same persons, viz., William S. Burnett, who is domiciled at London, and William Ivens, who is domiciled at St. Michaels; and that the documentary evidence, and private correspondence, show that the shipment was made on account of the hostile house. If the fact of the identity of the two houses were material to a decision of the cause, it might furnish a proper ground for an order for further proof. But admitting the fact to be as the captors contend, we are satisfied that it can be of no avail to them. It is clear, from the whole documentary evidence, that this shipment was not made on the account and risk of the hostile house, but *bona fide* on the account and risk of the neutral house. It does not, therefore, present a case for the application of the principle, that the property of a house of trade in the enemy's country is condemnable as prize, notwithstanding the neutral domicile of one of its partners. On the contrary, it presents a case for the application of the ordinary principle which subjects to confiscation, *jure belli*, the share of a partner in a neutral house, where his own domicile is in a hostile country. And, on this view, the decision of the Circuit Court is entirely correct, and

Wheat. 1..

is consistent with the doctrines established in the cases cited at the argument.

The next inquiry is, as to the freight decreed to the master. As no appeal was interposed to the decree of the District Court, allowing the whole freight for the whole voyage, the question, whether more than a *pro rata* freight was due (a question which would otherwise have 169*) deserved grave consideration). *does not properly arise. The only discussion which can now be entertained, is whether the freight so decreed ought not to have been charged upon the whole cargo instead of being charged upon a portion of it. And we are all of opinion that it was properly a charge upon the whole cargo. Although capture be deemed, in the prize courts, in many cases, equivalent to delivery, yet the captors cannot be liable for more than the freight of the goods actually received by them. The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not, therefore, answerable *in pœnam* to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral, and not the fault of the belligerent. By the capture, the captors are substituted in lieu of the original owners, and they take the property *cum onere*. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners succeeding to the former proprietors. So far the rule seems perfectly equitable; but to press it farther, and charge them with the freight of goods which they have never received, or with the burden of a charter-party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, 170*) *lead the captors to their ruin by loading them with the stipulated freight of a whole cargo.

On the whole, we are all of opinion that the decree of the Circuit Court ought to be affirmed, except so far as it charges the freight upon the property condemned, and the moiety claimed by Messrs. Ivens & Burnett; and as to this, it ought to be reversed, and that the freight should be decreed to be a charge upon the whole cargo, to be paid by each parcel thereof, in proportion to its value.

*Decree affirmed, except as to the freight.*¹

1.—It has been held that the charter-party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflated rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to every extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. (5 Rob., 82; The *Twilling Riget*.)

Wheat. 1.

*[PRIZE.]

[*171

THE NEREID. PINTO, Claimant.

Under the prize act of June 26th, 1812, and the act of the 2d of August, 1813, allowing a deduction of thirty-three and one-third per centum on "all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States," are not included goods captured and brought in for adjudication, sold by order of court, and ultimately restored to a neutral claimant as his property; but such goods are chargeable with the same rate of duties as goods imported in foreign bottoms.

THIS cause was originally brought into the Circuit Court by appeal from the District Court for the Southern District of New York, in which the property claimed by Mr. Pinto had been condemned as prize of war. The decree of the District Court was affirmed in the Circuit Court, September term, 1814, *pro forma*, for the purpose of taking the cause, by appeal, before the Supreme Court, for its final determination; which was accordingly done, and the decree of the Circuit Court reversed, February term, 1815, except as to the undivided fourth part which Mr. Pinto claimed of certain goods, part of the cargo, his claim to which was relinquished by his counsel, on the argument of the cause before the Supreme Court. All the other property claimed by Mr. Pinto, for himself and others, was ordered to be restored to him. The cause was then remanded to the Circuit Court, with directions to carry the decree *of the Supreme Court into effect; [*172 and the mandate for that purpose was filed in the Circuit Court, April term, 1815, and an order made in pursuance of the mandate. It was then stated, and made to appear to the satisfaction of the Circuit Court, that, after the *Nereid* and her cargo had been libeled by the captors, as prize of war, in the District Court, and after the condemnation thereof, except the parts of the cargo which were claimed by Mr. Pinto, and during the pendency of such claim, Peter H. Schenck, the prize-agent of the Governor Tompkins, entered the whole of the cargo of the *Nereid* at the custom-house of the city of New York, and secured the duties thereon; Mr. Pinto having consented that the goods which he claimed should be entered with the others, and be subject to the payment of such duties as they were by law liable to, without prejudice to his rights under his claim; that the prize-agent did enter the goods, so condemned (as also the said goods of which Mr. Pinto claimed the one-fourth), as prize goods, and bonded therefor for prize duties; but was required by the collector of the customs, and did enter all the residue of the goods claimed by Mr. Pinto, as neutral property, subject to the full duties payable on goods regularly imported in foreign bottoms, and bonded for the same accordingly. The goods claimed by Mr. Pinto were afterwards, and before condemnation, sold by the marshal of the district, together with the goods condemned, in pursuance of an order of the District Court, to which Mr. Pinto also consented, subject to the same reservation of his rights; and the proceeds *of the sales of the [*173 goods claimed by Mr. Pinto, after deducting the duties, were paid into court; the amount of the said duties having been paid by the marshal

to the prize-agent, with the consent of Mr. Pinto, for the prize-agent's indemnity. The difference between the duties thus secured to be paid by the prize-agent on the goods finally restored to Mr. Pinto, according to the decision of the Supreme Court, and those which would have been payable on them, as prize goods, under the act of the 2d of August, 1818, entitled, "An act for reducing the duties payable on prize goods captured by the private armed vessels of the United States," amounted to \$11,079.59. After the mandate and decree of the Supreme Court, respecting the restitution of the goods claimed by Mr. Pinto, was carried into effect by the Circuit Court, there remained in the District Court the sum of \$18,771.63, being the amount of the net proceeds of the fourth part of the goods, Mr. Pinto's claim to which had been relinquished.

A motion was made in the Circuit Court on behalf of Mr. Pinto, that the prize-agent should be ordered to pay to him, out of any of the proceeds of the sales of the condemned part of the Nereid and cargo, and which were in, or might come to, his hands, the said sum of \$11,079.59, the difference between the two rates of duties on the goods finally restored to Mr. Pinto, as before mentioned.

It then appeared to this court that three bonds had been given, by the prize-agent, for the duties on those goods which were thus ordered to be restored to Mr. Pinto; that the two of those bonds which first became due had been paid by the prize-agent; but that the last, which became payable on the 9th of February, 1815, and which was for the sum of \$8,782.97, the collector had suffered, as he said, to remain unpaid until it should be ascertained whether the property, on which said duties were thus secured, was condemned to the captors or restored to the claimant. That after the mandate of the Supreme Court was returned to the Circuit Court, the collector required the prize-agent to pay this bond, and he paid the same accordingly on the 7th of April, 1815.

The court were divided in opinion on the point respecting the rates of duties chargeable on the goods so restored to Mr. Pinto; whereupon it was ordered that the said sum of \$11,079.59 shall remain subject to the opinion of the Supreme Court, and that the residue of the \$18,771.65 be paid to Mr. Schenck, as the prize-agent; and that the point on which the disagreement of the judges of the Circuit Court took place should be certified to the Supreme Court for their final decision thereon.

Hoffman, for the appellant and claimant. The statutes on this subject are: 1st. The Prize Act of the 26th of June, 1812, s. 14, which repeals the non-importation act, so far as respects goods "captured from the enemy, and made good and lawful prize of war;" and declares that such goods, "when imported and brought into the United States, shall pay the [175*] same duties as goods imported *in American vessels in the ordinary course of trade," &c. 2d. The act of the 2d of August, 1818, which provides "that all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States, shall be allowed a deduction of thirty-three and one-third per centum." 3d.

The acts of non-importation, prohibiting the importation of British goods. 1. The goods in question being of British manufacture, could only be imported under the prize act, and the act of the 2d of August, 1818. They were captured from the enemy, for they were on board an enemy's vessel; they were taken as enemy's property; they were captured and brought in as good and lawful prize of war. 2. The character of the goods is determined at the time they were brought in; it is not to be determined by subsequent events: duties are payable on goods on their being first imported or brought in; and the prize act puts these goods on the same footing with other importations, and, of course, makes the duties on them payable at the same time. 3. The words "good and lawful prize of war" refer to the time of capture, and not of condemnation. By the very act of capture, the goods became prize; and being captured by a lawfully-commissioned vessel, were good and lawful prize. The expression "such goods" refers to goods so captured. They are to pay when brought in, and not subsequently, upon condemnation. 4. The condemnation does not make the goods prize of war; it merely puts an end to the *jus recuperandi* of the former owner, and gives a new title to the purchaser. The character of prize is, *then, either confirmed by condemnation or lost by restitution. If the property is restored, it is released from the character it had before borne from the time of capture, and ceases to be prize of war, but being captured and brought in as such, is to pay the prize duties.

Pinkney, for the respondents and captors. The question now raised seemed to be settled by the decision in the case of *The Concord*, at the last term. But, independently of authority, the question is manifestly against the claimant. 1. The goods were not entered under the prize act, and the act of the 2d of August, 1818; but as neutral property imported in a foreign bottom, and having been sold, are evidently liable to the full duties on such goods, unless these acts authorize a diminution of them. 2. These acts do not authorize such diminution; the goods were not captured from the enemy, and have never been made good and lawful prize. They were taken from Mr. Pinto, who was no enemy, either in fact or constructively, according to the judgment of the court. If anything, then, has made them lawful prize, how has it happened that they have been restored? The claimant's counsel, to avoid the appearance of too bold a paradox, mitigates his conclusion on this head in such a way as proves nothing for the purpose of his argument. He ends with saying that these goods were captured and brought into the United States as good and lawful prize. He can scarcely, however, have intended to stop here; for if his conclusion goes no farther, it surrenders the *whole argument, unless it can be shown that to seize and bring in as prize that which is not good and lawful prize, and never can become so, makes good and lawful prize of the thing so seized and brought in; or, in other words, that a seizure and bringing in, as prize, of neutral property, makes it, *ipso jure*, good prize, although the owner is, nevertheless, entitled to have it

Wheat. 1.

again, as not being good prize, and has, in fact, got it again accordingly. 3. The character of these goods, with reference to their liability to duty, was not determined at the time they were brought in. If they had been specifically restored, and withdrawn from the United States by the claimant, they would have been liable to no duty. 4. The words "made good and lawful prize" do not refer to the capture merely: the act speaks of the capture first, and then adds, "and made good and lawful prize." The capture, too, must be of enemy's goods, either in fact or in contemplation of law. To say that the goods are, by the act of capture, made good and lawful prize, because the capture is made by a lawfully-commissioned cruiser, is to drop more than a moiety of the definition of good and lawful prize, or, rather, to insist on that which is not an essential part of its definition. Prize may be made (as a *droit*) by a non-commissioned captor; but good and lawful prize cannot be made by any captor, unless the goods be liable to condemnation. It is the formula of a sentence of condemnation, to condemn the thing taken as "good and lawful prize" to the captors; and this not because it was taken by a lawfully-commissioned cruiser, [178*] but because, being so taken, it *was under all the circumstances subject to confiscation. 5. Capture gives possession; but it is the condemnation which ascertains that the things taken are good prize of war: until condemnation, it cannot be known whether they are good prize or not. But, certainly, it is self-evident, that after restitution it must be held that they were not good prize. The condemnation does more than destroy the *jus recuperandi*. It establishes what nothing else can establish—that the goods were lawful prize. Restitution, on the other hand, establishes, conclusively, that they never were lawful prize, although they might be justifiably seized, upon probable cause, as such.

MARSHALL, *Ch. J.*, delivered the opinion of the court, that the goods were chargeable with the same rate of duties as goods imported in foreign bottoms, according to the decision in the case of *The Concord*, at the last term.

Cited—Olcott, 347.

NOTE.—A court of equity is not, like a court of law, bound to enforce a written contract; but it may exercise its discretion, when a specific performance is sought, and may leave the party to his remedy at law. *Miss. R. Co. v. Cromwell*, 1 Otto, 643; *Joyner v. Statham*, 3 Atk. 388; *Garrard v. Grinling*, 2 Swanst. R. 257; *Pitcairne v. Osbourne*, 2 Ves. 375; *Legal v. Miller*, 2 Ves. 299; *Mason v. Armistage*, 13 Ves. 25; *Clark v. Grant*, 14 Ves. 519; *Gillispie v. Moon*, 2 John Ch. R. 585, 598; *Clowes v. Higginson*, 1 Ves. & B. 524; *Winch v. Winchester*, 1 Ves. & B. 375; *Ramsbottom v. Golden*, 1 Ves. & B. 165; *Flood v. Finley*, 2 Ball & B. 53; *Townshend v. Strangroom*, 6 Ves. 328; *Price v. Dyer*, 17 Ves. 357; *Burling v. King*, 46 How. Pr. R. (N. Y.), 452; *Gale v. Archer*, 42 Barb. 320.

A court of equity will not compel a specific performance of a contract, unless it can compel the execution of the whole contract. *Talbot v. Adams*, 12 N. Y. Week. Dig. 410.

Purchaser not surrendering possession, may be compelled to take title good at time of trial. *Coray v. Mathewson*, 7 Lans. (N. Y.) 80.

Where the remedy at law is adequate, chancery will not compel specific performance. *Carter v. U. S. Ins. Co.*, 1 John. Ch. 463; *Bailey v. Strong*, 8 Wheat. 1. U. S., Book 4. 5

*[CHANCERY.]

[*179

HEPBURN & DUNDAS'S HEIRS AND EXECUTORS

DUNLOP & COMPANY.

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HEPBURN & DUNDAS'S HEIRS AND EXECUTORS.

A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make a good title at any time before the decree is pronounced; but the dismissal of a bill to enforce a specific performance in such a case, is a bar to a new bill for the same object.

The inability of the vendor to make a good title at the time the decree is pronounced, though it forms a sufficient ground for refusing a specific performance, will not authorize a court of equity to rescind the agreement in a case where the parties have an adequate remedy at law for its breach.

The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may afford a reason for refusing a specific performance as against the vendee.

But if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for whoever may become purchasers under a sale by order of the court for the benefit of the vendee.

Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated until he makes a good title, and the vendee is accountable for the rents and profits from the time the title is perfected until the contract is specifically performed.

THESE causes were appeals from the chancery side of the Circuit Court of the District of Columbia for the county of Alexandria. The facts are stated in the opinion of the court, and the controversy is the *same [*180 as in the suits between the same parties reported in 1 Cranch, 321, and 5 Cranch, 262.

The causes were argued by *Taylor* and *Swann* for Hephburn & Dundas, and by *Jones* and *Lee* for Dunlop & Company.

WASHINGTON, *J.*, delivered the opinion of the court:

These causes come before the court upon appeals from the Circuit Court of the District of Columbia, for the county of Alexandria.

Conn. 273; *Pitkin v. Pitkin*, 7 Cow. 315; *Dhetegroft v. Lond. A. Co.*, 1 Atk. R. 547; *Rees v. Parish*, 1 McCord's Ch. 59; *Rose v. Clarke*, 1 Y. & Col. 534; *Hammond v. Messenger*, 9 Sim. 327; *Bell v. Bremen*, 3 Murph. 273; *Sampon v. Hunt*, 1 Root, 317; *Adair v. Winchester*, 7 Gill. & John. 114; *Smiley v. Bell*, Mart. & Yerg. 378; *Moseley v. Boush*, 4 Rand. 322; *Thompson v. Manley*, 16 Georg. 440; *Mech. Bk. v. DeBolt*, 1 Ohio St. 501; *Bonebright v. Pease*, 3 Mich. (Gibbs) 318; *Deggett v. Hart*, 5 Fla. 215; *Redmond v. Dickerson*, 1 Stock. (N. J.) 507.

Specific performance not decreed, where there has been a suppression of a material fact, or mistake or fraud. *King v. Knapp*, 59 N. Y. 462; *Schmidt v. Livingston*, 2 Edw. Ch. 213; nor where the wife, not a party to the contract, refuses to join in the deed. *Dixon v. Rice*, 16 Hun. 422; *Sternberger v. McGovern*, 15 Abb. N. S. 257; *S. C. 56 N. Y. 12*; may be enforced of oral contract partly executed. *Bennett v. Abrams*, 41 Barb. 619; *Williston v. Williston*, 41 Barb. 635.

It is only necessary that the plaintiff should be able to make a good title, at the time of the decree. Not necessary that his title should be perfect when bill was filed.

Such fact is immaterial except upon the question

The material facts upon which the questions now to be decided arise, are as follows:

Hepburn & Dundas being indebted to John Dunlop & Co., of Great Britain, on account of certain mercantile dealings which had taken place between those parties, the precise amount whereof was disputed, an agreement in writing was entered into on the 27th of September, 1799, between the said Hepburn & Dundas and Colin Auld, the attorney in fact of John Dunlop & Co., whereby it was stipulated that the parties mutually agreed to submit all matters in dispute, respecting the demand of Dunlop & Co., to certain arbitrators named in the agreement, whose award should be made on or before the 1st day of January following. That Auld, as the agent of Dunlop & Co., would, on the next day, to wit, the 2d day of January, 1800, accept, from Hepburn & Dundas, the sum which should be awarded to Dunlop & Co., in bills of exchange, or in Virginia currency, at the par of exchange; and upon such payment being made in either way, that Auld would give to Hepburn & Dundas a full receipt and **[181*]** discharge of all the claims and demands of Dunlop & Co., against them; that, in case Hepburn & Dundas should not, on the said 2d day of January, pay the amount of the said award, either in bills of exchange or money, they should, on that day, assign to Auld, as attorney of Dunlop & Co., in the fullest manner, a contract entered into in the year 1796, by Hepburn & Dundas, with a certain William Graham, for the sale of 6,000 acres of land lying on the river Ohio, for the recovery of which, on account of the non-payment of the purchase money by Graham, Hepburn & Dundas had brought an ejectment, which was then depending; that this assignment should be accompanied by a power of attorney irrevocable, to enable the said Auld to pursue all legal means to recover the possession of the land, or to enforce the payment of \$18,000, the amount of the purchase money, whichever of these measures Auld might prefer. Hepburn & Dundas further stipulated not to interfere with the measures which Auld might choose to

pursue for the recovery of the land or the purchase money, and, further, that whenever any suit brought, or to be brought, for the land, should be judicially determined, or otherwise settled, by an amicable compromise, Hepburn & Dundas would convey the same to the person who, by such determination or compromise, should be acknowledged to be entitled to it in the manner expressed in the contract with Graham. It was also stipulated that if the purchase money for the said land, with interest thereon to the 2d of January, 1800, should be insufficient to discharge the sum which might be awarded to Dunlop & Co., Hepburn & Dundas should, on that day, pay to Auld as much money as should make up the deficiency; and if, on the other hand, the said purchase money and interest should fall short of the sum awarded, that Auld would, on the same day, pay to Hepburn & Dundas the excess over and above the sum awarded. Lastly, it was stipulated, that if Auld should recover the land, and be enabled to sell the same for more than was allowed to Hepburn & Dundas, by the said agreement, together with the costs and expenses attending the recovery, Auld should pay to Hepburn & Dundas the expenses incurred in prosecuting the suit commenced by them for the recovery of this land. In pursuance of these articles, an award was made by the day mentioned in the submission, which award stated that the sum of £4,379 9 0½ sterling, including interest, would be due to Dunlop & Co. on the 1st day of January, 1800. This sum fell short of the purchase money and interest, due by Graham to the same period, the sum of £494 6 8, Virginia currency. Hepburn & Dundas having prepared a deed of assignment of Graham's contract, and a power of attorney, as stipulated in the above-mentioned agreement, offered to deliver the same to Auld on the 2d of January, 1800, which he refused to accept, because the deed recited, as a part of the consideration, that a release had been executed by Auld, of all the claims and demands whatsoever of Dunlop & Co. against Hepburn & Dundas, and because, as is asserted by Auld,

of the interest to be allowed the opposite party for the delay of the performance. *Jenkins v. Fahey*, 73 N. Y. 355; *McCotter v. Lawrence*, 4 Hun. 107; *S. C.* 6 N. Y. S. C. R. (T. & C.), 392; *Bruce v. Tilson*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 N. Y. 362; *Langford v. Pitt*, 2 P. Wms. 629; 10 Vesey, 315; *Coffin v. Cooper*, 14 Ves. 205; *Clute v. Robinson*, 2 John. R. 566; *Pierce v. Nichols*, 1 Paige, 244; *Brown v. Hafl*, 5 Paige, 235; *Ref. D. Ch. v. Mott*, 7 Paige, 77; *Viele v. Troy R. Co.*, 21 Barb. 381; *S. C.* 20 N. Y. 184; *Cleveland v. Burrill*, 25 Barb. 532; *Hepburn v. Auld*, 5 Cranch, 262; *Allerton v. Sanford*, 3 Sand Ch. R. 72. The vendor must make a case showing that the purchaser would receive such a title as he had contracted to take. *Hinckley v. Smith*, 51 N. Y. 21; *Beckwith v. Kouns*, 6 B. Mon. 222.

Time not generally material, particularly where delay has been acquiesced in; nor unless the delay is great, and the defendant has been injured thereby. *Leaird v. Smith*, 42 How. Pr. R. (N. Y.), 56; *S. C.* 44 N. Y. 618; *Hubbell v. Van Schoening*, 49 N. Y. 320; *S. C.* 2 Hun, 376; *Miller v. Bear*, 3 Paige, 466; *Brashler v. Gratz*, 6 Wheat. 523; *Taylor v. Longworth*, 14 Pet. 172; *Butler v. O'Kear*, 1 Desau. 398.

An alien cannot defend a suit for specific performance of his agreement to purchase land, on the ground that he is an alien, and has not filed a deposition under the statute. He could have obviated this difficulty by filing the necessary deposition. *Scott v. Thorp*, 1 Edw. Ch. R. (N. Y.) 512.

As a general rule, specific performance of an agreement relating to personal chattels will not be decreed. *Cowles v. Whitman*, 10 Conn. 121; but when it is only part of a contract otherwise enforceable, the contract may be performed. *Marsh v. Milligan*, 3 Jur. N. S. 979. Wherever a breach of the contract in regard to personal chattels, cannot be compensated by damages, equity will grant relief. *Sullivan v. Fink*, 1 Md. Ch. Dec. 59; *Roundtree v. McLean*, 1 Hemp. 245; *Waters v. Howland*, 1 Md. Ch. Dec. 112; *Lloyd v. Wheatley*, 2 Jones' Eq. (N. C.) 267; or where the article has a *pretium affectionis*, in addition to the market value. *Fusey v. Fusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 360; *Fells v. Reed*, 3 Ves. 70; *Lloyd v. Loring*, 6 Ves. 773; *Savill v. Tancred*, 1 Ves. Sen. 101; *Lady Armdel v. Phipps*, 10 Ves. 139; *Lowther v. Lord Lowther*, 13 Ves. 95.

Specific performance may be refused where there has been long delay and change of circumstances. *Boone v. Miss. In. Co.*, 17 How. 340; *McNeill v. Magee*, 5 Mas. 244; *Pratt v. Law*, 9 Cranch, 456; *Brashler v. Gratz*, 6 Wheat. 523; *Holt v. Rogers*, 12 Pet. 420; *Garnett v. Macon*, 2 Brock. Marsh. 185; *Cooper v. Brown*, 2 McLean, 495; *Preston v. Preston*, 5 Otto, 200.

A court of equity will not decree specific performance of a contract for the construction of a railroad. *Ross v. Union Pac. R. Co.* 1 Woolv. 20, 32.

Wheat. 1.

Hepburn & Dundas required Auld to execute [183*] such a release prior to the *delivery of the deed of assignment. The suit of Hepburn & Dundas against Graham, for the recovery of the 6,000 acres of land, was prosecuted against his heirs; and in May, 1801, by a compromise between Hepburn & Dundas, and the defendants in the ejectment, judgment was rendered in favor of Hepburn & Dundas.

Without noticing, particularly, the conduct of those parties subsequent to the transactions of the 2d of January, 1800, as well as on that day, it may be sufficient to say, that if the tender made by Hepburn & Dundas was, upon the condition asserted by Auld, to have been annexed to it, and if, in consequence thereof, any legal advantage accrued to him, it was waived by his subsequent conduct. As late as February, 1807, Auld made a tender of the difference between the sum awarded to Dunlop & Co. and the purchase money and interest due upon Graham's contract, and demanded a deed; but this demand was made in a manner, and under circumstances, which this court, upon a former occasion, deemed unreasonable.

Things remained in this situation, until some time about April, 1801, when Hepburn & Dundas instituted a suit at law against Auld, for the difference between the sum awarded to Dunlop & Co. and the amount of the purchase money and interest due by Graham's contract on the 2d of January, 1800. About the same time a suit at law was commenced by Auld, against Hepburn & Dundas, upon the agreement of the 27th of September, 1799, to recover the whole sum awarded. In the first case, [184*] *this court, upon a writ of error, decided upon the pleadings (which were so drawn as to present the point), that Hepburn & Dundas had no right to demand of Auld a release of all claims and demands against Dunlop & Co., to be executed as a precedent act to the assignment of Graham's contract, and the delivery of the power of attorney; and, on that ground, judgment was rendered against Hepburn & Dundas.¹

In the other case, the pleadings presented the question, whether the recital of such a release in the deed of assignment offered to be delivered by Hepburn & Dundas, invalidated the tender. Upon a writ of error, it was decided, by this court, that the recital of the release could not impair the rights of Dunlop & Co., under the agreement of September, 1799, and that it formed no objection to the assignment; consequently, that the tender and refusal amounted to a performance, in like manner as if Auld had accepted the assignment; but that Hepburn & Dundas would still be obliged to execute a proper deed of assignment, and a conveyance of the land, whenever they should be required to do so. Judgment was, accordingly, rendered in this suit against Auld.²

Hepburn & Dundas having been thus defeated in their attempt at law, to enforce a performance of the agreement, filed a bill in equity, praying for a specific performance. The answer of Auld contained, among other objections to a specific performance, an allegation that the title of Hepburn & Dundas

*to the land was defective. Hepburn [*185 & Dundas then set forth their title in a supplemental bill. This suit came on to be heard, upon an appeal to this court, at the same time that Auld's suit at law against Hepburn & Dundas, above mentioned, was decided. This court determined: 1st. That since Auld had, by his conduct subsequent to the 2d of January, 1800, waived all objections to the tender of the assignment of Graham's contract on that day, and did not refuse to receive a conveyance which was offered to be made by Hepburn & Dundas, in June, 1801, on account of any defect in the title, but for other reasons which would equally have operated with him had there been no such defect, Hepburn & Dundas would still be entitled to a specific performance if they could then make a good title. 2d. That the title appeared by the bills to be defective as to 208 acres, being Thomas West's part of Mrs. Bronaugh's 1,000 acres, and also his part of Francina Turner's interest in the same tract, and also on account of the failure to record Thomas West's deed to Hepburn & Dundas for 1,000 acres. For these defects in the title, the bill was dismissed.³

Presuming that this decree, which seemed to close forever the doors of a court of equity against Hepburn & Dundas, opened them to Dunlop & Co., to get rid of the contract altogether, Auld filed the bill which is now under consideration, stating, among other things, the previous and present inability of Hepburn & Dundas, to make a good title to this *land; and praying that the agreement [*186 may be set aside, and the debt awarded to Dunlop & Co., with the interest thereon, to be decreed; or that, if the court should consider Dunlop & Co. under an obligation to accept of the land, that only the reasonable value of the land at the time when Hepburn & Dundas's title to it was perfected, should be allowed. The bill also contains the general prayer for such relief as is consistent with equity.

Hepburn & Dundas seem to have given a very different construction to the above decree, and supposing that if, within a reasonable time after it was pronounced, they could remove the objections to their title which were pointed out in the decree, they might still call for a specific performance, they soon obtained a conveyance from the heirs of Thomas West, of all their right, title, and interest in and to this land, and on the 27th of March, 1809, less than a month after the decree of dismissal by this court, they offered to convey to Auld a good and sufficient title. This offer being refused, Hepburn & Dundas filed a bill against Colin Auld, as attorney of Dunlop & Co., setting forth their ability and readiness to convey an unexceptionable title to this land, and praying that Auld, or Dunlop & Co., might be compelled to accept of a conveyance, and to pay the difference between the agreed value of the land and the sum awarded.

These suits came on to be heard at the same time. In the suit brought by Dunlop & Co., against Hepburn & Dundas, it was decreed by the court below that Hepburn and the heirs of Dundas should pay to Dunlop & Co., or their agent, the sum of \$33,060.37, being the amount

1.—1 Cranch, 321.

2.—5 Cranch, 262.

Wheat. 1.

3.—5 Cranch, 262.

187* of the sum awarded, *with interest thereon, at five per cent., from the 1st January, 1800, till the time of rendering the decree; but that the sum of \$21,112, part thereof, might be discharged by a conveyance, within a certain time, of the above land to Auld in trust for Dunlop & Co. From this decree an appeal was prayed by both parties.

In the other suit, brought by Hepburn & Dundas against Auld, a decree was made, that upon the complainant's paying to Auld, as attorney of Dunlop & Co., the sum of \$11,966.-37, and conveying to the said Auld, in trust for Dunlop & Co., on or before a certain day, the above-mentioned land, the said Auld, as attorney of said Dunlop & Co., should execute and deliver to Hepburn & Dundas such a receipt and discharge of all the claims and demands of Dunlop & Co. against them as the court might approve. From this decree both sides again appealed.

Against so much of these decrees as compel Auld to accept of a conveyance in trust for Dunlop & Co., in part discharge of the debt decreed to be paid by Hepburn & Dundas to Dunlop & Co., the following objections have been made, and are now to be considered:

1st. That Hepburn & Dundas were guilty of a fraudulent misrepresentation of the value of this land; and, also, of a wilful concealment of the defects in the title, whereby Auld was induced to enter into the agreement of September, 1799.

2d. A want of authority in Colin Auld to enter into an agreement for taking a conveyance of land in discharge of the debt due to Dunlop & Co.

188* 3d. The refusal of Hepburn & Dundas to assign Graham's contract, on the 2d of January, 1800, except upon a condition which they had no right to exact, and their interference in the suit with Graham's heirs, and the compromise made with them, whereby (it is contended) they disabled themselves from executing the agreement of September, 1799.

4th. That the title to the land is yet defective.

5th. That the former decree, dismissing Hepburn & Dundas's bill for a specific performance, is a perpetual bar to the relief sought by their present bill.

6th. That Dunlop & Co. being aliens, and incapable of holding lands in Virginia, a court of equity will not compel them to execute their agreement, even if Hepburn & Dundas had been always in a condition to perform it on their part.

1. The first objection appears to be unsupported by the evidence. In respect to the value of the land, the representations made of it in the letters of Hepburn & Dundas to Dunlop & Co., and to Colin Auld, affirm no fact which is proved to be untrue. Those letters contain expressions of the opinion of Hepburn & Dundas, that the land was an ample security for the debt due to Dunlop & Co.; and it must be admitted, that in their letter to Colin Auld of the 6th of September, 1799, they seem to have indulged themselves in very extravagant notions of its value. But it is to be remarked that the grounds of this calculation are fairly stated in the letter, and an opportunity is afforded to Auld to inquire into them and to judge for himself; besides which, it should be recollected that Auld

having agreed, in his letter *of the 4th [**189** of September, two days before the date of this letter, to submit to the award of arbitrators, and to receive an assignment of Graham's contract at the stipulated sum to be paid by Graham, Hepburn & Dundas could have had no motive, at that time, to make an untrue representation of the value of the land. At no antecedent period does it appear that they had made an uncandid statement, upon this subject, to Dunlop & Co., or to Auld. Their opinion of the real value of the property might be incorrect; but a mistaken opinion of the value of the property, if honestly entertained, and stated as opinion merely, unaccompanied by an assertion, or statement, untrue in fact, can never be considered as a fraudulent misrepresentation. That Hepburn & Dundas intended no deception, is evident from the following considerations: 1. That the offer made by them, to Colin Auld, of this land, was that of a security only, for the debt due to Dunlop & Co., which was declined by Auld, upon the ground that if payment of the debt to Dunlop & Co. was to be postponed until the suit with Graham should be concluded, Dunlop & Co. ought to be entitled to all the benefit of the contract with Graham, and for this reason a proposition was made by him to accept an assignment of that contract, and to pay the difference between the purchase money and interest thereon, and the sum which might be awarded, in case the latter should fall short of the former. 2. That Hepburn & Dundas had, in the year of 1796, sold this land to Graham for the sum at which Auld agreed to take it, and as evidence of their opinion, that the *land had, since that sale, [**190** risen in value, they had instituted a suit at law against Graham in order to avoid the sale, and to recover back the land. If any further answer to this objection be necessary, it may be sufficient to add, that the fraud now charged against Hepburn & Dundas was not thought of, and certainly not imputed to them, when the former suit of Hepburn & Dundas, for a specific performance, was depending.

As to the alleged concealment by Hepburn & Dundas of defects in their title, there is every reason to believe that they were unknown to them until some time in the year 1805, when they endeavored to remove them, and supposed they had done so. The only objection suggested by the special verdict in the ejectment was the want of a partition deed between the original grantees of this land, which objection this court has declared to be insufficient to bar Hepburn & Dundas from asking for a specific performance of the agreement.

2. The next objection to the decree below is, that Auld had no authority, in virtue of the power of attorney from Dunlop & Co., to enter into an agreement to receive land in discharge of the debt due by Hepburn & Dundas.

This, like the former, is a new objection, not thought of, or argued, as a reason against a specific performance in the former suit. It is unnecessary to examine, with critical nicety, the import of the expressions used in the power of attorney to Auld. He was empowered to sue for, and to compound and agree, for all debts due to Dunlop & Co., and, in *gen- [**191** eral, to do all other lawful acts needful for those purposes, as fully as Dunlop & Co. could

do. Under this authority he entered into the agreement with Hepburn & Dundas, which, there is no reason to doubt, he communicated in due time to his constituents, and it is perfectly fair to consider their acquiescence in that agreement as amounting to a ratification of it. It would be most inequitable to permit Dunlop & Co., at the distance of many years after this agreement was made, to controvert the authority of their agent, and to say they are not bound to perform it, although it must be admitted that, during all that time, it was in their power to enforce it against Hepburn & Dundas, had it been their wish or interest to do so.

3. The third objection to the decrees below, is the refusal of Hepburn & Dundas to assign Graham's contract on the 2d January, 1800, except upon a condition which he had no right to exact, and their interference in the suit with Graham's heirs, and the compromise made with them. In answer to the different parts of this objection, it might be sufficient to remark, that they were urged by Colin Auld in his answer to Hepburn & Dundas's former bill; that they were considered by this court, and decided to be insufficient to deprive Hepburn & Dundas of the relief prayed for. However true the allegation may be, that Hepburn & Dundas refused to assign Graham's contract, and to deliver the power of attorney to Auld on the 2d of January, 1800, unless Auld would first execute a release of all claims and demands of Dunlop & Co. against Hepburn & Dundas, yet [192*] the subsequent *conduct of Auld amounted to a waiver of all objections on that account: his, and his counsel's, letters to Edward Graham, in which he was asserted to be the assignee of the contract with Graham; his instructions to Cook to attend to the ejectment, and to get it brought to a speedy decision; his engaging counsel in that suit; and, in short, his whole conduct throughout the year 1800, all tend to prove that the transaction of the 2d of January, 1800, had not, in any manner, impaired the rights of the parties under the agreement now alleged to have been violated by Hepburn & Dundas.

As to the compromise said to have been made by Hepburn & Dundas with the claimants under Graham, their conduct, upon that occasion, appears to have been unexceptionable. That a judgment against those claimants, at an early day, was anxiously desired by Auld, and the assistance of Hepburn & Dundas to effect that object, was expected and required by him, is apparent from the above letters from him to Edward Graham, and from many other facts proved in the former suit. The endeavors of Auld to hasten the decision of the ejectment, and to obtain a judgment for the land, seem to have been unremitting, until some time in December, 1800, when he declined interfering any further in the business; but, neither then nor at any subsequent period did he express to Hepburn & Dundas a disinclination to obtain a judgment, nor did he forbid them from proceeding to effect it. It is objected, under this head, that Hepburn & Dundas, contrary to an express stipulation in the agreement with Auld, [193*] released *to the defendants in the ejectment the right which, as trustee for Auld, they had to demand mesne profits during the time that Hepburn & Dundas had been out of pos-

session of the land; and, further, that they consented to permit those defendants to retain possession of the premises for a year after the judgment was rendered. Neither of these allegations are supported by the evidence in the cause. The agreement made by Hepburn & Dundas with the heirs of Graham, in relation to the costs of the suit and the mesne profits, disavows, in the most explicit terms, all power in them, and all intention to release either of those claims, but stipulates to indemnify those defendants against these claims, in case they should be made and enforced by Auld, who is declared to be alone entitled to make them. This contract of indemnity, therefore, did not amount to a release, nor did it impair the rights of Dunlop & Co. under their agreement with Hepburn & Dundas. As to the remainder of this objection, it is founded altogether upon the deposition of Mr. Sheffey, the counsel for Graham's heirs, which, as it is explained by the same witness in a subsequent deposition, proves no more than that such a proposition had been made by Edward Graham to Mr. Hepburn. That it was not accepted by him, is manifest by the judgment itself, which is unconditional, as well as by an agreement made between Hepburn & Dundas and Edward Graham, the day after the judgment was entered.

4. The next objection is, that the title of Hepburn & Dundas to this land, or to some [*194 part thereof, is still defective.

In the opinion given by this court, at February term, 1809, in the suit brought by Hepburn & Dundas, for a specific performance, the title was declared to be unexceptionable, except, 1st. As to 208 acres, being the part of Sarah Bronaugh's 1,000 acres, to which Thomas West was entitled as one of the heirs of Mrs. Bronaugh, and of Francina Turner, and, 2d. As to 1,000 acres, the original share of Thomas West, which had been conveyed by him to Hepburn & Dundas by a deed which had not been recorded. These defects have since been cured by a conveyance to Hepburn & Dundas by the heirs of Thomas West, bearing date the 20th of March, 1809, of all their title to the aforesaid parcels of land.

It is, nevertheless, contended that this conveyance is insufficient to pass a clear and undisputed title; inasmuch as the land may be bound by the claims of creditors, or of purchasers subsequent to the deed from Thomas West to Hepburn & Dundas. The answer given at the bar to these suggestions is entirely satisfactory to the court. If the land be exposed to the claims of subsequent purchasers or mortgagees under West, to be effectual against Hepburn & Dundas, the deeds must have been recorded within eight months after the death of West, at the latest period, either in the general court or in the district or county court where the land lies. Had any such deeds been so recorded, it was in the power of Auld to have proved the fact by the records *of some one of those [*195 courts, and the want of such proof destroys all presumption that any such conveyances were made.

As to judgments against West, they, too, must be of record; and, after a lapse of 10 years since his death, the court cannot presume the existence of such judgments. As to specialties in which the heirs of West are bound, if there

be such, which is not proved, they cannot affect this land in the hands of a *bona fide* purchaser under those heirs.

5. The next objection made to the decrees below is, that the dismissal of the former bill of Hepburn & Dundas, for a specific performance, is a bar to their present bill for the same object. This objection is well founded. If a bill, by the vendor of land, seeking a specific performance of the contract, be dismissed on account of a defect in the title, the doors of a court of equity are and ought to be, forever closed against him, notwithstanding he should, afterwards, have it in his power to make a good title; unless, perhaps, in a case where an original bill, in the nature of a bill of review, might be entertained. But the present bill is not founded upon new matter, discovered since the hearing of the former cause, and which it was not in the power of Hepburn & Dundas to produce at that time. It is not pretended that he was ignorant who were the heirs of Thomas West, or that he could not as well have procured a deed from them before as after the former decree. His ignorance was not of a matter of fact, but of law. He erroneously supposed that his title was good, and on account [196*] of the defects existing *in it at the time of the decree, his bill was dismissed. The rule of the court of equity to decree a specific performance, if the vendor is able to make a good title before the decree is pronounced, is an indulgence which he is not entitled to by the terms of his contract. A majority of this court approves of the rule as a general one, but is not disposed to extend it as such. If, in a case peculiarly circumstanced, an extension of the time for completing the title would be proposed, and should be intended to be granted, the court would either continue the cause, in order to give the vendor time to perfect his title, or would dismiss the bill without prejudice.

The questions, then, which remain to be decided, are: 1st. Whether Dunlop & Co. are entitled to the relief for which they specifically prayed? and if not, then, 2d. Are they entitled to any other, and what relief, under the general prayer in their bill?

1. The relief specifically prayed for consists of two parts: 1st. That the agreement of September, 1799, may be rescinded, and the sum awarded with interest, decreed to be paid. If this should be denied, and Dunlop & Co. be compelled to receive a conveyance of the land, then, 2d. That the reasonable value only of the land at the time when the title was perfected should be allowed.

As to the first. Most of the objections which have been urged against the decree of the court below, for a specific performance, were relied upon by the counsel for Dunlop & Co., as sufficient to set aside the contract. These have already been considered, and the result has been [197*] shown to be, that if the bill *of Hepburn & Dundas, for a specific performance, were unaffected by the dismissal of their former bill, none of these objections would be sufficient to preclude them from the relief sought by their present bill. If so, they are insufficient to enable Dunlop & Co. to obtain a decree to rescind the contract. There are many cases in which a court of equity, although it

would not decree a specific performance, will yet refuse to order a contract to be cancelled. The inability of the vendor to make a good title at the time the decree is to be pronounced, furnishes a very good reason for excluding him from relief in a court of equity; and yet it does not follow that the court will, for this reason merely, set aside the contract. Generally speaking, a court of law is competent to afford an adequate remedy to either party, for a breach of the contract by the other, from whatever cause it may have proceeded; and whenever this is the case, a resort to a court of equity is improper.

But if the contract ought not, in conscience, to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interpose and afford a relief, which a court of common law cannot, by setting aside the contract; and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice and equity of the case may require. Whether inability in the vendor to make a title, is, of itself, unattended by some peculiar circumstances of hardship, sufficient to justify the court in setting aside *the contract, need not now be [*198] decided. This is certainly not a case where the exercise of this branch of equity jurisdiction can be fairly demanded by Dunlop & Co. Within a month after the recovery of the judgment against the heirs of Graham, Hepburn & Dundas tendered to Colin Auld a conveyance of the land, which was refused, not on account of any defect in the title, but for reasons which would equally have operated with him had there been no such defect. Immediately after the defects in the title were pointed out by this court, they were removed, and the conveyance of an unexceptionable title was tendered and refused. Had Hepburn & Dundas been in a condition to make such a title a month sooner, this court, instead of dismissing their bill, would have decreed a specific performance. Under such circumstances it would be inequitable to set aside the contract. The alienage of the complainants is urged as an additional reason for setting aside this contract. Although the incapacity of the purchaser to hold land might afford a reason for denying a specific performance upon the prayer of Hepburn & Dundas (a point, however, not intended to be decided), it is certainly insufficient to entitle the vendor, under the circumstances of this case, to a decree to rescind the contract. But the court does not mean to intimate an opinion that the terms of this contract did expose this land to the danger which is apprehended.

It appears by the contract, and the previous correspondence between these parties, that they contemplated a sale of this land, in the event of the contract *with Graham be: [*199] ing rescinded, and that the proceeds thereof should be paid over to Auld, in discharge of so much of the debt due by Hepburn & Dundas to Dunlop & Co. as the purchase money due by Graham, with interest thereon to the 1st of January, 1800, would amount to; and this whether the land should sell for more or less than that sum. In this view of the case, the land was considered as a security for a stipulated sum, and Hepburn & Dundas were con-

Wheat. 1.

stituted trustees for whoever might become the purchasers of it. A conveyance to Auld or to Dunlop & Co. does not appear to have been contemplated. But if, in point of law, it should be true that Auld, by neglecting to proceed against Graham's representatives for the recovery of the land, in the name of Hepburn & Dundas, separated the interests of his constituents, this can surely afford no sound reason for setting aside the contract. It is sufficient if Hepburn & Dundas are able and ready to make a conveyance when they shall be required to do so.

2d. The other specific relief prayed for, is that Hepburn & Dundas may be credited on account of the land for no more than its real value in March, 1809, when a conveyance was tendered and refused. A decree of this sort would be an anomaly in the jurisprudence of a court of equity. It would be an affectation of decreeing a specific performance contrary to the terms of the contract upon which the decree is to operate. It would be, in fact, to make a contract for the parties altogether different from what they had made for themselves, and then to **200*** decree "an execution of it. There is no precedent, and certainly no principle of equity to sanction such a decree. Either the contract of the parties must be executed according to the terms of it, or it cannot be executed at all.

The only remaining question, then, is whether, under the general prayer, the court can grant any and what relief.

There can be no question but that it is competent to Dunlop & Co. to ask for a specific performance of the agreement, so far as it can now be performed, although the court cannot now listen to a similar prayer from Hepburn & Dundas. But this is not the relief specifically stated in this bill; and it is supposed to be unreasonable to compel a specific performance under the general prayer for relief, in opposition to the specific prayer that the contract may be set aside. To this objection it may well be answered, that if it be improper to rescind, or to modify, the contract, nothing remains to be done, under the general prayer, but to dismiss the bill, or to decree an execution of the contract. But as the former cannot be presumed to be the object of the general prayer, it would seem to follow that an execution of the contract was intended to be asked for, in case the specific relief should be denied.

For these reasons the court will decree a specific performance, so far as it is practicable, and considering Hepburn & Dundas as trustees for the person or persons to whom this land may be sold, the conveyance will be decreed to **201*** be made to such persons "as may become the purchasers of the land under the decree of this court.

The residue of the decree below, which allows to the complainants, Dunlop & Co., interest upon the sum awarded from the 1st of January, 1800, to the time of the decree, is objected to by Hepburn & Dundas, upon the ground that the purchaser of land, to whom neither a conveyance has been made or possession delivered, is to be considered in equity as the owner, and, of course, entitled to the rents and profits; and that the right of the vendor to the purchase money draws after it a correspondent right to demand interest upon the same until it is paid.

Wheat. 1.

This, it must be acknowledged, is the general principle which prevails in the courts of equity.

But it would seem to be inequitable to apply it to a case like the present. Here the purchase money was in the hands of the vendor at the time the contract was made. It consisted of a debt due by the vendor to the purchaser, which the former bound himself by his agreement to discharge by bills of exchange or cash, or by an assignment of a contract for land, and a conveyance of a good title to it, and with money to make up any deficiency which might arise by the agreed price of the land falling short of the debt. Neither bills nor cash were paid, nor was the contract assigned or a conveyance made, for it turned out that the vendor could not make a good title to the whole of the land until March, 1809. They have always retained possession, and the land is, in reality, unproductive of profits in any measure equal to the interest on the *debt. This debt ***202** unquestionably bore interest from the moment it was ascertained and agreed to be paid; and not having been paid, nor a tender of a good title to the land made until March, 1809, it would be highly unjust to stop interest on the debt until that period.

The written arguments of the counsel, which have been sent to the court, present two questions in relation to interest, which remain to be noticed. It is contended, by the counsel for Dunlop & Co., that interest ought to be calculated upon the sum composed of principal and interest, stated, by the arbitrators, to be due on the 1st of January, 1800, at the rate of 6 per cent. per annum, from that day. On the other side it is insisted that no more than 5 per cent. per annum should be allowed, and this not on the sum found by the arbitrators to be due, but upon the principal sum only.

The court is of opinion that, although the award does not direct the sum which is found to be due by Hepburn & Dundas to be paid to Dunlop & Co., yet it ascertains the sum which was due on the 1st of January, 1800, and the agreement upon which the submission was made, bound Hepburn & Dundas to pay that sum when it should be so ascertained. The two instruments, taken together, amount to a contract to pay a specific sum, and are clearly within the words, as well as the fair interpretation of the law of Virginia, passed in the year 1796, which fixed the rate of interest at 6 per cent. per annum. This principle being settled, it follows that the interest must be calculated upon the sum *ascertained by the ***203** award to be due on the 1st of January, 1810. To separate the principal from the interest, even if the award furnished materials for such an operation, would be, in effect, to set aside the award, and to vary the agreement with which it is intimately connected.

It is therefore the opinion of the court that Hepburn & Dundas ought to pay interest upon the sum awarded by the arbitrators, after the rate of 6 per cent. per annum, from the 1st of January, 1800, to the 27th of March, 1809, when they were able to make, and did in fact tender, a good and sufficient conveyance to the agent of Dunlop & Co. From the 27th of March, 1809, interest ought to stop; but Hepburn & Dundas ought to account with Dunlop & Co. for the rents and profits of the 6,000

acres of land from that period to the time of rendering this decree.¹

204*] *DECREE.—These causes came on to be heard this 8th day of February, 1816, on the **205*]** transcript of the *records, and were argued by counsel, whereupon, it is decreed and ordered, that the decree of the Circuit Court of the District of Columbia for the county of Alexandria, in the suit of William Hepburn and the heirs and executors of John Dundas against Colin Auld, agent and attorney in fact for John Dunlop & Co., be reversed and annulled, and this court, proceeding to give such decree as the said Circuit Court ought to have given, it is further ordered and decreed that the said bill be dismissed.

And it is further decreed and ordered that the decree in the suit of John Dunlop & Co. against William Hepburn and the heirs and executors of John Dundas be reversed, each party paying his own costs in this court. And this court, proceeding to give such decree in the said suit as the said Circuit Court ought to have given, it is decreed and ordered that the defendants, William Hepburn and the executors and executrix of John Dundas, do, on or before the first day of April next, pay to the complainants, John Dunlop & Co., or to their agent or attorney, duly authorized to receive **206*]** the *same, the sum of nine thousand one hundred and forty-three dollars and seventy-two cents, being the difference between the sum of nineteen thousand four hundred and sixty-four dollars and twenty-four cents, the value in current money at the par of exchange of the sterling debt stated in the award of William Hartshorne, William Herbert, and

William Hodgson, to be due by Hepburn & Dundas to John Dunlop, with interest thereon after the rate of 6 per centum per annum from the first day of January, 1800, to the 27th of March, 1809, and twenty-one thousand one hundred and twelve dollars, the sum due upon William Graham's contract, on the first day of January, in the year 1800.

It is further decreed and ordered that the 6,000 acres of land in the proceedings mentioned, be sold at public auction to the highest bidder, at such times, in such proportions, and upon such terms as John Dunlop & Co., or their agent or attorney in fact, may direct, and that the proceeds of such sales be paid over to the said John Dunlop & Co., or their agent or attorney as aforesaid; and upon such sale or sales being made, it is decreed and ordered, that the said William Hepburn, or his legal representatives, and the legal representatives of John Dundas, deceased, do, by good and sufficient deed, or deeds, in law, to be prepared at the expense of John Dunlop & Co., convey the aforesaid land to the purchaser or purchasers thereof, in fee-simple, with a general warranty, and free from all incumbrances. And it is further ordered and decreed that the sales of the aforesaid land be made under the superintendence *of Colin Auld, the attorney in ***207** fact of John Dunlop & Co., or of such other person or persons as the said Circuit Court may appoint, in case the said Colin Auld should decline to serve, or the said Circuit Court should see good cause to make such other appointment.

And it is further ordered and decreed that the defendants, William Hepburn and the executors and executrix of John Dundas, deceased,

1.—In the progress of society the defects of the common law to answer the exigencies of a civilized and commercial age became manifest. It was particularly in not furnishing an adequate remedy for the breach of contracts, where the spirit of the agreement required a specific performance, that these defects were disclosed. For, except in real actions and ejectment, where the proceedings are *in rem*, and the actions of detinue and replevin, where the thing sued for is specifically recovered, a court of common law uniformly gives a compensation in money for civil injuries, whether arising *ex contractu* or *ex delicto*. This remedy is frequently insufficient to repair the injury sustained by the parties, and to place them in the same situation they were in before the breach of the contract. Hence the origin of that jurisdiction, which, although it was long contested by the courts of common law, has at length been firmly established, and matured into a regular system. This system is, however, remarkably subject to the exercise of discretion according to the peculiar circumstances of each particular case. But few inflexible rules can therefore be laid down concerning it. Among those admitting of the fewest exceptions are the following: 1st. This equitable jurisdiction extends to all cases where either the *res* in dispute, or the party, is within the jurisdiction of the court; for it proceeds *in personam* as well as *in rem*, and wherever the land or other thing in controversy is not within its reach, it will compel the specific performance of an agreement by means of its appropriate process acting on the parties. 1 Ves. 447, 454. 2d. A specific performance will not be decreed of an agreement whereupon damages could not be recovered at law. But if an action at law cannot be maintained on account of a mere formal defect of the instrument, the agreement will be enforced in equity. 1 Ves. 256; 1 P. Will., 243. And there are also several other cases of exceptions to this general rule, where, although the agreement was void at law, a specific performance has been decreed, there being a clear ground for the interference of equity, according to the general rules of the court. 2 Eq.

Cas. Abr. 32 pl. 43; 2 Vern. 490; 2 P. Will. 243; 2 Vern. 24; 3 P. Will. 187. 3d. A specific performance will not be decreed where the parties have an adequate remedy at law. 8 Ves., Jun., 163; 2 Schoales & Lefroy, 553. And the court will exercise its discretion, and leave the contract at law, rather than compel a purchaser to take a doubtful title. 1 Ves., Jun., 565; 2 P. Will. 198; 2 Ves. 679; 1 Bro. C. C. 74; 4 Bro. C. C. 80; 4 Ves., Jun., 97; 5 Ves., Jun., 186. 4th. If the vendor can make a good title at the time the conveyance is to be made under the decree of the court, a specific performance will be decreed. 2 P. Will. 630; 1 Atk. 12; 10 Ves., Jun., 315; 5 Cranch, 262; 8 Ves., Jun., 655; 7 Ves., Jun., 202. 5th. In the construction of a contract, it is considered as executed from the time of its being entered into, unless some other time be stipulated for its execution. And so powerful is this rule, that by an equitable fiction, it is held to alter the very nature of things, to make land money, and, on the contrary, to make money land. Upon this principle, land which is sold is considered in equity as the property of the vendee from the making of the contract, and descendible and devisable as such. 2 Vern. 536; 1 P. Will. 872; 3 P. Will. 215; 7 Ves., Jun., 294. 6th. In decreeing the specific performance of an agreement, time may be dispensed with if it be not of the essence of the contract. 1 Atk. 12; 2 P. Will. 630; 5 Cranch, 262; 7 Ves., Jun., 273; 12 Ves., Jun., 326; 4 Bro. C. C. 329; 1 Ves. 450. But where there has been gross laches on the part of the plaintiff, a bill for specific performance will be dismissed. 5 Ves., Jun., 145; 736, 818; 4 Ves., Jun., 667, 686; 1 Bro. P. C. 27; 2 Eq. Cas. Abr. 686, pl. 6. 7th. Fraud will vitiate a contract in equity as well as at law, and consequently a fraudulent agreement will not be specifically enforced. And the morality of a court of equity, if the expression may be allowed, is even more strict than that of a court of law in this particular, for *suppositio facti*, as well as *suppositio iuris*, is a ground for refusing to carry an agreement into effect. 3 Atk. 383; 2 Atk. 271; 1 Bro. C. C. 440; Amb. 495; 10 Ves., Jun., 492.

do make up, state, and settle, before a commissioner, or commissioners, to be appointed by the said Circuit Court, an account of the rents and profits of the said 8,000 acres of land since the 27th day of March, 1809, and that they pay over the same to the complainants, John Dunlop & Co., or to their lawful agent or attorney.

And this cause is remanded to the said Circuit Court for such proceedings to be had therein, for carrying into execution the decree of this court in the premises.¹

Rev'g—2 Cranch, C. C. 85.

Cited—2 Wheat. 209; 12 Pet. 297; 6 How. 120; Bald. 408, 409, 416, 420; 1 Wood. & M. 112, 114, 146; 2 Wood. & M. 29, 30, 221; 1 McLean, 65.

208*]

*[PRIZE.]

THE ST. JOZE INDIANO.

LIZAU, Claimant.

Goods were shipped by D. B. & Co., of Liverpool, on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. D. B. & F., by order and for account of J. L." In a letter accompanying the invoice from the shippers to the consignees, they say: "For Mr. J. L. we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments; therefore we consign the whole to you, that you may come to a proper understanding with him." It was held that the goods were, during their transit, the property, and at the risk of the enemy shippers, and, therefore, subject to condemnation.

APPEAL from the Circuit Court for the District of Massachusetts. The ship *St. Joze Indiano*, bound from Liverpool to Rio de Janeiro, was captured and sent into the United States, as prize of war, in the summer of 1814. The ship and most of the cargo were condemned as British property in the Circuit Court, and there was no appeal by any of the claimants except in behalf of Mr. J. Lizaur, of Rio de Janeiro. The right of Mr. J. Lizaur, to have restitution of property belonging to him, at the time of capture, was not contested by the captors; but it was contended that the property in question, when captured, was at the risk of the shippers, Messrs. Dyson, Brothers & Co., of **209*]** Liverpool. The bill of lading did not specify any order, or account and risk. The invoice was headed: "Consigned to Messrs. Dyson, Brothers & Finnie, by order, and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, of the 4th of May, 1814, from Dyson, Brothers & Co. to Dyson, Brothers & Finnie, they say: "For Mr. Lizaur we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The house of Dyson, Brothers & Co., of Liverpool, and of Dyson, Brothers & Finnie, of Rio, consist of the same

1.—Livingston, J., and Story, J., did not sit in this cause.
Wheat. 1.

persons; goods claimed in behalf of the latter house were condemned on the ground that both firms represented the same parties in interest, and from this decision there was no appeal.

Harper, for the appellant and claimant. This case may be contrasted with those said to be similar. In the case of *Kimmel and Altrers*,¹ on the authority of which this portion of the cargo was condemned in the court below, the claimants had ordered the goods shipped, but there was no evidence that they had paid for any part of the goods, or that they were charged to them by the shippers. In that case the breaking out of the war produced a change in the destination of the goods, and a complete control over them was retained by the vendor, which control ***was exercised** by his di-***210** recting his agent not to deliver them without payment in cash, in case war should have been declared before their arrival. The doctrine in the case of the Messrs. *Wilkins*,² fully bears out the present claim. In that case the mere right of stoppage *in transitu* was held to be vested by the shipper in his agent, to be exercised only in the event of insolvency. But in the case now before the court, the power of Dyson & Co. was limited to an arrangement for the payment of a certain part of the price only which remained unpaid. In the case of the Messrs. *Wilkins* no part was paid in advance, and the goods were not charged to the claimants, another circumstance which distinguishes it from the present. The case of *Magee and Jones*,³ and that of *Dunham and Randolph*,⁴ was a mere offer to sell, not a sale agreed to by the vendee, like that in the present case.

Dexter, for the respondents and captors. The case is clearly within the principles adjudged. Thus, it has been determined, incidentally, at the present term, in the case of *Van Wagenan*,⁵ that property is not immediately vested in the correspondent by a purchase by his agent, by order, whether it be with the money of the former or latter. The case of Messrs. *Wilkins* was not a unanimous decision of the court, but is clearly distinguishable from the present. ***Here there was no change of posses- [211** sion from the shippers; the goods were in their possession during the voyage, by their agent, the master; had the goods arrived, they would still have been in their possession, by their agents, the consignees. If the goods remained the property of the shippers at the time of shipment, and during the voyage, then they became the property of the captors, *jure belli*. They remained the property of the shippers, because they were consigned to their agents, to be delivered, contingently, to the claimant. Therefore the goods are confiscable as prize of war. The cases of *Magee and Jones*, and of *Dunham and Randolph*, are in point.

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The single question presented on these facts

- 1.—The Merrimack, February term, 1814, 8 Cranch, 317.
- 2.—The Merrimack, February term, 1814.
- 3.—The Venus, February term, 1814.
- 4.—The Frances, February term, 1815.
- 5.—The Mary and Susan. *Vide Supra*, p. 46.

is, in whom the property was vested at the time of its transit, if in Mr. Lizaar, then it is to be restored; if in the shippers, then it is to be condemned. It is contended, in behalf of the claimant, that the goods having been purchased by the order, and partly with the funds, of Mr. Lizaar, the property vested in him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title; that nothing was reserved to the shippers but a mere right of stoppage *in transitu* and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaar.

212*] The doctrine as to the right of stoppage *in transitu*, cannot apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property has passed to the consignee, but that the possession is in a third person in the transit to the consignee. It cannot, therefore, touch a case where the actual or constructive possession still remains in the shipper or his exclusive agents. In general, the rules of the prize court, as to the vesting of property, are the same with those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser.¹ But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes **213*]** an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods or purchases goods on his own credit (and thereby, in reality becomes the owner), no property in the goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act in him to convert them to any use which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipment. These principles have been frequently recognized in prize causes heretofore decided in this court.² In the present case, the delivery to the master was not for the use of Mr. Lizaar, but for the

consignees, a house composed of the same persons as the shippers, and acting as their ***214** agents. They, therefore, retained the constructive possession, as well as right of property, in the shippers; and it is apparent from the letter that the shippers meant to reserve to themselves and to their agents, in relation to the shipment, all those powers which ownership gives over property. It is material, also, in this view, that all the papers respecting the shipment were addressed to their own house, or to a house acting as their agents, and the claimants could have no knowledge or control of the shipment, unless by the consent of the consignees, under future arrangements to be dictated by them. In this view this case cannot be distinguished from that of Messrs. *Kinnell and Alters*; and it steers wide of the distinction upon which Messrs. Wilkins' claim was sustained.³ The authorities also cited at the argument by the captors are exceedingly strong to the same effect. *The Aurora*⁴ approaches very near to the present case. There the shipment, by the express agreement of the parties, was, in reality, going for the use, and by the order, of the purchaser, but consigned to other persons, who were to deliver them if they were satisfied for the payment. And Sir William Scott there quotes a case as having been lately decided, where goods sent by a merchant in Holland to A, a person in America, by order, and for account of B, with directions not to deliver them unless satisfaction should be given for the payment, were condemned as the property of the Dutch shippers.

*On the whole, the court are unani- ***215** mously of opinion that the goods included in this shipment were, during their transit, the property, and at the risk of the shippers, and, therefore, subject to condemnation. The claim of Mr. Lizaar must, therefore, be rejected.

Sentence affirmed with costs.

Aff'r—2 Gall. 288.

[COMMON LAW.]

RENNER & BUSSARD v. MARSHALL.

The commencement of another suit for the same cause of action in the court of another state since the last continuance cannot be pleaded in abatement of the original suit.

If matter in abatement is pleaded *puts darrein*

1.—By the common law, the right of property in the thing sold is completely vested in the purchaser by the execution of the contract, subject to the equitable right of stoppage *in transitu* in case of insolvency, and where the bill of lading has not been, in the meantime, indorsed to a third person. But by the civil law, the right of property was not vested in the purchaser, unless the goods were paid for, or sold on a credit. Just., l. 2, tit. 1, s. 41. Pothier *Traite de Vente*, No. 322. But this rule is not copied by the Napoleon Code, which, on the contrary, adopts a principle similar to that of the common law. *Elle (la vente) est parfaite entre les parties, et la propriété est acquise de droit à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.* Code Napoleon, l. 3, tit. 6, c. 1, No. 1583. The French Commercial Code also subjects the goods sold to the right of stoppage *in transitu*, by the vendor, upon the same condition, with our own law. Code de Commerce, l. 3, tit. 3. De la Revendication.

2.—In *The Venus*, at February term, 1814, on the

claim of Messrs. Magee & Jones, Washington, J., in delivering the opinion of the court, observed: "To effect a change of property, as between seller and buyer, it is essential that there should be a contract of sale agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee, it is necessary, to the perfection of the contract, that it should be delivered to the purchaser, or to his agent, which the master of a ship to many purposes is considered to be." And adverting to the facts of that claim, he further says: "The delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the shipper solely, and consequently it amounted to nothing so as to divest the property out of the shipper until Magee should elect to take them on joint account, or to act as the agent of Jones."

3.—*The Merrimack*; February Term, 1814, 8. Cranch, 317.

4.—4 Rob., 218.

continuance, the judgment, if against the defendant, is peremptory.

Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be entered by the court without a writ of inquiry.

ERROR to the Circuit Court for the District of Columbia for Washington county. The defendant in error, at June term, 1813, declared against the plaintiffs in error in *assumpsit*, upon an inland bill of exchange drawn by one Rootes on Renner & Bussard, and accepted by them; to which declaration they pleaded *non-assumpsit*, and issue was thereupon joined, and the cause was continued to December term, 1813. At that term the plaintiffs in error appeared [*216*] and *pleaded "that, after the last continuance of the plea aforesaid, to wit, the first Monday of June, in the year one thousand eight hundred and fourteen, from which day the plea aforesaid was farther continued here until this day, to wit, the fourth Monday of December, in the year last aforesaid, and before this day, to wit, on the nineteenth day of October, in the year last aforesaid, before the Superior Court of Chancery of the commonwealth of Virginia, &c., the plaintiff exhibited his certain bill of complaint against the defendants, &c.; and also against one Anthony Buck and one Miles Dowson, complaining and alleging in his said bill, that on the twelfth day of October, in the year one thousand eight hundred and twelve, Thomas R. Rootes drew his bill of exchange upon the defendants, &c. And the said defendants further say, that the plea aforesaid, for which the said defendants, by the said plaintiff in the said bill of complaint mentioned, are impleaded in the said Superior Court of Chancery as aforesaid, is for the same identical matter and cause of action, of, and for which the said plaintiff hath now impleaded the said defendants, Renner & Bussard," &c. To which the plaintiff replied the prior pendency of the suit in the Circuit Court; and the defendants rejoined in substance the same matters as contained in their plea, whereupon the plaintiff demurred specially. Upon which the court rendered judgment "that the plea of the said Daniel Renner and Daniel Bussard by them above pleaded, to the writ and declaration of the said Horace Marshall, and the plea of the said Daniel Renner and Daniel Bussard, by [*217*] way *of rejoinder to the said replication of the said Horace Marshall, and the matters therein contained, are not sufficient in law to preclude him, the said Horace Marshall, from maintaining his action aforesaid; therefore it is considered by the court here that the aforesaid Horace Marshall recover against the said Daniel Renner and Daniel Bussard, as well the sum of, &c., his damages," &c.

The cause was argued by *Jones* and *Key* for the plaintiff in error, and by *Lee* for the defendant in error.

Story, J., delivered the opinion of the court:

The first question in this case is, whether the commencement of another suit for the same cause of action in the court of another state, since the last continuance, can be pleaded in abatement of the original suit. It is very clear that it cannot. A subsequent suit may be abated by an allegation of the pendency of a prior suit; but the converse of the proposition is, in *Wheat. 1.*

personal actions, never true. The decision of the Circuit Court of the District of Columbia overruling the plea was therefore correct.¹

*The next question is, whether the [*218 judgment rendered on the overruling of the plea ought to have been peremptory, or an award of *respondeas oster*. This point is completely settled by authority. If matter in abatement be pleaded *purs darrein continuance*, the judgment, if against the defendant, is peremptory as well on demurrer as on trial.²

The last question is, whether judgment could be entered up for the plaintiff for the amount of his damages by the court, without a writ of inquiry. This, also, is completely settled by authority in all cases whether the action is brought for a sum certain, or which may be made certain by computation.³

Judgment affirmed with costs.

Cited—13 Pet. 151; 7 Wall. 104; Hemp. 48; 2 Mo-Lean, 31; 5 Bliss. 54.

*[COMMON LAW.]

[*219

MOREAN

v.

THE UNITED STATES INSURANCE COMPANY.

The insurer on memorandum articles is only liable for a total loss, which can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination.

Where the ship being cast on shore near the port of destination, the agent of the insured employed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one-half was landed, dried, and sent on to the port of destination, and sold by the consignees at about one quarter the price of sound corn, this was held not to be a total loss, and the insurer not to be liable.

ERROR to the Circuit Court for the District of Pennsylvania. This was an action commenced by the plaintiff in error, upon a policy

1.—The exception *rei judicate* applies only to final or definitive sentences in another state, or in a foreign court, upon the merits of the case; and the rule has even been applied to the pendency of a cause in an inferior court in the same state. ⁹ Johns. Rep., 221. *Bowe v. Joy*, and the authorities there cited. *Sed quere*, if it were alleged that the inferior court had jurisdiction. *Fitzg.* 314. But whether the suit be pending in a foreign or a domestic court, a prior suit cannot be abated by the allegation of the pendency of a suit subsequently brought.

2.—See 1 Chitty on Plead., 636.

3.—See 2 Williams's Saunders, 107, *Holdip v. Otway*, note 2; 5 T. R. 87, *Maunsell v. Lord Masareene*; 8 T. R. 326, *Butler v. Street*; 8 T. R. 305, *Nelson v. Sheridan*; 8 T. R. 410, *Byron v. Johnson*; Dougl. 302, *Theluson v. Fletcher*; 1 H. Bl. 252, *Rashleigh v. Salmon*; 1 H. Bl. 529, *Andrews v. Blake*; 1 H. Bl. 541, *Longman v. Penn*; 3 Dall. 355, *Brown v. Van Braam*; 1 Dall. 185, *Graham v. Bickham*; 4 Dall. 149, *Graham v. Bickham*.

NOTE.—The rule as now established by jurisprudence and practice, is that the criterion of damage over fifty per cent. is not applicable to articles insured free from average; and "where the case embraces some articles within and some without the memorandum, no abandonment for mere deterioration in value can be valid, unless the damage to the non-memorandum articles exceeds a moiety of the value of the whole goods insured, including the

of insurance dated the 14th of December, 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of six per cent., on which \$5,000 were underwritten by the defendants, and valued at that sum, declared to be against all risks, except British capture, warranted American property. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the following facts agreed by the parties: The cargo consisted of 4,406 bushels of Indian corn, 100 barrels of navy bread, and 20 barrels of corn meal. The brig sailed from Baltimore on the 11th of November, 1812, and from Cape Henry on the 18th of the same month. She experienced, on the voyage, many and severe gales of wind. On 220*] the 18th of December she passed the rock of Lisbon, and came to anchor about four miles below Belem Castle. She leaked considerably in consequence of the injury she had sustained from the severe gales to which she had been exposed. After passing the rock the wind died away, and the current being adverse, she came to anchor. The master and supercargo landed, went through the customary forms at Belem to obtain a permit to pass the castle, and then proceeded to Lisbon. The health boat visited the brig, and ordered her to get above the castle as soon as possible. On the 19th she was again exposed to a heavy and fatal gale, and drove ashore near to Belem Castle, the sea breaking over her, and the crew hanging by the rigging to preserve their lives. The supercargo considered both vessel and cargo as totally lost. By directions of the custom-house, as much of the cargo as could be got out was unladed by a number of French prisoners, who were employed for that purpose. The cargo was all wet, and the part of it which was then taken out was carried to the fort, where it was spread and dried. From thence it was carried to Lisbon in lighters, and was sold in the corn market by the consignee of the cargo. The quantity so saved and sold amounted to about 1,988 bushels, which was sold at 50 cents a bushel, whereas the price of sound corn was \$2.25 a bushel. The supercargo petitioned for liberty to sell the corn at the place where it was first deposited and dried, which could not be granted, and he was obliged to submit to the custom of the place, and allow it to be sold at

the corn market. *The brig was so [221 completely wrecked that she was sold, with her materials, where she lay, in lots. Had the supercargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage, and the great expense of saving it. The net proceeds of the cargo were not much more than the expenses of saving it, including those of the supercargo. The port of Lisbon commences above Belem Castle, and the custom of the place is to discharge cargoes of corn between that castle and Cantara, which latter place is from one to two miles below Lisbon. The vessel never arrived at her port of discharge. On the 22d of December she was entered at the custom-house by the American vice-consul, which he said was necessary; but port dues do not attach to vessels till they pass the castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the consul, and the dues were paid. On the 11th of March, 1813, the plaintiff, having received notice of the shipwreck, offered to abandon, which was refused. Upon these facts the Circuit Court gave judgment for the defendants, and the cause was brought by writ of error into this court.

Pinkney, for the plaintiff. By the shipwreck, and breaking up of the voyage, the plaintiff was entitled to abandon; and there is no distinction in law in this respect between memorandum articles and general articles. The wreck disabled the ship from transporting the commodity, and the insured was not obliged to find another vehicle to carry it on. [222 Here more than a moiety of the thing insured was annihilated, to say nothing of the deterioration of the rest. By the contract, it became the duty of the agent of the insured to labor about the thing; and, if the wreck and consequent damage justified the right of abandonment, what effect can the conduct of the supercargo have? The subsequent transportation can have no effect on the right of abandonment; the supercargo was compelled to carry it on by the Portuguese government for the supply of the capital. The law holds that the insured shall not abandon in the case of memorandum articles upon deterioration merely. This is not a mere technical total loss; it is the

memorandum articles." *Marcardler v. Ches. Ins. Co.*, 8 Cranch, 39 per Story, J.; 2 Phill. on Ins., sec. 1615; *Aranzemendi v. Louis. Ins. Co.*, 2 Louis. R. 432.

About 1749 a stipulation was introduced in policies, that upon certain enumerated articles of a quality peculiarly perishable, the insurer shall not be answerable for any partial loss whatever. This stipulation is made by a memorandum at the bottom of the policy. *Marsh. on Ins.* 138, 139.

"From the first introduction of this clause in 1749 to the present time, the underwriter has never been held answerable, but where there has been a total loss of the articles mentioned in it." Per Justice Buller, cited *Marsh. on Ins.* 145; *Idem.* 149, 150.

An insurance against total loss, or with the exception of particular average, the two forms being equivalent, excludes a total constructive loss on account of damages to the article, so long as it remains in specie, and can be transported in the same ship, or another can be had to transport it, to the port of destination, so as to be there of value, as being the sort of article which it was at the time of being shipped. 2 Phill. on Ins., sec. 1767; *Brooks v. Louis. Ins. Co.*, 4 Martin. N. S. 640, 681; *Murray v. Hatch*, 6 Mass. R. 465.

There can be no recovery in case of loss of memorandum articles, when any portion thereof arrives in specie at the port of destination, although possessing no value there. 1 Car. 166; 1 John. 226; 4 Wend. 33; *De Peyster v. Sun. Ins. Co.*, 19 N. Y. 272; *Astor v. Un. Ins. Co.*, 7 Cow. 202; *Marcardler v. Ches. Ins. Co.*, 8 Cranch, 39; *Hugg v. Augusta Ins. Co.*, 7 How. 595; *Bullard v. Roger W. Ins. Co.*, 1 Curt. C. C. 148; *Guerlain v. Col. Ins. Co.*, 7 John. 527.

As to what is a total loss of memorandum articles. *Gordon v. Brown*, 2 John. 150; *DePeyster v. Sun. Mut. Ins. Co.*, 19 N. Y. 272; 8 C. 17 Barb. 306; 12 N. Y. Leg. Obs. 75; *Bryan v. N. Y. Ins. Co.*, 25 Wend. 617; *Murray v. Harm. Ins. Co.*, 58 Barb. 9; *Wallenstein v. Columbian Ins. Co.*, 44 N. Y. 204; *McCall v. Sun Ins. Co.*, 34 Supr. Ct. R. 2 J. & S., N. Y., 313; 8 C. 39 Id. 330; *Young v. Pac. Ins. Co.*, 34 Sup. Ct. R. J. & S. N. Y. 321; *Robertson v. Atl. Ins. Co.*, 37 Sup. Ct. R. J. & S. N. Y. 442; *Phill. on Ins.* See 1708, 1770; *Reimer v. Ringrose*, 20 L. J. R. N. S. Exch. 175, 4 Eng. L. & Eq. R. 388; *Roux v. Salvador*, 1 Bing. N. C. 528; *Murray v. Hatch*, 6 Mass. 465; *Skinner v. West. Ins. Co.*, 19 La. R. 273; *Parry v. Aberdeen*, 7 Barn & C. 411; *Judah v. Randall*, 2 Calne's Cas. 324; *Insurance Co. v. Fogarty*, 19 Wall. 540.

same thing as if the waves of the sea had washed this portion of the cargo up to Lisbon. The usage of the government, in compelling a sale in such cases, must have been equally known to both parties, and ought to operate equally on both.

Harper, contra. 1. A distinction is here attempted to be taken, on account of the nature of the peril by which the loss was occasioned. But the law prescribes that the insured must carry on memorandum articles, if possible, in another vehicle. No degree of injury, short of total destruction, will justify the insured in abandoning without making an effort to carry on the articles; and their actual arrival at the port of destination, no matter how, prevents abandonment.¹ Our policies contain no stipulation similar *to those in the English, as to "standing of the ship," in the case of memorandum articles. Wreck cannot help the insured, where the consequence is the destruction of the voyage only, without the actual destruction of the thing. The right of abandonment exists while the peril of total loss exists; but when the article is saved from that peril the right no longer exists.² 2. The right of abandonment was not exercised in due time; not until after the peril had ceased. Memorandum articles may be abandoned while they are submerged, or the hand of the enemy is upon them; but here the loss of the voyage was repaired by other means found to carry on the goods before the abandonment is made.³ They were transported, not by violence, but according to the usage of the country; and the parties must be considered in law as having assented to this usage.

Pinkney, in reply. If the insured was not obliged to carry on the commodities, and he would have had a right to abandon at the time, nothing subsequent has devested it. The sole object of the memorandum clause is to exempt the insurer from liability for deterioration only, and the reason was the inherent tendency of these articles to decay. The destruction of the vehicle, and the destruction of the greater part [224*] of the things transported, justified *the abandonment. None of the cases cited apply to this case; and the insurer knew of the usage as well as the insured. If this case be determined not to be a case justifying abandonment, on account of the saving of so small a part, what case of abandonment of memorandum articles can exist? The abandonment was in time, because made in good faith, and as soon as the insured knew of the peril.

WASHINGTON, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

All considerations connected with the loss of the cargo, in respect to quantity or value, may at once be dismissed from the case. As to memorandum articles, the insurer agrees to pay

for a total loss only, the insured taking upon himself all partial losses without exception.

If the property arrive at the port of discharge, reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. These principles are clearly established by the cases of *Mason v. Skurray*,⁴ *Neilson v. The [225] Columbian Insurance Company*,⁵ *Cocking v. Frazer*,⁶ *M'Andrews v. Vaughan*,⁷ *Dyson v. Rowcroft*,⁸ and *Magrath and Huggins v. Church*.⁹ The only question that can possibly arise, in relation to memorandum articles, is whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy. If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage by capture, shipwreck, or otherwise, may be treated as a total loss. This is the doctrine in the case of *Dyson v. Rowcroft*, in which the right to abandon was placed, not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it of throwing the cargo overboard; *this was, in effect, the [226] same thing as if it had, in a storm, been swept from the deck. Such, too, was the case of *Manning v. Newnham*.¹⁰ In *Cocking v. Frazer* no such necessity existed, and the breaking up of the voyage was attempted to be justified by the damaged state of the cargo, which, *per se*, did not justify the insured in putting an end to the voyage, and thus to turn a partial loss, for which the insurer was not liable, into a total loss. *Magrath and Huggins v. Church* establishes the same doctrine. Now, what is the present case? The ship being thrown on shore, within a mile or two from her port of destination, the agent of the insured employs persons to unlade as much of the cargo as could be

1.—*Marshall on Insurance*, Cond'y's ed. 223, and the cases there cited.

2.—1 *Caines's R.* 211, *Magrath & Huggins v. Church*; 3 *Caines's R.*, *Neilson et al. v. The Columbian Insurance Co.*; 9 *Johns. R.*, *Sheffell v. The New York Insurance Co.*; 2 *Camp. N. P. Cases*, 623, *Wilson v. The Royal Insurance Co.*; 7 *East*, 84, *Anderson et al. v. The Royal Insurance Co.*

3.—*Ibid.*

Wheat. 1.

4.—*At. N. P.* 1780; *Park*, 116; *Marshall, Cond'y's ed.*, 223.

5.—3 *Caines's Rep.* 108.

6.—*Park*, 114; *Marshall*, 227, *Cond'y's ed.*

7.—*At. N. P.* 1793; *Ib.*

8.—3 *Bos. & Pul.* 474.

9.—1 *Caines's Rep.* 196.

10.—*Park*, 169.

saved, and nearly one-half was, by his exertions, landed, dried, and sent to the market at Lisbon, and sold by the consignees at about one-quarter the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of *Neilson v. The Columbian Insurance Company*, and *Anderson v. the same*,¹ with this difference only, that in the first case the insured declined sending on the corn, when he might have done so, and, consequently, he was not permitted to turn a partial into a total loss by his own neglect; and, in the latter case, part of the cargo having been rescued from the wreck, before the offer to abandon was made, the insured could not claim as for a total loss, either on account of the injury which [227*] the corn had sustained or of his own act in not sending it forward to its port of destination. In the case now before the court, the cargo which was saved was sent forward and sold at the port of its destination.

In addition to the cases above referred to, the cases of *Biays v. The Chesapeake Insurance Company*, [228*] *pamy*,² and *Marcadier v. The Ches-*

apeake Insurance Company,³ in this court, are strongly applicable to the present, and seem, in a *great measure, to settle it. But it is [229*] contended, by the counsel for the plaintiff, that if the loss be such *as that the insured [230*] might at one time have treated it as total, it continues to be so, unless at the time when the *offer to abandon is made clear of the [231*] effects of the peril, and in a condition to prosecute the voyage, it is restored to his possession. Now, this is certainly not the condition of property, which, at the time of the offer to abandon, is in the possession of a recaptor, who has a right to retain it until he is paid his salvage. But, in the present case, the corn never was out of the possession of the agents of the insured, who exercised every act of ownership over it, subject, nevertheless, to the laws and customs of the country to which it was sent, with which the insurer and insured are supposed to have been acquainted at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo, which was landed, not only continued in the possession and under the direction of the agents of the

1.—3 Calnes's Rep. 108.

2.—February term, 1813. This was an insurance on hides, "warranted by the assured free from average, unless general." The declaration was for a total loss by perils of the seas; but it appeared in evidence that 3,288 hides (the whole number insured being 14,565) were put on board of a lighter, to be transported from the vessel to their place of destination; that the lighter, on the passage to the shore, was sunk, by which accident 780 of the hides, of the value of \$4,000, were totally lost, and the residue, to the number of 2,491, were fished up and saved at the expense of \$6,000, which were paid by the insured. The hides thus saved were delivered to his agent, and sold on his account. The whole sum insured on the cargo was \$25,000. In delivering the opinion of the court, it was remarked by Livingston, J., that whatever might have been the motive to the introduction of this clause in policies of insurance, which was done as early as the year 1749, and, most probably, with the intention of protecting insurers against losses arising solely from a deterioration of the article by its own perishable quality, or whatever ambiguity might once have existed, from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it was well understood at the present day, with respect to such articles, that underwriters are free from all partial losses, of every kind, which do not arise from a contribution towards a general average. It only remained, then, to examine (and so the question had been properly treated at the bar) whether the hides which were sunk, and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It had been considered as total by the counsel for the insured, but the court could not perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board not quite 800 were lost, making in point of value somewhat less than one-sixth part of the sum insured. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it was perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But, without having recourse to any reasoning on the subject, the proposition appeared too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue (which in this case amounted to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that it must forever be so as long as a part continues to be less than the whole. This, then, being a particular loss only, and not resulting from a general average, the court was of opinion that the defendants were not liable for it.

3.—February term, 1814. This was an action on a policy of insurance for \$31,000, upon any kind of lawful goods on board the brig Betsey, on a voyage from New York to Nantes. The cargo was of the invoice value of \$29,880, of which \$7,459 were in memorandum articles. The brig sailed on the voyage, but was compelled, by stress of weather and other accidents, to bear away for the West Indies, and arrived at Antigua, where the master applied to the Court of Vice-Admiralty for a survey; upon which the cargo was landed, and ordered by the court to be sold for the benefit of the concerned. Under this sale the net proceeds of the cargo amounted to \$13,767, and of the memorandum articles to \$6,883. The vessel was repaired within a reasonable time, and capable of performing the voyage with the original cargo, but the master abandoned the voyage at Antigua. Of the cargo 90 bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage during the voyage, exceeding a moiety of its original value. Within a reasonable time after receiving information of the loss, the plaintiff abandoned the whole cargo to the underwriters. The plaintiff contended that he was entitled to recover as for a total loss of the cargo insured, including the memorandum articles. Story, J., who delivered the opinion of the court, stated that a technical total loss might arise from the mere deterioration of the cargo, by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet, if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It had, therefore, been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It did not, however, appear that the exact quantum of damage which shall authorize an abandonment as for a total loss had ever become the direct subject of adjudication in the English courts. The celebrated *Le Guillon*, c. 7, art. 1, considers that a damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment. This rule had received some countenance from more recent elementary writers; and from its public convenience and certainty, had been adopted as a governing principle in some of the most respectable commercial states in the Union, and was now so generally established as not easily to be shaken. 1 Johns. Cas., 141; 1 Johns. Rep., 355, 406; Marshall on Insurance, 562, note 62, Condry's edit.; Park, 194, 6th edit. But this rule has been deemed not to ex-

insured, but it was relieved from the effects of the peril, as between the insurer and insured, and it was not only in a condition to prosecute the voyage, but it did in reality complete it. Upon the whole, it is the opinion of the court that this is not such a loss as the defendants engaged to indemnify against, and that judgment should be given in their favor.

*Judgment affirmed.*¹

Cited—7 How. 606; 19 Wall. 643; 3 Sumn. 224; 3 Mason, 443; 6 Blatchf. 324.

233*] * [COMMON LAW.]

WELCH v. MANDEVILLE.

A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

ERROR to the Circuit Court for the District of Columbia for Alexandria county. This

tend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriters from all partial losses; and, if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles, at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed. And, perhaps, even as to an extinction in value, where the commodity specifically remains, it might yet be deemed not quite settled whether, under the like circumstances, it would authorize an abandonment for a total loss. The case before the court was of a mixed character. It embraced articles of both descriptions: some within, and some without, the purview of the memorandum. If, in such a case, a deterioration exceeding a moiety in value be a proper case of technical total loss, it will follow that, in many cases, the underwriter will indirectly be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage to the memorandum articles were 40 per cent., and to the other articles 10 per cent., in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage, from which the memorandum meant to exempt him. Indeed, cases might arise in which the damage might exclusively fall on memorandum articles; and, if it exceeded the moiety in value of the whole cargo, might load him with the burden of a partial loss, in manifest contravention of the intention of the parties. A construction leading to such a consequence could not be admitted unless it be unavoidable, and the court were entirely satisfied that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and, in order to effectuate this right, it was necessary, where a technical total loss is sought to be maintained, upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, in a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, could be valid, unless the damage on the non-memorandum articles exceeded a moiety of the whole cargo, including the memorandum articles. The case was considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect was given to the contract of the parties. The underwriter would never be made responsible for partial losses on memorandum articles, however

Wheat. 1.

was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville & Jamesson. The suit abated as to Jamesson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this court arises, states, that on the 5th of July, 1806, James Welch impleaded Mandeville & Jamesson, in the Circuit Court of the District of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterwards, to wit, at a session of the Circuit Court, on the 31st day of December, 1807, "the said James Welch came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself." The plea then avers that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville & Jamesson, in the former suit, are the same persons who are *defendants [*234 in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff

great; and the technical total losses for which alone he could be liable, were such as stood unaffected by the perishable nature of the commodity which he insures. Admitting, therefore, the rule to be correct that the party has a right to abandon when the depreciation exceeds a moiety of the value, the plaintiff had not brought himself within that rule, as applied to a cargo of a mixed nature, and there was, consequently, no total loss proved by the perils of the seas.

1.—We are informed by Targa, c. 52, n. 18, p. 220, and Casaregis, Disc. 47, that in the practice of Italy, in order to avoid the difficulty of settling averages on perishable articles, the clause *exclusio getto et avaria*, as it was called, was introduced. The French law requires goods, which, by their [*232 nature, are subject to particular detriment or diminution, such as grain, salt, or merchandise, subject to leakage, to be specified in the policy, otherwise the insurer is not liable for the damages or losses which may happen to these articles, unless the insured was ignorant of the nature of the cargo at the time the contract was made. Ordonnance de la Marine, l. 3, tit. 6, des Assurances, art. 31; Code de Commerce, l. 2, tit. 10, art. 355. In the different parts of France, before the revolution, various clauses were inserted in the policy, excluding responsibility for losses not exceeding a certain percentage on such articles. At Marseilles the insurers exempted themselves from average losses, on certain voyages, by a clause which was construed to extend both to general and particular average, on vessel or cargo. Under this clause *franc d'avarie*, the insurer was held answerable only for an entire loss of the subject insured. It was, however, determined not to extend to any case of technical total loss, which by the French law authorizes the insured to abandon, such as capture, stranding, shipwreck, &c. 1 Emerigon, Traite des Assurances, c. 12, s. 45, 46; Pothier d'Assurance, No. 166; Valin sur l'Ordonnance, l. 3, tit. 6; Des Assurances, art. 47. The origin of the English memorandum is referred by Sergeant Dunning, in the case of Wilson et al. v. Smith (3 Burr. 1551), to its "being better calculated to deliver the insurers from small averages than adapting the premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer; which method would have made the policy too complicated, and which the Dutch bad at first tried but afterwards altered." The English formula is as follows: "N. B.—Corn, &c., are warranted free from average, &c., unless general, or the ship be stranded." The last words, or *the ship be stranded*, have been omitted for several years in the forms of policies adopted by the English insurance companies, viz., the London Royal Assurance, and the Royal Exchange Assurance. 2 Selwyn's N. P., 949. They are not inserted in the policies used in the United States.

filed a special replication, protesting that the said James Welch did not come into court and acknowledge that he would not further prosecute the said suit and from thence altogether withdraw himself; and avers that James Welch, being indebted to Prior, in more than \$8,707.09, and Mandeville & Jamesson being indebted, by virtue of the covenant in the declaration mentioned, in \$8,707.09, to Welch, he, Welch, on the 7th of September, 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said \$8,707.09, in discharge of the said debt, of which assignment the replication avers Mandeville & Jamesson had notice. The replication further avers that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication further avers that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, "that the said James Welch had no authority from Prior to agree or dismiss said suit. The replication further avers that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers that the said Prior did not know that the said suit was dismissed until after the adjournment of the court at which it was dismissed; and, further, that the supposed entry upon the record of the court in said suit, that the plaintiff voluntarily came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion, and fraud; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words: "This suit is dismissed, agreed," and that this entry was made by the clerk without the order of the court, and that there is no judgment of dismissal rendered by the court, but only a judgment refusing to re-instate the cause.

The cause was argued by *Lee* for the plaintiff, and *Swann* for the defendant.

Storx, J., delivered the opinion of the court:

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the [236*] benefit of *his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

80

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenanted combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retrahit*; and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is *bona fide*, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court that the judgment of the Circuit Court, overruling the replication to the second plea of the defendant, is erroneous, *and the same [*237] is reversed, and the cause remanded for further proceedings.

*Judgment reversed.*¹

S. C. 5 Wheat. 277.

Cited—5 Wheat. 283; 5 Pet. 394; 3 Wood. & M. 386.

*[PRIZE.]

[*238]

L'INVINCIBLE.

THE CONSUL OF FRANCE AND HILL & M'COBB, Claimants.

During the late war between the United States and Great Britain, a French privateer, duly commissioned, was captured by a British cruiser, afterwards recaptured by an American privateer; again captured by a squadron of British frigates, and recaptured by another American privateer, and brought into a port of the United States for adjudication. Restitution, on payment of salvage, was claimed by the French consul. A claim was also interposed by citizens of the United States, who alleged that their property had been unlaw-

1.—By the common law, choses in action were not assignable, except to the crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam*, as it was called; and it was stipulated that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier de Vente, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. Ib. 110, 554; Code Napoleon, liv. 3, tit. 6. De la Vente, c. 8, s. 1890. The court of chancery, imitating, in its usual spirit, the civil law in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of choses in action. This liberality was at last adopted by the courts of common law, who now consider an assignment of a chose in action as sub-

Wheat. 1.

fully taken by the French vessel before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed; and it was held that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.

APPEAL from the Circuit Court for the District of Massachusetts.

The French private armed ship *L'Invincible*, duly commissioned as a cruiser, was, in March, 1813, captured by the British brig of war *La Mutine*. In the same month she was recaptured by the American privateer *Alexander*; was again captured, on or about the 10th of May, 1813, by a British squadron, consisting of the frigates *Shannon* and *Tenedos*; and, afterwards, in the same month, again recaptured by the **239*** American privateer *Young Teazer*, carried into Portland, and libeled in the District Court of Maine for adjudication, as prize of war. The proceedings, so far as material to be stated, were as follows: At a special term of the District Court, held in June, 1813, a claim was interposed by the French consul on behalf of the French owners, alleging the special facts above mentioned, and claiming restitution of the ship and cargo, on payment of salvage. A special claim was also interposed by Mark L. Hill and Thomas M'Cobb, citizens of the United States, and owners of the ship *Mount Hope*, alleging, among other things, that the said ship, having on board a cargo of freight, belonging to citizens of the United States, and bound on a voyage from Charleston, S. C., to Cadiz, was on the high seas, in the latter part of March, 1813, in violation of the law of nations, and of treaties, captured by *L'Invincible*, before her capture by *La Mutine*, and carried to places unknown to the claimants, whereby the said ship *Mount Hope* and cargo became wholly lost to the owners, and thereupon praying, among other things, that after payment of salvage, the residue of said ship *L'Invincible* and cargo might be condemned and sold for the payment of the damages sustained by the claimants. At the same term, by consent, an interlocutory decree of condemnation to the captors passed against said ship *L'Invincible*, and she was ordered to be sold, and one moiety of the proceeds, after deducting expenses, was ordered to be paid to the captors, as salvage, and the other moiety to be brought into court, to abide the final decision of the respective claims of the **240*** French consul and Messrs. Hill & M'Cobb. The cause was then continued for a further hearing unto September term, 1813, when Messrs. Maisonarria & Devouet, of Bayonne, owners of *L'Invincible*, appeared under protest, and in answer to the libel and claims of Messrs. Hill & M'Cobb alleged, among other

things, that the ship *Mount Hope* was lawfully captured by *L'Invincible*, on account of having a British license on board, and of other suspicious circumstances, inducing a belief of British interests, and ordered to Bayonne for adjudication; that (as the protestants believed) on the voyage to Bayonne the *Mount Hope* was recaptured by a British cruiser, sent into some port of Great Britain, and there finally restored by the Court of Admiralty to the owners, after which she pursued her voyage, and safely arrived, with her cargo, at Cadiz, and the protestants thereupon prayed that the claim of Messrs. Hill & M'Cobb might be dismissed. The replication of Messrs. Hill & M'Cobb denied the legality of the capture, and the having a British license on board the *Mount Hope*, and alleged embezzlement and spoliation by the crew of *L'Invincible*, upon the capture; admitted the recapture by a British cruiser, and the restitution by the admiralty upon payment of expenses, and prayed that the protestants might be directed to appear absolutely and without protest. Upon these allegations the District Court overruled the objection to the jurisdiction of the court, and compelled the owners of *L'Invincible* to appear absolutely, and without protest, and thereupon the owners appeared absolutely, and alleged the same matters in defense which were stated in their answer under protest, and prayed the court to assign Messrs. Hill & M'Cobb to answer interrogatories touching the premises, which was ordered by the court. Accordingly, Messrs. Hill & M'Cobb made answer to the interrogatories proposed, except an interrogatory which required a disclosure of the fact whether there was a British license on board, which M'Cobb (who was master of the *Mount Hope* at the time of the capture) declined answering, upon the ground that he was not compelled to answer any question, the answer to which would subject him to a penalty, forfeiture, or punishment; and this refusal, the District Court, on application, allowed. Hill, in answer to the same interrogatory, denied any knowledge of the existence of a British license. The cause was thereupon heard on the allegations and evidence of the parties, and the District Court decreed that Messrs. Hill & M'Cobb should recover against the owners of *L'Invincible* the sum of \$9,000 damages, and the costs of the suit. From this decree the owners appealed to the Circuit Court, and in that court their plea to the jurisdiction was sustained, and the claim of Messrs. Hill & M'Cobb dismissed, with costs. An appeal was thereupon entered by them to this court.

Dexter, for the appellants. The sole question is, whether the District Court of Maine had jurisdiction. It is a case where a citizen, against whose property a tort has been committed **242** on the high seas, appears in his own natural forum, and the *res*, which was the instrument of the wrong done, is within the territorial jurisdiction of his own country, and in possession of the court for other (lawful) purposes when he applies for justice. 1. An injury of this nature is either to be redressed by a process *in rem* or *in personam*, and in either case, application must be made where the thing, or person, is found. The action is transitory in both cases; where the party proceeds *in rem*, the

stantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee as *procurator in rem suam*. See 4 T. R. 340, *Master v. Miller*; 1 Johns. C. 411, *Andrews v. Beecker*; 3 Johns. C. 242, *Bates v. New York Insurance Company*; 1 Johns. R. 532, *Wardell v. Eden*, *in nota*; 3 Johns. R. 423, *Carver v. Tracy*; 11 Johns. R. 47, *Raymond v. Squire*; 4 Johns. R. 406, *Van Vechten v. Greves*; 12 Johns. R. 276, *Westor v. Barker*.

Wheat. 1.

U. S., Book 4.

6

81

possession of the thing gives jurisdiction to the tribunal having that possession. It is said that in prize proceedings the forum of the captor is the only one having jurisdiction. But what is the extent of the principle, and what are the exceptions to the rule? The rule is not of a nature peculiar to prize proceedings, but is rather a corollary from the general principles of admiralty jurisdiction. The locality of the question of prize or no prize must have been originally determined by the fact of the property being carried *infra præsidia* of the captor's country, and in possession of its courts. I agree that the possession of the thing does not give jurisdiction to a neutral country, and the reason is, because the country is neutral. But this has only been recently settled; and in the reign of Charles II. the question was referred to the crown lawyers in England (then neutral), whether the property of English subjects, unjustly taken by foreign cruisers, should not be restored to them by [243*] the English court.¹ *It is, however, now determined that, unless there has been a breach of neutrality in the capture, the courts of a neutral state cannot restore, much less condemn. But this concession does not shake the position that local jurisdiction is founded upon the possession of the *res*, which in this case having escaped from the former captor, the action becomes transitory, and follows the thing. There are several decisions of this court, all confirming, either directly or by analogy, the position now taken.² In the famous report of Sir George Lee, &c., on the memorial of the King of Prussia's minister, relative to the non-payment of the Silesian loan, which was intended to maintain the strongest maritime pretensions of Great Britain, the only passage that even glances at the doctrine of the exclusive jurisdiction of the courts of the captor's country is, that all captors are bound to submit their seizures to adjudication, and that the regular and proper court is that of their own country. But this principle is sustained rather by the authority of usage and treaties than by elementary writers; and yet, all the other incidental ques-

tions are illustrated by multifarious citations of elementary books, equally respected in Prussia as in England. The reporters do not fairly meet the menace of the Prussian monarch, to set up courts of prize in his own dominions; but content themselves with asserting that it would be irregular, absurd, and impracticable. Had *it been at that time settled by Europe- [*244 an jurists of authority, the question would not have been made; or if made, would have been satisfactorily answered. The general principle has been rather assumed than proved. And the practice of one nation, at least, contradicts it; for the ordinance of Louis XIV. restores the property of French subjects brought into the ports of France.³ 2. Suppose the *ques- [*245 tion of prize or no prize to be exclusively within the jurisdiction of the courts of the capturing power, yet that question does not arise in the present case. This is a question of probable cause. If the commander of L'Invincible took without probable cause, he had no right; if he took with probable cause, then the claimants have sustained no injury, and ought not to recover damages; consequently, no injury can result from the court taking cognizance of the suit. As to the spoliation after the capture, that is still less a question of prize. 3. But be the general principles as they may, the jurisdiction having attached for other purposes on recapture, the former owner of a vessel unlawfully taken and despoiled by the prize, comes in and claims damages under the law of nations.

Pinkney, contra. If there be any rule of public *law better established than another, [*246 it is, that the question of prize is solely to be determined in the courts of the captor's country. The report on the memorial of the King of Prussia's minister, refers to it as the customary law of the whole civilized world. The English courts of prize have recorded it; the French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lays, as an elementary principle, at the very foundation of that law. The whole question, then, is, whether

1.—2 Browne's Civ. and Adm. Law, 256.

2.—3 Dall. 6, *Glass v. The Betsey*; 3 Dall. 133, *Talbot v. Jansen*; 3 Dall. 333, *Del Col. v. Arnold*; 3 Dall. 138, *The Mary Ford*.

3.—*Ordonnance de la Marine*, liv. 3, tit. 9, *Des Prizes*, art. 15. The same provision is contained in the 16th article of the Spanish ordinance of 1718; and Valin considers the restitution of the effects as a just recompense for the benefit rendered to the captor, in granting him an asylum in the ports of the neutral country to whose subjects those effects belong. But Azuni contests this opinion, and maintains that the obligation to restore in this case is founded on the universal law of nations. Part 2, c. 4, art. 3, s. 18. And it must be confessed that the reasons on which Valin rests his opinion are by no means satisfactory; so that the French and Spanish ordinances are evidently mere municipal regulations, which have not been incorporated into the code of public law, and cannot be justified upon sound principles. It is an observation, somewhere made by M. Portalis, that such regulations are not, properly speaking, to be considered laws, but are essentially variable in their nature, *pro temporibus et causis*, and are to be tempered and modified by judicial wisdom and equity. These ordinances are indeed supported by the practice of the Italian states, and the theory of certain Italian writers. Among the latter are Galliani and Azuni, both of whom maintain, each upon different grounds, the right of the neutral power, within whose territorial

jurisdiction a prize is brought, to adjudicate upon the question of prize or no prize, so far as the property of its own subjects are concerned. They are, however, opposed by their own countryman, Lampredi, who, after assigning the reasons for his dissent, concludes thus: "*Egli*" (the neutral) *dunque dovrà rispettare questo possesso* (that of the captor) *lasciando che i giudici costituiti dal Sovrano del predatore lo dichiarino o legittimo, o illegittimo, e così o liberino la preda, o la facciano passare in dominio del predatore, purché questo giudizio si faccia fuori del suo territorio, ove nessuno usurpar può i diritti spettanti al sommo impero. È falso adunque in diritto quello che asserisce il Galliani, ed il progetto, ch'egli propone sul giudizio delle prede non si potrebbe eseguire senza lesione dei diritti sovrani.* Lampredi, p. 228. Since the decision of the case to which this note is appended, the following may be considered as the only exceptions to the general rule, that the question of prize or no prize, with all its incidents, is only to be determined in the courts of the captor's nation established in his country, or in that of an ally or co-belligerent. 1st. The case of a capture made by the cruisers of the belligerents within the jurisdiction of a neutral power; and, 2d. That of a capture made by armed vessels fitted out in violation of its neutrality, and where the captured property, or the capturing vessel, is brought into its ports. The obvious foundation of these exceptions is to be discovered in the right and the duty of every neutral state to maintain its neutrality impartially, and neither to do nor suffer any act which might tend to involve it in the war.

this case be an exception to the general rule. The positive law of nations has ordained the rule; the natural law of nations has assigned the reasons on which it is founded; and Rutherford, in his institutes,¹ explains those reasons, which arise from the amenability of governments to each other. A cruiser is amenable only to the government by whom he is commissioned; that government is amenable to the power whose subjects are injured by him; and after the ordinary prize judicature is exhausted, they are to apply to their own sovereign for redress. The principal object of that judicature is the examination into the conduct of the captors. The question of property is merely incidental. But, whatever the question may be, it is to be judged exclusively by the courts of the capturing power. It is contended, on the other side, that this jurisdiction must be exerted *in rem*; but the jurisdiction to which Rutherford refers is much more extensive, not confining it to the question whether the property be transferred.² If the thing be within the possession of the court, then it exerts a jurisdiction *in rem*, by restitution, or condemnation, as the case may be. But if not, then it exerts it on the person, and inquires into the manner in which the captor has used his commission, and whether any wrong has been done to friends, under color of its authority. It is a gratuitous assumption that prize jurisdiction is always *in rem*, as that of the ordinary court of admiralty usually is. The commissioned captor cannot be responsible to any but his own sovereign; from him he receives the law which forms his rule of conduct. Sir William Scott expressly admits that his king can give him the law, and the judges of other European countries practically admit the same thing. *A fortiori*, can the sovereign give it to his delegated cruisers; he being answerable over, in the first instance, diplomatically, and finally by war, to the injured nation. The captor is responsible only through the courts of his own country. 2. Is this case an exception to the general rule? The reasons of the allowed exceptions do not apply to this case. Thus the cases are, of violation of neutral territory; or where a commission is issued to subjects of the neutral country; or, lastly, of a prize brought into its territorial limits with neutral property on board. In the case of *Talbot v. Jansen* the commission was null, and captures under it were void; it was equivalent to no commission at all. Here is no pretense that the commission was null; that she had been fitted out here; or that the thing captured had been brought within the grasp of our municipal law; or that the capture was made ^{248*} within our limits. In *Del Col v. Arnold* the ground of the decision was, that the thing was brought voluntarily into our limits, and the wrong done within those limits. The judgment must be supported on that ground or it cannot be supported at all. As to *The Betsey*, its authority is doubtful, and it cannot be referred to any intelligible principle, unless it be that the belligerent captor submits to the neutral jurisdiction, by bringing the property within it. *The Cassius*,³ is directly in point for the captors in the case now before the court. Why was

the libellant's application refused in that case? Because the thing captured was not brought in; thereby showing that, in the present case, the prize not having been brought in, damages cannot be awarded against the captor. As to the ordinance of Louis XIV., it goes no further than this court did in the case of *The Betsey*. The same authority has been practically assumed among the Italian states; but further no nation, ancient or modern, has gone. The natural, customary, and conventional law of nations, are all equally adverse to it. The claimants have a remedy, correspondent to the extent of their injury, in the courts of France. The prize jurisdiction is as effectually exerted when the property is not, as when it is, within its control. The cases are multiplied where the thing is even lost, of an application compelling the captor to proceed to adjudication; if he fails to show that the capture was lawful, he is mulcted in costs and damages.³ The cruisers of every nation are bound to obey the ²⁴⁹ instructions of the sovereign power, whether lawful or not. The condemnations under the British orders in council of November, 1793, were reversed by the lords of appeal, and mere dry restitution decreed, without damages, because the cruisers were justified by the instructions. But the commissioners under the 7th article of the British treaty of 1794, gave damages for what the lords of appeal were obliged judicially to refuse them, upon the authority of Rutherford, and upon the ground that the British government was answerable over to the injured power. In the present case, if justice should be refused in the courts of France, the French government would be answerable over to this country. The process is here, in effect, *in personam*, and it is as if the captor were here. You go beyond retaining your own property merely, and lay your hand on his; which is his by the municipal code only; by the law of nations it is the property of the state. It is certain he was not originally responsible personally, and the capture and recapture can have made no difference. The acts exerted over him by the enemy could not have changed his responsibility; nor can the captor's having failed to proceed to adjudication in France, for the claimants may compel him; nor the bringing in of his vessel, for, as to him, it was involuntary. 3. Probable cause is emphatically a question of prize or no prize; but it is not always the same by the law of different countries. The law of France must, therefore, be looked into, and applied to the case, which the French courts only are competent to expound. If their ²⁵⁰ position does injustice to the party, his remedy is by application to his own government. So, also, is the question of spoliation a question of prize; and the prize court, having jurisdiction of the principal matter, has jurisdiction of all its incidents.

Dexter, in reply. 1. There is only one authority produced to show that the prize jurisdiction is exclusively in the courts of the capturing power. Rutherford speaks only of cases where the proceeding is to condemn, or restore, the captured property. When he, or any other writer, gives the reasons for his opinion, the latter is worth just as much as the for-

1.—2 Rutherford's Institutes, 594.

2.—3 Dall. 121.

Wheat. 1.

3.—1 Rob. 93, *The Betsey*.

mer, and no more. What is the reason? He says it cannot be known before trial that forcible possession was lawful; and if unlawful, it could not give jurisdiction. It may be answered, in every case where jurisdiction is gained by possession, it is unknown before trial whether it was obtained lawfully or by force or fraud. All-right of jurisdiction from possession is thus equally denied. The other party cannot be injured by submitting to the jurisdiction while that uncertainty remains. If it shall appear that the possession was unlawfully acquired, he will be restored to his right by the exercise of jurisdiction. Rutherford asserts that the true ground of prize jurisdiction is that the state of the captor is responsible to other states for his misconduct. It may be answered, that when the state has only granted a lawful commission, and has not assented to any unlawful act done by color of it, such state is not responsible, though the act be **251*** unlawful. *For the naked unauthorized act, then, the state is not accountable. The unjust judgment of a neutral state, condemning the property, might make the latter state answerable, but not the former. The reasoning goes on the supposition that the state of the captor might relieve itself from responsibility by doing justice, in restoring the property. This can only be done where the property can be reached by it. Holding jurisdiction would rather relieve the state of the captor from responsibility; for either the injury of the complaining party would be repaired, or the courts of his own country would determine that he had not suffered any. There is no distinction between the property being lawfully brought in, as in this case, or voluntarily, as in the case of *The Betsey*. The injured party has an election to proceed *in personam* against the owners, or *in rem* against the inanimate instrument of the wrong. 2. There may be a jurisdiction to restore, without invading the exclusive prize jurisdiction of the captor's country. Let the court take jurisdiction, and if it turns out to be a question of prize or no prize, then dismiss the suit. Suppose the question to be, whether the captor had a commission, must we not proceed further, and see what is the extent of that commission? And if the act done exceed its limits, has not the neutral state a right to adjudge costs and damages to its citizens injured, without any authority from the captor's sovereign? 3. The vessel is in judicature, rightfully and lawfully. The party now protesting against the jurisdiction, had submitted to it for another purpose. He claims his property upon the payment of **252*** wage. *The obvious answer to his demand is, When you have discharged all liens, you shall have it. The Court of Admiralty, having jurisdiction for another purpose, like a court of chancery in the case of a mortgage, has a right to do complete equity. Why is restitution decreed in the case of violated territory? Because the courts of the neutral state, having jurisdiction for the principal purpose of avenging its violated sovereignty, also takes jurisdiction of all the incidents.

JOHNSON, J., delivered the opinion of the court:

It would be difficult to distinguish this case,

in principle, from those of *The Cassius* and *The Exchange*,¹ decided in this court. The only circumstance, in fact, in which they differ, is that in those cases the vessels were the property of the nation; in this it belongs to private adventurers. But the commission under which they acted was the same; the same sovereign power which could claim immunities in those cases equally demands them in this; and although the privateer may be considered a volunteer in the war, it is not less a part of the efficient national force, set in action for the purpose of subduing an enemy. There may be, indeed, one shade of difference between them, and it is that which is suggested [**253** by Rutherford in the passage quoted in the argument. The hull, or the owners of the privateer, may, perhaps, under some circumstances, be subject to damages in a neutral court after the courts of the captor have decided that the capture was not sanctioned by his sovereign. But, until such a decision, the seizure by a private armed vessel is as much the act of the sovereign, and entitled to the same exemption from scrutiny, as the seizure by a national vessel. In the case of *The Cassius*, which belonged to the French republic, the vessel was finally prosecuted and condemned on an information *qui tam*, under the act of Congress for an illegal outfit, and thus had applied to her, under the statute, the principle which dictated the decision in the case of *Talbot v. Jansen* with relation to a private armed vessel. As to the restitution of prizes, made in violation of neutrality, there could be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture even to a vessel which is national property.

*But it is contended that, admitting [**254** the general principle, that the exclusive cognizance of prize questions belongs to the capturing power, still the peculiar circumstances of this case constitute an exception, inasmuch as the recapture of the *Mount Hope* puts it out of the power of the French courts to exercise jurisdiction over the case. This leads us to inquire into the real ground upon which the exclusive cognizance of prize questions is yielded to the courts of the capturing power. For the appellants, it is contended that it rests upon the possession of the subject-matter of that jurisdiction; and as the loss of possession carries with it the loss of capacity to sit in judgment on the question of prize or no prize, it follows that the rights of

1.—February Term, 1812. In this case it was determined that a public vessel of war, belonging to the Emperor Napoleon, which was before the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself in a friendly manner, was exempt from the jurisdiction of this country, and could not be reclaimed by the former owner in its tribunals.

judging reverts to the state whose citizen has been divested of his property. On the other hand, I presume, by the reference to Rutherford, we are to understand it to be contended that it is a right conceded by the customary law of nations, because the captor is responsible to his sovereign, and the sovereign to other nations.

But we are of opinion that it rests upon other grounds; and that the views of Vattel on the subject are the most reconcilable to reason, and the nature of things, and furnish the easiest solution of all the questions which arise under this head. That it is a consequence of the equality and absolute independence of sovereign states on the one hand, and of the duty to observe uniform impartial neutrality on the other.

Under the former, every sovereign becomes the acknowledged arbiter of his own justice, [255*] and cannot, "consistently with his dignity, stoop to appear at the bar of other nations to defend the acts of, his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them. Under the latter, neutrals are bound to withhold their interference between the captor and the captured; to consider the fact of possession as conclusive evidence of the right. Under this it is, also, that it becomes unlawful to divest a captor of possession even of the ship of a citizen, when seized under a charge of having trespassed upon belligerent rights.

In this case the capture is not made as of a vessel of the neutral power; but as of one who, quitting his neutrality, voluntarily arranges himself under the banners of the enemy. On this subject there appears to be a tacit convention between the neutral and belligerent; that, on the one hand, the neutral state shall not be implicated in the misconduct of the individual; and on the other, that the offender shall be subjected to the exercise of belligerent right. In this view the situation of a captured ship of a citizen is precisely the same as that of any other captured neutral; or, rather, the obligation to abstain from interference between the captor and captured becomes greater, inasmuch as it is purchased by a concession from the belligerent, of no little importance to the peace of the world, and particularly of the nation of the offending individual. The belligerent contents himself with cutting up the unneutral commerce, and makes no complaint to the neutral [256*] power, not even "where the individual rescues his vessel, and escapes into his own port after capture.

Testing this case by these principles, it will be found that, to have sustained the claim of the appellants, the court below would have violated the hospitality which nations have a right to claim from each other, and the immunity which a sovereign commission confers on the vessel which acts under it; that it would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another, and from the acknowledged right of every belligerent to judge for himself when his own rights on the ocean have been violated or evaded; and, finally, that it would have been a deviation from that strict line of neutrality which it is the universal duty of neutrals to observe—a duty of the most

delicate nature with regard to her own citizens, inasmuch as through their misconduct she may draw upon herself the imputation of secretly supporting one of the contending parties. Under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power or not. Yet, if the recapture of the prize necessarily draws after it consequences so fatal to the rights of an unoffending individual as have been supposed in the argument, it may well be asked, shall he be referred for redress to courts which, by the state of facts, are rendered incompetent to afford redress?

The answer is, that this consequence does not follow from the recapture. The courts of the captor *are still open for redress. The [257*] injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate, or indemnify him.

Some confusion of idea appears to hang over this doctrine, resulting chiefly from a doubt as to the mode in which the principle of exclusive cognizance is to be applied in neutral courts to cases as they arise; and this obscurity is increased by the apparent bearing of certain cases decided in this court in the years 1794 and 1795.

The material questions necessary to be considered, in order to dissipate these doubts, are: 1st. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then does not jurisdiction over the subject-matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta*?

The first of these questions was the only one settled in the case of *Glass v. The Betsey*, and the case was sent back with a view that the District Court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.

And this is certainly the correct course. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. But sitting and judging, as such courts do, by the law of nations, the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights *of war, their progress is arrested; for this circumstance is, in those courts, a sufficient evidence of right.

That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact that there are acknowledged cases in which the courts of a neutral may interfere to divest possessions, to wit, those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture. The case of *Talbot v. Jansen*, as well in the reasoning of the judges as in the final decision of the case, is fully up to the support of this doctrine. But it is supposed that the case of *The Mary Ford* supports the idea that

as the court had acknowledged jurisdiction over the question of salvage, its jurisdiction extended over the whole subject-matter, and authorized it to proceed finally to dispose of the residue between the parties litigant.

That case certainly will not support the doctrine to the extent contended for in this case. It is true that the court there lay down a principle, which, in its general application is unquestionably correct, and which, considered in the abstract, might be supposed applicable to the present case. But this presents only one of innumerable cases which occur in our 259*] *books to prove how apt we are to misconceive and misapply the decisions of a court, by detaching those decisions from the case which the court propose to decide. The decision of the Supreme Court in that case is in strict conformity with that of the Circuit Court in the present case. For when the court come to apply their principle, they do not enter into the question of prize between the belligerents, but decree the residue to the last possessor; thus making the fact of possession, as between the parties litigant, the criterion of right; and this is, unquestionably, consistent with the law of nations. Those points, which can be disposed of without any reference to the legal exercise of the rights of war, the court proceeds to decide; but those which necessarily involve the question of prize or no prize, they remit to another tribunal.

It would afford us much satisfaction could we, with equal facility, vindicate the consistency of this court in the case of *Del Col v. Arnold*. To say the least of that case, it certainly requires an apology. We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which the case is reported, which we are informed had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer to the case of *The Cassius*, decided but the term preceding, and observe the correctness with which the law applicable to this case, 260*] in principle, is laid down in *the recital to the prohibitions, we are confirmed in that opinion.

But the case itself furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears that, when pursued by the *Terpsicore*, the *Grand Sachem* was wholly abandoned by the prize crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore when the prize crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total dereliction (an opinion which, if incorrect, was only so on a point of fact, and one in support of which much might be said, as the prize crew had no proprietary interest, but only a right founded on the fact of possession), it would follow that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the *Industry*, to satisfy those damages, the court give no opinion, but place the application of the proceeds of the sale of this vessel on

the ground of consent; a principle, on the correctness of the application of which to that case the report affords no ground to decide.

But, admitting that the case of *The Grand Sachem* was decided under the idea that the courts of the neutral can take cognizance of the legality of belligerent seizure, it is glaringly inconsistent with the acknowledged doctrine in the case of *The Cassius* and of *Talbot v. Jansen*, decided the term next *preceding; [*261 and in *The Mary Ford*, decided at the same term with that of *The Grand Sachem*. The subject has frequently, since that term, been submitted to the consideration of this court, and the decision has uniformly been that it is a question exclusively proper for the courts of the capturing power.

Sentence affirmed.

Cited—4 Wheat. 307; 7 Wheat. 351; 6 How. 432; 11 Ct. 21; 1 Curt. 89; 5 Mason, 471.

[INSTANCE COURT.]

THE EDWARD. SCOTT, Claimant.

In revenue, or instance causes, the Circuit Court may, upon appeal, allow the introduction of a new allegation into the information, by way of amendment.

Under the 3d section of the act of Congress of the 28th of June, 1809, every vessel bound to a foreign permitted port was obliged to give a bond, with condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port.

Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, the Supreme Court will remand the cause to the Circuit Court, with directions to allow the information to be amended.

APPEAL from the Circuit Court for the District of Massachusetts. The offense charged in the information filed in this case, in the District Court of Massachusetts, is, that the ship *Edward*, on the 12th day of February, 1810, departed from the port of Savannah *with a cargo, bound to a foreign port [*262 with which commercial intercourse was not permitted, without a clearance, and without giving a bond in conformity with the provisions of the act of Congress of the 28th of June, 1809. A claim was interposed by George Scott, of Savannah, in which he alleged that the ship did not depart from Savannah, bound to a foreign port, in manner and form as stated in the information. The District Court condemned the ship; from which sentence an appeal was taken to the Circuit Court, where the district attorney was permitted by the court to amend the information, by filing a new allegation, that Liverpool, in Great Britain, was the foreign port to which the ship was bound when she departed from Savannah, and that she did so depart without having a clearance, agreeably to law. The Circuit Court affirmed the sentence, and the cause was brought before this court upon an appeal.

Harper, for the appellants and claimant. 1. The object of the 3d section of the act of the 2d of June, 1809, was to prevent the going to prohibited ports. When this supposed offense was committed, there were no prohibited ports,

Wheat. 1.

and the legislature could never mean to attach the penalty to ports permitted temporarily. If Liverpool was not, at the time, a prohibited port, and there were no other prohibited ports, the vessel was not obliged to give bond. Before the voyage was undertaken, it had become impossible to commit the offense with which the vessel is charged. 2. The information **263*** charges the vessel *with going to a forbidden port without a clearance. But Liverpool was not a forbidden port, and therefore the information cannot stand. 3. The allegation was, that the vessel proceeded from Savannah; but the proof was, that the voyage was undertaken from Charleston. The prosecutor could not lawfully prove a proceeding from any other port than that alleged in the information.

The *Attorney-General* and *Law*, for the respondents, argued: 1. That the laws, under which the supposed offense was committed, were in force at the time. But as the argument is fully stated in the opinions of the judges, it is omitted here. 2. Common law strictness is not required in these proceedings, and it is unreasonable to insist on the particular foreign port being named. The prosecutor had a right to prove a voyage from Charleston. It has been decided in this court that it is sufficient if the offense be laid in the words of the act. Even the rules of the common law applicable to indictments do not require time and place to be proved as stated; and the only case where a variance is fatal is where it affects the jurisdiction of the court, as where criminal proceedings are required to be local.¹ In no case in civil proceedings does the common law consider the venue as matter of substance, except where both the proceedings are *in rem*, and the effect of the judgment could not be obtained if the offense were laid in a wrong place.² **264*** The Circuit Court had a *right to amend the proceedings, but the practice of this court is to remand the cause to the Circuit Court with directions to amend.

WASHINGTON, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

Three questions have been made and discussed by the counsel: 1st. Whether the Circuit Court could, upon the appeal, allow the introduction of a new allegation into the information by way of amendment. 2d. Whether the omission to give the bond required by the 3d section of the act of the 28th of June, 1809, subjected the vessel to forfeiture; and if it did, then, 3d. Whether the information, which alleges the voyage to Liverpool to have commenced at Savannah, is supported by the evidence in the cause, and whether the sentence below ought not to be reversed for this reason, although the court should be satisfied that the ship departed from Charleston for Liverpool without giving the bond required?

Upon the first question it is contended, for the claimant, that the Circuit Court has only appellate jurisdiction in cases of this nature, and that to allow the introduction of a new al-

legation, would be, in fact, to originate the cause in the Circuit Court. This question appears to be fully decided by the cases of *The Caroline* and *Emily*, determined in this court. These were informations *in rem*, under the slave-trade act, and the opinion of this court was, that the evidence was sufficient to show a breach of the law; but that the informations were not sufficiently certain *to author. **[*265]** ize a decree. The sentence of the Circuit Court was therefore reversed, and the cause remanded to that court, with directions to allow the information to be amended. But even if an amendment would be improper if it stated a different case from that which was presented to the District Court, the objection would not apply to this case, in which the offense, though more definitely laid in the second allegation than it was in the first, is yet substantially the same. In both of them the charge is, departing from Savannah to a foreign interdicted port without giving bond, and the amendment, in substance, merely states the particular foreign port to which the vessel was destined.

The next question is, whether the omission to give the bond required by the third section of the act of the 28th of June, 1809, subjected the vessel to forfeiture? It is contended, by the claimant's counsel, that after the end of the session of Congress in which this law passed, there were no foreign ports either permitted or interdicted by law, inasmuch as the embargo laws which prohibited exportations from the United States to foreign countries, would then stand repealed, by force of the 19th section of the act of the 1st of March, 1809, to interdict the commercial intercourse with Great Britain and France, and the 2d section of the above act of the 28th of June. That all the ports of the world being thus permitted to the commerce of the United States, no subject would remain on which the 3d section would operate; and, consequently, there could be no necessity for giving a bond not to go to an interdicted port.

*An attentive consideration, however, **[*266]** of the two acts above mentioned, will show that the argument is not well founded. The 3d section of the act of the 28th of June, 1809, declares, that during the continuance of that act, no vessel, not within the exceptions therein stated, shall be permitted to depart for a foreign port with which commercial intercourse has not been, or may not be, permitted by virtue of this act, or the act of the 1st of March, 1809. And if bound to a foreign port with which commercial intercourse has been, or may be, permitted, still she shall not be allowed to depart without bond being given, with condition not to proceed to any port with which commercial intercourse is not thus permitted, nor be directly or indirectly engaged, during the voyage, in any trade with such port. This law was in full force at the time the offense charged in this information is alleged to have been committed.

If, then, there was any country with which commercial intercourse was interdicted, and would continue to be so after the end of the session, during which this law was passed, it seems to be admitted in the argument that a vessel destined to a foreign permitted port would be liable to forfeiture, unless the above

1.—2 Hawk. c. 25, s. 83, c. 23, s. 83, 91; 2 Hale's P. C. 179, 180.

2.—Cowp. 176.

Wheat. 1.

bond had been given. To ascertain whether there was any such country, it will be necessary to inquire what is the true meaning of the term commercial intercourse. No higher or more satisfactory authority upon this subject need be resorted to than the legislature itself, by which this act was passed.

The act of the 1st of March, 1809, which is entitled, "An act to interdict the commercial **267*** intercourse *between the United States and Great Britain," &c., contains nineteen sections. The first ten (exclusive of the first, which denies to the vessels of those countries the privilege of entering the ports and harbors of the United States) forbid the importation into the United States of the products and manufactures of Great Britain and France, or of any other part of the world, if brought from the ports of either of those countries. The 12th section repeals, after the 15th of March, 1809, all the embargo laws, except as they relate to Great Britain and France; and the 19th section repeals them, after the end of the succeeding session of Congress, as to all the world. The 18th, 14th, 15th, 16th, and 18th sections are intended to provide securities for enforcing the non-importation system established by this law; and the 17th section repeals the former non-importation law of April, 1806.

Hence, it appears that the commercial intercourse which this law was intended to interdict consisted of importations from Great Britain and France, and of the products and manufactures of those countries, and of exportations to them. In the 11th section it is called the trade of the United States, suspended by that act and the embargo laws, which trade the President is authorized to renew, by his proclamation, upon a certain contingency; and in pursuance of this power, he did, accordingly, renew it with Great Britain in April, 1809.

Thus stood the commercial intercourse of the United States with foreign nations at the commencement of the extraordinary session of Congress which *commenced in May, 1809; permitted by the above law, both as to exportations and importations with all the world, except Great Britain and France, and their dependencies; and, as to them, interdicted in both respects as to France, and permitted with Great Britain by virtue of the President's proclamation. But, as the law of the 1st of March would expire, by its own limitation, after the end of the May session, whereby, not only exportations, but the importations forbidden by that act, in relation to France, would become lawful; the 1st section of the act of the 28th of June, 1809, revives the whole non-importation system, except so far as it had been permitted to Great Britain by the proclamation; and the 2d section declares, in effect, that the embargo laws, which were repealed by the 12th and 19th sections of the act of the 1st of March, shall be and remain repealed, notwithstanding the expiration of that law by its own limitation.

From this view of the subject, it appears that the non-importation system of the 1st of March was to continue in force until the end of the session of Congress, which would succeed that of May, 1809, except as to Great Britain; and that, after the end of that session, the embargo laws would cease to operate against any nation.

If, then, importation be a branch of com-

mercial intercourse, in the avowed meaning of Congress, and if, on the 28th of June, and from thence until the end of the next session of Congress, it was to continue in force, as to France (unless the President should declare, by proclamation, the revocation of *her offen- [***269** sive edicts), but were inoperative as to Great Britain, it follows, inevitably, that, in February or March, 1810, when the offense is charged to have been committed by this vessel, there were foreign ports permitted, and others interdicted, to the commerce of the United States; and, consequently, that the destination of this vessel being to Liverpool, a bond ought to have been given, such as the 3d section of the act of the 28th of June required, not to go to an interdicted port.

This construction of the law has frequently been given to it by this court; but the serious opposition made to it, by the counsel for the claimant, will account for the deliberate examination of the question which is contained in this opinion.

As to the last question, a majority of the court being of opinion, upon a view of the whole evidence, that the voyage to Liverpool had its inception at Savannah, the objection as to the form of the information, in this respect, has nothing to stand upon. Were the evidence on this point more doubtful than it is, the court would remand the cause, with directions to the Circuit Court to allow an amendment, by inserting Charleston instead of Savannah, from which the claimant could derive no benefit, since it is not denied that the ship departed from Charleston directly for Liverpool, without giving bond.

LIVINGSTON, J. This ship was proceeded against under the 3d section of the act of the 28th of June, 1809, for sailing from the United States to a foreign port with which commercial intercourse had not *been, nor was then, [***270** permitted, by virtue of that act, or of the act to interdict commercial intercourse between the United States and Great Britain and France, without a clearance, and without a bond having been given, in conformity to the provisions of the said act, not to proceed to any port with which commercial intercourse was not then, by law, permitted, nor be directly or indirectly engaged, during the voyage, in any trade or traffic with such place.

The only question, on this part of the case, is, whether, at the time of the departure of the *Edward* from Savannah, which was in February, 1810, there existed any law subjecting her to forfeiture if the owner omitted giving the bond prescribed by the 3d section of the act above mentioned.

By the claimant it is contended, that after the end of the session of Congress in which this act passed, which occurred on the 28th of June, 1809, there ceased to exist in the United States any distinction between prohibited and permitted ports within the meaning of the restrictive system; that the embargo laws, which alone restricted exportations to foreign countries, had, at that time, become repealed by the operation of the last section of the act of the 1st of March, 1809, as well as by that of the 2d section of the act of the 28th of June of the same year; that by this repeal the whole world,

Wheat. 1.

as far as could depend on our own laws, was open to the vessels of the United States, and, consequently, that it could not be illegal to neglect giving a bond not to go to an interdicted port, if, at the time of sailing, there was 271*] no port in the world to which that interdiction could apply.

In examining this question, my attention will be confined to a consideration of the two acts which have just been mentioned; because, if the interdiction which is supposed to have existed when the Edward left Savannah is not to be found in either of these laws, no other has been referred to as creating it. Let us, then, see what has been done, and if there be no ambiguity in the provisions of these two acts on the subject before us, it will be safer, in a case so highly penal, to adhere to the letter of them than to incur the danger of falling into error by indulging in a mode of interpretation which was adopted at the bar, and which was too conjectural to be in any degree satisfactory.

By the 12th section of the act of the 1st of March, 1809, the embargo law was repealed as to all nations, except Great Britain and France, and their dependencies. This repeal, necessarily and immediately, created a distinction between ports with which commercial intercourse was permitted, and those to which it was interdicted; and we accordingly find Congress, in the very next section of this act, providing for this new state of things by requiring bonds to be given when vessels were going to ports which had now become permitted ports, not to proceed to any port or place in Great Britain or France, &c. No such regulation had been prescribed in consequence merely of the non-importation law, and for the plainest reason; for, while they prohibited an introduction into the United States, from any part of the world, of the produce and manufactures of France and England, our vessels were allowed to go to those countries, and thus continue a commercial intercourse with either or both of them, limited, it is true, as to the articles which might be brought from thence, but uncontrolled as to the commodities which might be carried thither, or as to the port to which they might go. This partial trade between the two countries, whether originating in the acts of the one government or the other, may frequently take place; but cannot, when it does, with any propriety, be termed an interdiction or suspension of commercial intercourse, which *ex vi termini*, means an entire cessation, for the time being, of all trade whatever. It was under the embargo laws alone that intercourse was interdicted between this country and Great Britain and France, as it was also with the rest of the world; which interdiction, as it arose out of those laws, so it is expressly continued, as it regards those two kingdoms, by excepting them out of the operation of the 12th section of the act of the 1st of March, 1809, which repealed the embargo laws as to all other parts of the world. It would seem, then, that after this no other inquiry would remain than to ascertain whether the commercial intercourse thus interdicted by the act laying an embargo, and continued, or rather not repealed, as it respected Great Britain and France, by the 12th section just mentioned, was still in force at the time this offense is alleged to have been com-

Wheat. 1.

mitted. Without leaving the act now under consideration, we find that it was *to [273 continue in force only until the end of the next session of Congress, and that the act itself, which lays the embargo, was to expire at the same time. This event took place on the 28th of June, 1809. Now, unless some law were passed before that time to continue the embargo longer, or, after that period, to revive it, how can it be said that, after that day, a distinction could still continue between prohibited and permitted ports? This brings us to see whether anything was done by Congress at the extraordinary session which commenced in May, 1809. By an act which they passed on the 28th of June of that year, they continued in force until the end of the next session, which happened on the 1st of May, 1810, the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 17th and 18th sections of the act of March, 1809, and they declare that all the acts repealed by the said act shall remain repealed, notwithstanding any part of that act might expire by its own limitation. Now, if we return to the sections which are revived, we find them containing nothing more than an interdiction of the harbors and waters of the United States to vessels sailing under the flag of Great Britain or France, or owned by subjects of either, accompanied with a prohibition to import from any foreign port whatever, into the United States, any goods, &c., being of the growth, produce, or manufacture of those countries or their dependencies. In not one of them is found a prohibition to our citizens against trading with either of those countries. Their revival, then, does not operate so as to create a single interdicted port in the whole commercial world. *Such interdiction, as has already been [274 said, was a creature of, and owed its existence solely and exclusively to, the embargo laws. If it be said that such prohibition necessarily flowed from the revival of these sections, notwithstanding their entire silence on the subject, then would our vessels have been under a disability of going to any part of the world, because they were no more at liberty to bring British and French goods from other countries than from Great Britain and France; and yet the 12th section of this act, by only taking the embargo out of their way, permitted them to go to any port of the world except to Great Britain and France. But, in availing themselves of this permission, they were still under a restraint not to bring to this country any British or French goods. The 11th section of the act of March, 1809, which is continued by that of June of the same year, authorizes the President, in certain cases, to issue his proclamation; after which, the trade of the United States, suspended by that act, and by the embargo law, may be renewed with Great Britain or with France, as the case may be. In this section we are presented with a distinction, taken by the legislature themselves, and which, indeed, pervades the whole system between the suspension of trade created by that act, and by the embargo laws. The two systems were entirely different, and enforced by different and distinct penalties. By the one, our vessels were at liberty to go where they pleased; by the other, they were prevented from going to any foreign port whatever. The revival, then, of

275*] these sections, did not preclude *our vessels from going to any part of the world, but only forbid their bringing to this country the articles whose importation was prohibited. If the 12th section had also been revived, then no vessel of the United States could have gone to Great Britain or France, and the distinction of permitted and forbidden ports would have continued until the 1st of May, 1810. But as the whole embargo system expired in June, 1809, not only by the 19th section of the act of March, 1809, but also by the express provision of the act of June of the same year, the conclusion is inevitable that when the *Edward* sailed there was no law in force by which any distinction of prohibited and permitted ports existed; and that, therefore, the not giving the bond in question was no violation of law.

No notice has been taken of either of the proclamations of the President, because, if the view here presented be correct, neither of them has any bearing on the question. Admitting the validity of both of them, the latter would not make the ports of England prohibited ports, if the laws which created the distinction had done it away by opening to the citizens of the United States the ports of every nation on the globe. The President's power could only exist while such a state of things continued as suggested the necessity of, and would render, an interference on his part proper and useful, and no longer.

It may be, and has been, said that the opinion here expressed is at variance with the public opinion on this subject, as well as with the understanding *of the collectors and some other officers of government; and that even this court has, at its present term, condemned property for the same offense with which the *Edward* is charged. The answer to all this is, that the condemnation alluded to passed *sub silentio*, without bringing the point distinctly to our view, and is, therefore, no precedent; and that, as to public opinion, or that of the officers of government, however respectable they may be, it can furnish no good grounds for enforcing so heavy a penalty, unless, on investigation, it shall appear to have been correctly formed. It was also urged that Congress must have supposed the law to be as it is now contended for by the Attorney-General, or they would not have passed the 3d section of the act of the

28th June, 1809, when there was no state of things to which its provisions could apply. To this the answer which was given at the bar is satisfactory. At the time of the bringing in of that bill the embargo laws were still in force, and would continue so until the end of that session. Now, as it could not then be foreseen that the bill would not become a law until the last day of the session, a prohibition not to go to prohibited ports was necessary, but became nugatory by the law not passing until the time prescribed for the extinction of the whole system.

Upon the whole, it appears to me clear that there was no law in force when the *Edward* left Savannah interdicting her from going to any foreign port whatever, or requiring from her owners any bond not to go to such port; and, under this persuasion, *I have thought [*277 it a duty to express my dissent from the judgment which has been just rendered.

But were the case doubtful, I should still arrive at the same conclusion, rather than execute a law so excessively penal, about whose existence and meaning such various opinions have been entertained.

To satisfy ourselves that great difficulties must exist, in relation to this law, we have only to look at the progress of the case now before us. The offense with which the *Edward* is charged in the information, is going, without giving bond, to a prohibited foreign port. The condemnation in the Circuit Court, however, proceeded on the ground of all the ports of Great Britain (to one of which it was alleged she was going) being permitted ports. In the very able argument which was made here in support of the prosecution, it was attempted to be shown that Liverpool was not a permitted, but an interdicted, port. This state of uncertainty, which, it would seem, could hardly exist if the legislature had expressed themselves with that precision and perspicuity which are always expected in criminal cases, would, with me, independent of my own convictions that there was no such prohibiting law, have been a sufficient reason for restoring this property to the claimants.

*Sentence of the Circuit Court affirmed.*¹

Cited—4 How. 154; 6 How. 434; 2 Wood. & M. 540; 3 Wood. & M. 348.

1.—In order to enable the reader the better to understand this case, the following account of the dates and substance of the British orders in council, the French decrees, and the consequent acts of the United States government, has been subjoined:

278*] *On the 16th of May, 1806, the British government issued an order in council declaring the coast included between the Elbe and Brest in a state of blockade.

On the 21st of November, 1806, the French emperor issued his Berlin decree declaring Great Britain and her dependencies in a state of blockade.

On the 7th of January, 1807, the British government issued an order in council prohibiting neutral ships from carrying on trade from one enemy's port to another, including France and her allies.

On the 11th of November, 1807, the British orders in council were issued, which declared the continental ports from which British ships were excluded in a state of blockade (except in case of ships cleared out from Great Britain whose cargoes had paid a transit duty), and rendered liable to condemnation all neutral ships, with their cargoes, trading to or from the ports of France, or her allies,

and their dependencies, or having on board certificates of origin.

On the 7th of December, 1807, the French emperor issued his Milan decree, declaring that any neutral ships which should have touched at a British port, or paid a transit duty to the British government, or submitted to be searched by British cruisers, should be liable to condemnation.

On the 22d of December, 1807, the American embargo took place.

On the 1st of March, 1809, the embargo was removed, and a non-intercourse substituted with both France and England.

On the 18th of April, 1809, a negotiation was concluded by Mr. Erskine, in consequence of which the trade with Great Britain was renewed on the 10th of June.

On the 28th of April, 1809, a British order in council was issued, modifying the former blockade, which was henceforth to be confined to ports under the governments of Holland (as far north as the river Ems) and France, together with the colonies of both, and all ports of Italy included between Orbitello and Pesaro.

On the 10th of August, 1809, the non-intercourse Wheat. 1.

279*]

*[LOCAL LAW.]

THE MUTUAL ASSURANCE SOCIETY
v.
WATTS' EXECUTOR.

Under the 6th and 8th sections of the Act of Assembly of Virginia, of the 22d of December, 1794, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the hands of a *bona fide* purchaser without notice.

A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the District of Columbia to the national government did not affect the lien created by the above act on real property situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property.

APPPEAL from the Circuit Court in the District of Columbia for Alexandria county. The cause was argued by *Swann* for the appellants, and by *Taylor* and *Lee* for the respondents.

JOHNSON, J., delivered the opinion of the court as follows:

280*] *This is a bill in chancery, filed by the complainants, to charge certain premises, in the possession of the defendant, situate in the town of Alexandria, with the payment of a sum of money, assessed in pursuance of the laws establishing the Mutual Assurance Society, for quotas becoming due after his testator acquired possession. The executor has, in fact, sold the premises, under a power given him by the testator, but the money remains in his hands; and it is conceded that the sole object now contended for is to charge the money arising from the sale of the land in question with the assessment to which it is contended that the land was liable. The insurance was made in 1799, and the property sold to the defendant's testator in 1807, long after the town of Alexandria ceased to be subject to the laws of Virginia. It is admitted that the sale was made without notice of this incumbrance (if it was one), and the quota demanded was assessed on the premises for a loss which happened subsequent to the transfer. The points made in the case arise out of the construction of the 6th and 8th sections of the act of Virginia, passed the 22d of December, 1794. The 6th section is in these words: "If the funds should not be sufficient, a repartition among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her, or their share, according to the sum insured, and rate of hazard at which the building stands, agreeably to the rate of premium, for which purpose it is hereby declared that the subscribers, as soon as they shall insure their property in the Assurance Society aforesaid, do mutually, for **281*]** themselves, *their heirs, executors, ad-

ministrators and assigns, engage their property insured as security, and subject the same to be sold, if necessary, for the payment of such quotas." And the 8th section is in these words: "To the end that purchasers or mortgagees of any property insured, by virtue of this act, may not become losers thereby, the subscriber selling, mortgaging, or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance; and indorse to him or them the policy thereof. And in every case of such change the purchaser or mortgagee shall be considered as a subscriber in the room of the original, and the property so sold, mortgaged, or otherwise transferred, shall still remain liable for the payment of the quotas, in the same manner as if the right thereof had remained in the original owner."

In the argument two points were made: 1st. That property pledged to the society remained liable for the quota to a purchaser without notice. 2d. That the purchaser, by the purchase of such property, although without notice, became, by virtue of the 8th section, a member of the society, and liable, in all respects, as such.

The second of these questions is now withdrawn from the consideration of this court by an agreement entered on record. And it must be admitted, that whatever may be the strict construction of the 8th section and its operation in the state of Virginia, so far as it is intended to force on the purchaser a personal character or liability, it could have no operation in the town of Alexandria at the date of this transfer. *The laws of Virginia had then [***282** ceased to be the laws of Alexandria, and it could only be under an actually existing law, operating at the time of the transfer, that the character of membership in the Virginia company would be forced upon the purchaser. This is not one of those cases in which tenure attaches to an individual a particular characteristic or obligation; such cases arise exclusively between the occupant of the soil and the sovereignty which presides immediately over the territory. The transfer, therefore, of the District of Alexandria to the national government, put an end to the operation of the 8th section, so far as it operated by mere force of law, independent of his own consent, to fasten on the purchaser the characteristics of a member. But it is otherwise with regard to the soil. The idea is now exploded that a mere change of sovereignty produced any change in the state of rights existing in the soil. In this respect everything remains in the actual state, whether the interest was acquired by law, under a grant, or by individual contract.¹

We consider the question, then, as reduced

1.—*Vide* 8 Cranch, 199, *Korn v. The Mutual Assurance Society*.

with Great Britain again took place, in consequence of Mr. Erskine's arrangement not being ratified.

On the 1st of May, 1810, the trade with both Great Britain and France was opened, under a law of Congress, that whenever either power should rescind its orders or decrees, the President should issue a proclamation to that effect; and in case the other party should not, within three months, equally withdraw its orders or decrees, that the non-impetration act should go into effect with respect to that power.

Wheat. 1.

On the 2d of November, 1810, the President issued his proclamation, declaring the Berlin and Milan decrees to be so far withdrawn as no longer to affect the neutral rights of America; and the orders in council not being rescinded,

On the 2d of February, 1811, the importation of British goods, and the admission of British ships into America, were prohibited.

On the 4th of April, 1812, an embargo was laid in the United States, and on the 18th of June following, war was declared against Great Britain.

to this: Does property, pledged to the society, continue liable for assessments in the hands of a *bona fide* purchaser without notice, notwithstanding that he does not become a member by the transfer?

Here we give no opinion on the extent or meaning of the words "property insured," how far they will operate to charge the lands on which buildings stand. The question was **283*** not made in the argument, and is *probably of no consequence in this or any other case. We only notice it in order that such a construction may not be supposed admitted, as is too often concluded, because a court passes over a question *sub silentio*.

Whatever be the property thus pledged, it is very clear that the words of the 6th section are abundantly sufficient to create in it a common law lien, not only in the hands of the original subscriber, but by express words in those of his assignee. If the case rested here, there would be no doubt or difficulty: but every law, and every contract, must be construed with a reference to the subject of that law or contract, and which it is designed to answer. In this view we readily concede that the duration of the lien could not extend beyond the duration of the liability of the subscriber to pay the premium; nor could the liability of the subscriber extend beyond the liability of the company to indemnify him. On the other hand, it would seem that as long as the company could exact of the subscriber the premium, they ought to be held liable to indemnify him. It will, then, be conceded that the liability of the subscriber, and of the company, are mutual, correlative, and co-extensive, and it remains to be examined how this concession affects the case.

It is very clear that there are but three ways by which a subscriber can cease to be a member: 1st. By the consumption of the buildings insured, which results from the nature of the contract. 2d. By complying with the stipulations of the 9th article of the rules and regulations of the society. **284*** 3d. By substituting a vendee in his place, in conformity with the 8th section of the act of the 22d December, 1794. If, then, a subscriber has not become discharged in one of these three ways, what is to prevent the society from pursuing their summary remedy against him? They are not bound to search for his vendee, or to raise the money by a sale of the property pledged; much less are they bound to prosecute their remedy against a purchaser whose name is unknown to them, or who may be absent from the state, or from the United States, or insolvent, or protected, at the time, by some legal privilege. Their contract is with the original subscriber; their rules point out the mode in which he is to extricate himself from this liability, and if he has not pursued it, what defense is left him against a suit instituted by the society? The court cannot imagine one that could avail him. He cannot urge that he has parted with the property. The rules point out to him the conduct that he is to pursue in that event. He may give notice to the vendee of the insurance, and tender an assignment. If the vendee refuse to receive it, he is bound to remain but six weeks longer under the obligation to pay his quotas and indemnify the vendee, at the end of which time he will be entitled to a discharge, upon giving

due notice, and complying with the other requisitions of the 9th section. Nor can he urge that he has no longer any interest in the thing insured; this, if any plea at all, is none in his lips. It belongs to the insurer to avail himself of it, if it belongs to anyone. But it is a plea not true in fact; for he continues *to indemnify his vendee against the [**285** quotas that may be assessed, which, by possibility, may reach to the value of the whole property sold or insured; and, if correct in principle or fact, still this plea could not avail him, since it is in consequence of his own folly or laches that he continues liable to pay the premium of insurance for another's property. And should it be urged that this would be converting an actual insurance into a wager policy, two answers may be given to it, either of which is sufficient; that there is nothing illegal in a wager policy, in itself, and if there were, it is no objection in this case, when it results from the constitution and laws of the society.

But it may be contended that the insurer is discharged, and, therefore, the liability for the quotas ceases.

It is unquestionably true, as a general principle, that where an insurer runs no risk, equity does not consider him entitled to a premium: and, although there exist some reasons in the policy and constitution of this society to apply it, in its fullest extent, to this case, yet, to give the argument its utmost weight, we are disposed to concede it. But what has occurred in this case to discharge the underwriters from their contract? The subscriber was clearly not discharged from his liability to them, and this single consideration furnishes a strong reason for holding them still bound under their contract. What has the subscriber done inconsistent with that contract? The only act he can be charged with, is alienating, without indorsing, the policy. But alienation *alone is perfectly [**286** consistent with the contract, for the policy issues to him and his assigns; and so far from interposing any obstruction to alienation, provision is made for that very case, and unlimited discretion vested in the subscriber to indorse his policy to whom he pleases. Nor is alienation, without indorsing the policy, considered in any more offensive light; inasmuch as the 8th section which enforces the assignment declares expressly that it is for the benefit of purchasers and mortgagees, "to the intent that they may not become losers thereby." It is not pretended that it is for the society's own security; nor do they ever require notice to be given them in case of such transfer of the policy. As to them, therefore, it is an innocent act, and we see no ground on which the society can be discharged, either to the vendor or vendee; they certainly remain liable, and although it may be a question to which of them equity would decree the money, yet to one or the other it certainly would be adjudged; but it is not material to this argument which, as it is a question between the vendor and vendee.

If, then, the case presents no legal ground for discharging either insurer or insured from the contract, and the lien created by the 6th section be commensurate with the liability of the insured, it will follow that the plaintiffs, in this case, ought to have a decree in their favor.

But we will examine, at a closer view, the liability of the property in the hands of the vendee. That he is not liable to the summary remedy is evident from a variety of considerations. He must, then, be *brought into chancery to have his property subjected to the consequences of the lien, whenever a loss happens and a quota is assessed. In that case his defense will always be just what it is in this—that he purchased without notice. But this was never held to be a defense to a bill to foreclose a mortgage, which is precisely a similar case to this. Nor is it any better defense to urge that he could derive no benefit under the policy in case of a loss; for this is precisely the same defense, a little varied, as will be seen by supposing that the vendee of a mortgagee should plead, to a bill of foreclosure, that the money borrowed did not come to his use. But his case is not as good as that of the vendee of the mortgagee in the case supposed; for the 8th section makes provision for his relief. That section says: "To the end that purchasers, or mortgagees, of any property insured, may not become losers thereby" the vendor shall give them notice, and indorse the policy over. In what manner shall the purchasers, or mortgagees, become losers, unless the lien is to continue on the property in their hands? If the vendor be guilty of the folly of paying the quotas, and the vendee never receives notice of the lien, through a demand from the society, there is no damage sustained. If he should be assailed with such a demand, he has a right to require of the vendee an assignment of the policy; and as there existed an original duty to make such an assignment, it may well be held to operate, *nunc pro tunc*, and carry with it all the benefits of an original assignment.

288* But it is contended that the 8th section explains and limits the 6th section in such a manner as to restrict the duration of the lien in the hands of the vendee to those cases only in which the transfer of the policy also takes place.

This consequence cannot be logically maintained. The argument is, that the words "such change" mean only a change of the property, attended with an assignment of the policy, and that if the legislature had supposed that property sold would, in the hands of the vendee, remain subject to the lien, they would not expressly have subjected it in such a case. But this section will, with philological correctness, admit of a different construction, and a construction more consistent with legal principles, inasmuch as it will not admit of an implication inconsistent with the preceding section, and even with other parts of the same section. Nor, if the construction on which this argument is founded were unavoidable, would the conclusion follow which the argument asserts. The question is, what is the meaning of the words "in every change," in the section under consideration? The solution is only to be found by referring to the preceding and only other clause of the same section; and there we find that a general provision is inevitably to be made for every possible change of sale or purchase. The operation of the clause will, then, be only to confirm and support the general words of the sixth section, and if it left any doubt with regard to the duration of the lien in the hands of the vendee, Wheat. 1.

to remove those doubts by express provision. This construction is also the most consistent with the recital *in the first clause of [***289** the same section, which, as has been before observed, with another view, is founded altogether on the idea that property sold remained pledged to the society in the hands of the vendee, whether with or without notice; as, in that case alone, could vendees, or mortgagees, need the protection held out to them in that clause.

But if a different construction could legally be given to that section, so as to restrict the words "every such case" to mean those cases only which were attended with an assignment of the policy, it would not follow that the lien ceased its operation in all others. To apply to this case the maxim, *expressio unius est exclusio alterius*, would be a glaring sophism. For, the only principle on which such a conclusion could be founded would be that the repetition of a legal provision, included, with many others, in another law, produced a repeal of all others by necessary implication. Such an implication may be resorted to in order to determine the intention of the legislature in a case of doubtful import, but cannot operate to destroy the effect of clear and unequivocal expressions. An obvious and unanswerable objection to giving this effect to this clause is, that it puts it in the power of the subscriber to exonerate the property from the lien by the single act of sale, not even sustaining it for the term of six weeks after the notice given of his intention to withdraw; an effect glaringly inconsistent, no less with the express words than with the general view of the law on this subject. For there is nothing in the act which obliges the vendee to accept an assignment. *A tender to [***290** him, therefore, cannot subject him to any onerous consequences. He does no more than what he may lawfully do. If, then, the lien ceases, unless he accepts the assignment, and it is legally at his option to accept or refuse, the subscriber, in having the right to sell to whom he pleases, has also the duration of the lien submitted to his will.

Some difficulty has also existed in the minds of some of the court on the contingent nature of this lien, whether the lien was complete to all purposes at any period before the assessment of a quota. But, on this subject the majority are of opinion that, as to legal incumbrance, or duration of a lien, it makes no difference whether its object is to secure an existing debt or a contingent indemnity. In the case of *Black et al., mortgagees of Gardner, v. Kraig & Mitchell*, this court sustained a mortgage, given to secure an indorser against notes which he might indorse, where he had entered into no stipulation to indorse for the mortgagee. And in the case of bonds given for the discharge of duties, offices, or annuities, it never was maintained as an objection that the object of the lien was future, contingent, or uncertain. In this case the mutual stipulation to indemnify each other against losses operates as a purchase of the lien, and places the parties on strong equitable grounds as to each other.

Some cases were cited in the argument from the reports of decisions which have been made in the courts of Virginia. This court uniformly acts under the influence of a desire to conform its decisions to those of the state courts on their

291*] local laws; and *would not hesitate to pay great respect to those decisions, if they had appeared to reach the question now under consideration. But they are persuaded that those cases do not come up to the present. In the case of *Greenhow et al. v. Barton* (1 Munf., 598), it is true that the decision of the District Court, which was finally confirmed, was in favor of the purchaser without notice. But it was solely on the question whether he was liable to the summary remedy, or, in other words, liable generally, as a member. And the case of *Anne Byrd*, reported in the cases of the General Court, was likewise the case of a motion for a summary judgment. In the latter case, the court went much further in charging the vendee than this court is called upon to proceed in the present case. But in neither of those cases was a bill filed to charge the vendee, as in the present; nor was the question brought up in either detached from that of his general liability as a member.

The decree below will be reversed, and a decree ordered to be entered for the complainants.

LIVINGSTON, J., and STORY, J., dissented.

Decree reversed.

Cited—1 Cliff. 439; 6 Wheat. 606.

292*] *[LOCAL LAW.]

WALDEN v. THE HEIRS OF GRATZ.

Under the Act of Assembly of Kentucky of 1798, entitled, "An Act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession.

The statute of limitations of Kentucky, does not differ essentially from the English statute of the 21st James I., c. 1, and is to be construed as that statute, and all other acts of limitation founded upon it, have been construed. The whole possession must be taken together; when the statute has once begun to run it continues, and an adverse possession under a survey, previous to its being carried into grant may be connected with a subsequent possession.

ERROR to the Circuit Court for the District of Kentucky. This was an action of ejectment in which the defendants in error were the lessors of the plaintiff in the court below. The declaration in ejectment was returned to the November term of that court, 1813. At the May term, 1814, the suit was abated as to one defendant; judgment by default was entered against Joseph Day, another defendant; and the defendants were admitted to defend instead of the casual ejector. The lessors of the plaintiff claimed under a patent issue to John Craig, in November, 1784. On the 20th of April, 1791, John Craig conveyed the lands mentioned in the declaration, in trust, to Robert Johnson, Elijah Craig, and the survivor of them. On the 11th of February, 1813, Robert Johnson, 293*] styling himself surviving "trustee, conveyed to the lessors of the plaintiff. The defendants below, now plaintiffs in error, claimed under a patent issue to John Coburn in September, 1795, founded on a survey made for Benjamin Netherland in May, 1782. John Coburn, claiming under the said survey, enter-

ed thereon about the year 1790, and dwelt in a house within the limits of said survey, but without the lines of Craig's patent. On the trial, the counsel for the defendants below moved the court to instruct the jury,

1st. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee to the lessors of the plaintiff, that deed did not pass such title as would enable them to recover in this suit.

2d. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee to the lessors of the plaintiff, and had held such adverse possession for twenty years next before said time, that said deed did not pass such title as would enable the plaintiffs to recover in this suit.

3d. That if the defendants, and those under whom they claim, have had possession of the land in question, or any part thereof, for twenty years next before the commencement of this suit, that the plaintiff cannot recover the lands so possessed for twenty years.

On the two first points, the court instructed the jury that, according to the principles of the common law, the deed from Craig's trustee to the lessors of *the plaintiff, would not [*294 pass the title to the lessors of the plaintiff; but that under the operation of the act of assembly of the state of Kentucky, of 1798, the said deed was valid, and did pass the title to the lessors of the plaintiffs, notwithstanding the adverse possession of the defendants. The court refused to give the last instruction applied for, but did instruct the jury that if Coburn entered upon the land in controversy, under the survey on which his patent was founded, and he, and those holding under him, held the said lands for twenty years and upwards, prior to the commencement of this suit, yet, as the patent to Coburn did not issue until 1795, such possession could not avail the defendants claiming under the said Coburn, but that the plaintiffs could recover, notwithstanding such possession. To these opinions and instructions, given by the court, the counsel for the defendants below excepted, and the cause was brought by writ of error into this court.

Hardin, for the plaintiff in error, and defendant in ejectment. 1. No person out of possession can grant; first, because at common law there must be livery of seizin; second, because the grantee could not purchase a mere right of action. Coburn was in possession adversely; therefore, the deed from Craig's trustee to the lessors of the plaintiffs was void. 2. The limitation of twenty years' possession by the defendant before notice of the ejectment was a complete bar. 3. The deed of trust was joint, and it was incumbent upon the plaintiff to prove that one of the trustees was dead. The recital in the deed of conveyance, that *[*295 E. Craig was dead, was no sufficient evidence of that fact, except as between the grantor and grantee. 4. There is error in the judgment by default against Day.

Hughes and Talbot, contra. 1. Before the act of 1798, "concerning champerty and maintenance," no title could pass without an actual possession of the grantor; but this statute has abrogated the common law in that particular.

Wheat. 1.

But, in fact, Coburn was not in possession adversely, and a grant from the commonwealth of vacant lands gives the patentee a right to convey. 2. A person leaving it equivocal what his possession was, cannot have an instruction in his favor. It does not appear what part the defendant possessed, nor was the instruction asked under an adverse possession. Twenty years' possession was no bar; the local courts adhere to the English principle, that when the statute has once begun to run, it continues; but the act of assembly differs materially from the English act of 21 James I., c. 1.; and, after the statute has begun to run, it stops if the title passes to a person under any legal disability, and recommences after the disability is removed.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The act of assembly, on which the opinion of the court below, on the first question, was given, is entitled, "An act concerning champerty and maintenance." It enacts, "that no person 296*" purchasing, or *procuring an interest in any legal or equitable claim to land held, &c., shall be precluded from prosecuting or defending said claim, under such purchase or contract; neither shall any suit, or suits, brought to establish such purchase, or make good the title to such claim, be considered as coming within the provisions, either at common law or by statute, against champerty or maintenance," &c. This court is of opinion that this statute enabled the lessors of the plaintiff to maintain a suit in their own name for the lands conveyed to them, and that there is no error in this instruction of the Circuit Court.

On the third question the Circuit Court instructed the jury that an adverse possession under a survey, previous to its being carried into grant, could not be connected with a subsequent possession, but that the computation must commence from the date of the patent. In giving this opinion, the court unquestionably erred. No principle can be better settled than that the whole possession must be taken together.

The counsel for the defendants in error have endeavored to sustain this opinion by a construction of the statute of limitations of Kentucky. They contend that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed as that statute, and all other acts 297* of limitation *founded on it, have been construed. This court is therefore of opinion that there is error in the instruction given by the Circuit Court to the jury on the third prayer of the plaintiff in error.¹

It has been contended by the counsel for the plaintiff, that there is also error in the judgment rendered against Joseph Day by default; but of his case the court can take no notice, as he is

not one of the plaintiffs in error, and the judgment rendered against him is not before us. The judgment must be reversed for error in the directions of the court to the jury on the third point, on which instructions were given.

JUDGMENT.—This cause came on to be heard on the transcript of the record, from the Circuit Court for the District of Kentucky, and was argued by counsel. On consideration whereof this court is of opinion that there is error in the proceedings and judgment of the Circuit Court in this, that the judge thereof directed the jury that the tenants in possession could not connect their adverse possession previous to the date of the patent under which they claimed with their adverse possession subsequent thereto, but in the length of time which would bar the action could compute that only which had passed subsequent to the emanation of their grant. Wherefore it is considered by the court that the judgment of the Circuit *Court [*298 be reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to award a new trial therein.

Judgment reversed.

Cited—9 Otto, 168; 2 Sawy. 518.

[PRIZE.]

THE HARRISON. HERBERT, Claimant.

If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors.

In prize causes this court has an appellate jurisdiction only, and a claim cannot for the first time be interposed here; but where the court below had proceeded to adjudication before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, &c.

APPEAL from the Circuit Court for the District of Maryland. The libel filed by the captors, in this case, in the District Court, alleged that the goods for which condemnation was sought were captured and taken out of a Spanish vessel. No claim was filed for the goods in either of the courts below. But, upon hearing, the District Court dismissed the libel, upon the ground that the property, to whomsoever belonging, was protected by the 15th article of the treaty *of 1795 with Spain, by [*299 which free ships make free goods; and this decree was affirmed, upon the same principle, in the Circuit Court. The captors brought the cause, by appeal, to this court; and a motion was made by *Winder*, in behalf of Elry Herbert, an asserted claimant, to be admitted to file a claim in this court.

STORY, *J.*, delivered the opinion of the court:

We have considered this question with a view to the general rules of practice. Whenever a prize is brought to adjudication in the admiralty, if, upon the hearing of the cause upon the ship's papers, and the evidence taken in pre-

1.—*Vide* 4 T. R. 800; Doe, ex dem., Durouse v. Jones.

Wheat. 1.

paratory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person having title to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed to a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy and default of the supposed owner. In the present case the prescribed period had not elapsed at the time when the District Court proceeded to decree a dismissal of the libel. A claim cannot, by the practice of this court, be for the first time interposed here. In prize causes this court can exercise only an appellate jurisdiction, and between **300*** parties who have litigated in the court below. We are all, therefore, of opinion that this cause ought to be remanded to the Circuit Court, with directions to allow the claim to be filed in that court; and, also, to allow the libel to be amended so as to conform to the general allegation of prize, and enable the captors to obtain condemnation of the property, if the asserted claim shall not be sustained, and the property shall not appear entitled to the protection of the Spanish treaty.

*Case remanded.*¹

Cited—5 Wall. 412; Blatchf. Pr. 54.

[COMMON LAW.]

HARDEN v. FISHER ET AL.

Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens; the parties must show that the title to the land for which the suit was commenced was in them, or their ancestors, at the time the treaty was made.

ERROR to the Circuit Court for the District of New York. This case was argued, with great learning and ability, by *Hoffman* for the plaintiff in error, and defendant in ejectment, and by *Stockton*, for the defendants in **301*** error and plaintiffs in ejectment. But, as the court gave no judgment upon the points discussed, the argument has been omitted.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

This is an action of ejectment, brought by the defendants in error, in the Circuit Court for the District of New York, to recover certain lands, which they claim as the heirs of Donald Fisher, deceased. A special verdict was found in the case, which shows that Donald Fisher was a British subject, residing in the City of New York, and departed this life in the year

1798, leaving the lessors of the plaintiffs in ejectment his heirs at law, who are also British subjects. The plaintiffs, being thus found to be British subjects, are incapable of maintaining an action for real estate in the state of New York, unless they are enabled to do so by the 9th article of the treaty between the United States and Great Britain, made in the year 1794, which provides that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, should not be considered as aliens. To avail themselves of this treaty, the lessors of the plaintiff below must show that their ancestors held the lands for which this suit was instituted at the time when it was made. The court does not mean to say that they must show a seizure in fact, or an actual possession of the land, but that the title was in him at the time. This must be *shown in order to bring the case [**302** within the protection afforded by the treaty.

The jurors find that Donald Fisher was, on the 1st day of January, in the year 1777, seized in his demesne, as of fee, of the lands and tenements in the declaration mentioned, and was in the actual possession thereof, and continued so seized and possessed, until the rendering the judgment herein after mentioned.

On the 17th day of April, in the year 1780, the grand jury, for the county of Charlotte, in the state of New York, found an indictment, stating that Donald Fisher (who is the ancestor under whom the lessors of the plaintiffs claim) did, on the 14th day of July, in the year 1777, voluntarily with force and arms, adhere to the enemies of the state. The record proceeds to state that "the said Donald Fisher having, according to the form of the act of the legislature, entitled 'an act for the forfeiture and sale of the estates of persons who have adhered to the enemies of the state,' &c., been notified to appear and traverse the said indictment, and not having appeared and traversed within the time, and in the manner in and by the said act limited and required, it is therefore considered that the said Donald Fisher do forfeit all and singular the estate, both real and personal, whether in possession, reversion, or remainder, had or claimed by him in this state." This judgment was signed on the 29th day of December, 1783, and is the judgment referred to in the special verdict, as herein before mentioned. Under these proceedings the lands in the declaration mentioned *were sold, [**303** and the defendants, in the court below, hold under that sale.

There are other points raised in the special verdict, and urged by counsel; but it will be unnecessary to notice them, and the court does not mean to give any opinion on them. The court gave judgment for the plaintiffs below, and that judgment is now before this court on a writ of error.

It is contended by the defendants in error that this judgment having been rendered subsequent to the treaty of peace of 1783, and in direct repugnance thereto, is not merely voidable, but absolutely void. By the plaintiffs it is alleged to be voidable only.

This court cannot now decide that question. The verdict does not find that Donald Fisher held his title until the treaty of 1794 was made.

Wheat. 1.

¹—Vide Appendix, note II.

and although nothing is found to show that he has parted with it, yet the court cannot presume that he did not part with it. The verdict ought to have shown that the title was in Donald Fisher when the treaty was made, and continued in him to the time of his death. For this essential defect, the verdict is too imperfect to enable the court to decide on the case. The judgment of the Circuit Court must therefore be reversed, and the cause remanded to that court, with directions to award a *venire facias de novo*.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of New York, and was 304*] argued by counsel; *all which being considered, this court is of opinion that there is error in the judgment of the Circuit Court for the District of New York, in this, that the said court ought not to have rendered judgment on the said verdict in favor of the plaintiffs in ejectment, because it does not appear certainly, in the said verdict, that the ancestor, under whom they claim, held in law, or in fact, the lands mentioned in the declaration, when the treaty of 1794, between the United States and Great Britain, was made; therefore, it is considered by this court that the said judgment be reversed and annulled, and that the cause be remanded to the Circuit Court for the District of New York, with directions to award a *venire facias de novo*.

*Judgment reversed.*¹

Cited—4 Wheat. 484; 9 Wheat. 496; 14 Pet. 413.

[CONSTITUTIONAL LAW.]

MARTIN, Heir at law and devisee of FAIRFAX,
v.
HUNTER'S LESSEE.

The appellate jurisdiction of the Supreme Court of the United States extends to a final judgment or decree in any suit in the highest court of law or equity of a state; where is drawn in question the validity of a treaty, or statute of, or an authority 305*] exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or the construction of a treaty, or statute of, or commission held

1.—*Vide* 11 Johns. Rep. 418, Jackson v. Decker.

NOTE.—Where by the statutes of a state it is necessary in order to appeal from an inferior state court to the highest court of the state, that leave of such highest court or of a judge thereof should be first obtained, and where that leave has been refused, a writ of error, if there be in the case "a federal question," properly lies, under section 709 of the U. S. revised statutes, to the inferior, and not to such highest court. Gregory v. McVeigh, 23 Wall. 294, 307.

It is necessary in order to give the Supreme Court jurisdiction over a judgment of a state court, that it should appear that one of the questions mentioned in the statute was raised and presented to the state court; and that such question was decided by the state court against the title, right, privilege or immunity, specially set up or claimed

under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission.

Such judgment or decree may be re-examined by writ of error in the same manner as if rendered in a circuit court.

If the cause has been once remanded before, and the state court decline or refuse to carry into effect the mandate of the Supreme Court thereon, this court will proceed to a final decision of the same, and award execution thereon.

If the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself.

The return of a copy of the record, under the seal of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case.

It need not appear that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.

THIS was a writ of error to the Court of Appeals of the State of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals, rendered on the mandate: "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not *extend to this court under a sound [*306] construction of the constitution of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non iudice* in relation to this court, and that obedience to its mandate be declined by the court."

The original suit was an action of ejectment, brought by the defendant in error, in one of the district courts of Virginia, holden at Winchester, for the recovery of a parcel of land, situate within that tract, called the northern neck of Virginia, and part and parcel thereof. A declaration in ejectment was served (April, 1791,) on the tenants in possession; whereupon Denny Fairfax (late Denny Martin), a British subject, holding the land in question,

by the plaintiff in error, under the constitution, treaty, statute, commission or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case. Murdock v. City of Memphis, 20 Wall. 591.

If such claim of right of the plaintiff in error was erroneously decided, by the state court, still, if the judgment of the state court can be sustained upon any other ground or issue adjudged in it, the judgment will be affirmed. *Idem*.

This court has no jurisdiction to re-examine the judgment of a state court, where a federal question was not in fact passed upon and where a decision of it was unnecessary in the view which the court below took of the case; or where the error was one of the jury alone, the charge of the court being correct. McManis v. O'Sullivan, 1 Otto, 578; Bol-

under the devise of the late Thomas Lord Fairfax, was admitted to defend the suit, and plead the general issue, upon the usual terms of confessing lease, entry, and ouster, &c., and agreeing to insist, at the trial, on the title only, &c. The facts being settled in the form of a case agreed to be taken and considered as a special verdict, the court, on consideration thereof, gave judgment (24th of April, 1794), in favor of the defendant in ejectment. From that judgment the plaintiff in ejectment (now defendant in error) appealed to the Court of Appeals, **307*** being the highest court of law of Virginia. At April term, 1810, the Court of Appeals reversed the judgment of the District Court, and gave judgment for the then appellant, now defendant in error, and thereupon the case was removed into this court.

State of the facts as settled by the case agreed:

1st. The title of the late Lord Fairfax to all that entire territory and tract of land called the Northern Neck of Virginia, the nature of his estate in the same, as he inherited it, and the purport of the several charters and grants from the kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an act of the assembly of Virginia, passed in the year 1736 (*vide* Rev. Code, v. 1, ch. 3. p. 5), "For the confirming and better securing the titles to lands in the Northern Neck, held under the Rt. Hon. Thomas Lord Fairfax," &c.

From the recitals of the act, it appears that the first letters patent (1 Car. II.), granting the land in question to Ralph Lord Hopton and others, being surrendered, in order to have the grant renewed, with alterations, the Earl of St. Albans and others (partly survivors of, and partly purchasers under, the first patentees) obtained new letters patent (2 Car. II.), for the same land and appurtenances, and by the same description, but with additional privileges and reservations, &c.

The estate granted is described to be, "All that entire tract, territory, or parcel of land, situate, &c., and bounded by, and within the heads of, the rivers Tappahannock, &c., together with the rivers themselves, and all the islands, &c.; and all woods, underwoods, timber, &c., **308*** mines of gold and silver, lead, tin, &c., and quarries of stone and coal, &c., to have, hold and enjoy the said tract of lands, &c., to the said patentees, their heirs and assigns forever, to their only use and behoof, and to no other use, intent or purpose whatsoever."

There is reserved to the crown the annual rent of £6 13 4 "in lieu of all services and

demands whatsoever;" also one-fifth part of all gold, and one-tenth part of all silver mines.

To the absolute title and seizin in fee of the land and its appurtenance, and the beneficial use and enjoyment of the same, assured to the patentees, as tenants *in capite*, by the most direct and abundant terms of conveyancing, there are superadded certain collateral powers of baronial dominion; reserving, however, to the governor, council and assembly of Virginia, the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants for the public and common defense of the colony, as well as a general jurisdiction over the patentees, their heirs and assigns, and all other inhabitants of the said territory.

In the enumeration of privileges specifically granted to the patentees, their heirs and assigns, is that "freely and without molestation of the king, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for, or buy, the same."

There is also a condition to avoid the grant, as to so much of the granted premises as should not be *possessed, inhabited, or plant- [**309** ed, by the means or procurement of the patentees, their heirs or assigns, in the space of 21 years.

The third and last of the letters patent referred to (4 Jac. II.), after reciting a sale and conveyance of the granted premises by the former patentees, to Thomas Lord Culpepper, "who was thereby become sole owner and proprietor thereof, in fee-simple," proceeds to confirm the same to Lord Culpepper, in fee-simple, and to release him from the said condition for having the lands inhabited or planted as aforesaid.

The said act of assembly then recites, that Thomas Lord Fairfax, heir at law of Lord Culpepper, had become "sole proprietor of the said territory, with the appurtenances, and the above-recited letters patent."

By another act of assembly, passed in the year, 1748 (Rev. Code, v. 1, ch. 4, p. 10), certain grants from the crown, made while the exact boundaries of the Northern Neck were doubtful, for lands which proved to be within those boundaries, as then recently settled and determined, were, with the express consent of Lord Fairfax, confirmed to the grantees; to be held, nevertheless, of him, and all the rents, services, profits, and emoluments (reserved by such grants), to be paid and performed to him.

In another act of assembly, passed May, 1779,

ling v. Lersner, 1 Otto, 594; *Brown v. Atwell*, 2 Otto, 327; *Woodruff v. Hough*, 1 Otto, 598; nor unless the decision of the state court is against the plaintiff in error. *Long v. Converse*, 1 Otto, 105. but in a chancery suit, where all of the evidence is brought up, as part of the record, the case may be re-examined as to the law and the facts, so far as to determine the validity of a right claimed under an act of Congress, the decision of the state court being adverse thereto. *Rep. R. B. Co. v. Kansas P. R. Co.*, 2 Otto, 315.

Though there be error in the charge, yet if it be evident that if the court had charged correctly the result would have been the same, this court will not reverse. *Decatur Bk. v. St. Louis Bk.*, 21 Wall, 284.

If the record shows that a federal question was

not necessarily involved, and does not show that one was raised, this court will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided. *Moore v. Mississippi*, 21 Wall, 638.

If the facts and decision are such as to show that a federal right was adversely decided below, the jurisdiction of the Supreme Court of the U. S. is not defeated by showing that the record does not mention a federal question, or state in terms that one was presented below. *Murray v. Charleston*, 6 Otto, 432; *Wolf v. Stix*, 6 Otto, 541.

A decision of the highest court of a state, reversing a decision of a court below, and remanding the case for further proceedings, is not final, so that it can be reviewed by the U. S. Supreme Court. *Davis v. Grouch*, 4 Otto, 514.

Wheat. 1.

for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands, there is the following clause, viz. (*vide* Chy. Rev. of 1783, ch. 13, s. 310*) 6, p. 98): "And that the *proprietors of land within this commonwealth may no longer be subject to any servile, feudal, or precarious tenure, and to prevent the danger to a free state from perpetual revenue, be it enacted, that the royal mines, quit-rents, and all other reservations and conditions in the patents or grants of land from the crown of England, under the former government, shall be, and are hereby declared null and void; and that all lands thereby respectively granted shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with the lands hereafter granted by the commonwealth, by virtue of this act."

2d. As respects the actual exercise of his proprietary rights by Lord Fairfax.

It is agreed that he did, in the year 1748, open and conduct, at his own expense, an office within the Northern Neck, for granting and conveying what he described and called the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published; that he did, from time to time, grant parcels of such lands in fee (the deeds being registered at his said office, in books kept for that purpose, by his own clerks and agents); that, according to the uniform tenor of such grants, he did, styling himself proprietor of the Northern Neck, &c., in consideration of a certain composition to him paid, and of certain annual rents therein reserved, grant, &c.; with a clause of re-entry for non-payment of the rent, &c.; that he also demised, for lives and terms of years, parcels of the same description of lands, also reserving 311*) annual *rents; that he kept his said office open for the purposes aforesaid, from the year 1748 till his death, in December, 1781; during the whole of which period, and before, he exercised the right of granting in fee, and demising for lives and terms of years, as aforesaid, and received and enjoyed the rents annually, as they accrued, as well under the grants in fee as under the leases for lives and years. It is also agreed that Lord Fairfax died seized of lands in the Northern Neck, equal to about 300,000 acres, which had been granted by him in fee, to one T. B. Martin, upon the same terms and conditions, and in the same form as the other grants in fee before described; which lands were, soon after being so granted, reconveyed to Lord Fairfax in fee.

3d. Lord Fairfax, being a citizen and inhabitant of Virginia, died in the month of December, 1781, and, by his last will and testament, duly made and published, devised the whole of his lands, &c., called, or known by the name of the Northern Neck of Virginia, in fee, to Denny Fairfax (the original defendant in ejectment), by the name and description of the Reverend Denny Martin, &c., upon condition of his taking the name and arms of Fairfax, &c.; and it is admitted that he fully complied with the conditions of the devise.

4th. It is agreed that Denny Fairfax, the devisee, was a native born British subject, and never became a citizen of the United States, nor any one of them, but always resided in England. 1.

land, as well during the revolutionary war as from his birth, about the year 1750, to his death, which happened some time between *the [*312 years 1796 and 1803, as appears from the record of the proceedings in the Court of Appeals.

It is also admitted that Lord Fairfax left, at his death, a nephew named Thomas Bryan Martin, who was always a citizen of Virginia, being the younger brother of the said devisee, and the second son of a sister of the said Lord Fairfax; which sister was still living, and had always been a British subject.

5th. The land demanded by this ejectment being agreed to be part and parcel of the said territory and tract of land called the Northern Neck, and to be a part of that description of lands within the Northern Neck, called and described by Lord Fairfax as "waste and ungranted," and being also agreed never to have been escheated and seized into the hands of the commonwealth of Virginia, pursuant to certain acts of assembly concerning escheators, and never to have been the subject of any inquest of office, was contained and included in a certain patent, bearing date the 30th of April, 1789, under the hand of the then governor, and the seal of the commonwealth of Virginia, purporting that the land in question is granted by the said commonwealth unto David Hunter (the lessor of the plaintiff in ejectment) and his heirs forever, by virtue and in consideration of a land-office treasury warrant, issued the 28d of January, 1788. The said lessor of the plaintiff in ejectment is, and always has been, a citizen of Virginia; and in pursuance of his said patent, entered into the land in question, and was thereof possessed, prior to the institution of the said action of ejectment.

*6th. The definitive treaty of peace [*313 concluded in the year 1783, between the United States of America and Great Britain, and also the several acts of the assembly of Virginia, concerning the premises, are referred to as making a part of the case agreed.

Upon this state of facts the judgment of the Court of Appeals of Virginia was reversed by this court, at February term, 1813, and thereupon the mandate above mentioned was issued to the Court of Appeals, which being disobeyed, the cause was again brought before this court.

Jones, for the plaintiffs in error. There are two questions in the cause: 1st. Whether this court has jurisdiction. 2d. Whether it has been rightly exercised in the present case. 1. Contemporaneous construction, and the uniform practice since the constitution was adopted, confirms the jurisdiction of the court. The authority of all the popular writers who were friendly to it, is to the same effect; and the letters of Publius show that it was agreed, both by its friends and foes, that the judiciary power extends to this class of cases. In the conventions, by which the constitution was adopted, it was never denied by its friends that its powers extended as far as its enemies alleged. It was admitted, and justified as expedient and necessary. Ascending from these popular and parliamentary authorities to the more judicial evidence of what is the supreme law of the land, we find a concurrence of opinion. This government *is not a mere confederacy, like [*314 the Grecian leagues, or the Germanic constitution, or the old continental confederation. In

275*] these sections, did not preclude *our vessels from going to any part of the world, but only forbid their bringing to this country the articles whose importation was prohibited. If the 12th section had also been revived, then no vessel of the United States could have gone to Great Britain or France, and the distinction of permitted and forbidden ports would have continued until the 1st of May, 1810. But as the whole embargo system expired in June, 1809, not only by the 19th section of the act of March, 1809, but also by the express provision of the act of June of the same year, the conclusion is inevitable that when the *Edward* sailed there was no law in force by which any distinction of prohibited and permitted ports existed; and that, therefore, the not giving the bond in question was no violation of law.

No notice has been taken of either of the proclamations of the President, because, if the view here presented be correct, neither of them has any bearing on the question. Admitting the validity of both of them, the latter would not make the ports of England prohibited ports, if the laws which created the distinction had done it away by opening to the citizens of the United States the ports of every nation on the globe. The President's power could only exist while such a state of things continued as suggested the necessity of, and would render, an interference on his part proper and useful, and no longer.

It may be, and has been, said that the opinion here expressed is at variance with the public opinion on this subject, as well as with the understanding *of the collectors and some other officers of government; and that even this court has, at its present term, condemned property for the same offense with which the *Edward* is charged. The answer to all this is, that the condemnation alluded to passed *sub silentio*, without bringing the point distinctly to our view, and is, therefore, no precedent; and that, as to public opinion, or that of the officers of government, however respectable they may be, it can furnish no good grounds for enforcing so heavy a penalty, unless, on investigation, it shall appear to have been correctly formed. It was also urged that Congress must have supposed the law to be as it is now contended for by the Attorney-General, or they would not have passed the 3d section of the act of the

28th June, 1809, when there was no state of things to which its provisions could apply. To this the answer which was given at the bar is satisfactory. At the time of the bringing in of that bill the embargo laws were still in force, and would continue so until the end of that session. Now, as it could not then be foreseen that the bill would not become a law until the last day of the session, a prohibition not to go to prohibited ports was necessary, but became nugatory by the law not passing until the time prescribed for the extinction of the whole system.

Upon the whole, it appears to me clear that there was no law in force when the *Edward* left Savannah interdicting her from going to any foreign port whatever, or requiring from her owners any bond not to go to such port; and, under this persuasion, *I have thought [*277 it a duty to express my dissent from the judgment which has been just rendered.

But were the case doubtful, I should still arrive at the same conclusion, rather than execute a law so excessively penal, about whose existence and meaning such various opinions have been entertained.

To satisfy ourselves that great difficulties must exist, in relation to this law, we have only to look at the progress of the case now before us. The offense with which the *Edward* is charged in the information, is going, without giving bond, to a prohibited foreign port. The condemnation in the Circuit Court, however, proceeded on the ground of all the ports of Great Britain (to one of which it was alleged she was going) being permitted ports. In the very able argument which was made here in support of the prosecution, it was attempted to be shown that Liverpool was not a permitted, but an interdicted, port. This state of uncertainty, which, it would seem, could hardly exist if the legislature had expressed themselves with that precision and perspicuity which are always expected in criminal cases, would, with me, independent of my own convictions that there was no such prohibiting law, have been a sufficient reason for restoring this property to the claimants.

*Sentence of the Circuit Court affirmed.*¹

Cited—4 How. 154; 6 How. 434; 2 Wood. & M. 540; 3 Wood. & M. 348.

1.—In order to enable the reader the better to understand this case, the following account of the dates and substance of the British orders in council, the French decrees, and the consequent acts of the United States government, has been subjoined:

278*] *On the 16th of May, 1806, the British government issued an order in council declaring the coast included between the Elbe and Brest in a state of blockade.

On the 21st of November, 1806, the French emperor issued his Berlin decree declaring Great Britain and her dependencies in a state of blockade.

On the 7th of January, 1807, the British government issued an order in council prohibiting neutral ships from carrying on trade from one enemy's port to another, including France and her allies.

On the 11th of November, 1807, the British orders in council were issued, which declared the continental ports from which British ships were excluded in a state of blockade (except in case of ships cleared out from Great Britain whose cargoes had paid a transit duty), and rendered liable to condemnation all neutral ships, with their cargoes, trading to or from the ports of France, or her allies,

and their dependencies, or having on board certificates of origin.

On the 7th of December, 1807, the French emperor issued his Milan decree, declaring that any neutral ships which should have touched at a British port, or paid a transit duty to the British government, or submitted to be searched by British cruisers, should be liable to condemnation.

On the 22d of December, 1807, the American embargo took place.

On the 1st of March, 1808, the embargo was removed, and a non-intercourse substituted with both France and England.

On the 19th of April, 1808, a negotiation was concluded by Mr. Erskine, in consequence of which the trade with Great Britain was renewed on the 10th of June.

On the 26th of April, 1808, a British order in council was issued, modifying the former blockade, which was henceforth to be confined to ports under the governments of Holland (as far north as the river Ems) and France, together with the colonies of both, and all ports of Italy included between Orbitello and Pesaro.

On the 10th of August, 1808, the non-intercourse

Wheat. 1.

279*]

*[LOCAL LAW.]

THE MUTUAL ASSURANCE SOCIETY
v.
WATTS' EXECUTOR.

Under the 6th and 8th sections of the Act of Assembly of Virginia, of the 22d of December, 1794, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the hands of a *bona fide* purchaser without notice.

A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the District of Columbia to the national government did not affect the lien created by the above act on real property situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property.

APPPEAL from the Circuit Court in the District of Columbia for Alexandria county. The cause was argued by *Swann* for the appellants, and by *Taylor* and *Lee* for the respondents.

JOHNSON, J., delivered the opinion of the court as follows:

280*] *This is a bill in chancery, filed by the complainants, to charge certain premises, in the possession of the defendant, situate in the town of Alexandria, with the payment of a sum of money, assessed in pursuance of the laws establishing the Mutual Assurance Society, for quotas becoming due after his testator acquired possession. The executor has, in fact, sold the premises, under a power given him by the testator, but the money remains in his hands; and it is conceded that the sole object now contended for is to charge the money arising from the sale of the land in question with the assessment to which it is contended that the land was liable. The insurance was made in 1799, and the property sold to the defendant's testator in 1807, long after the town of Alexandria ceased to be subject to the laws of Virginia. It is admitted that the sale was made without notice of this incumbrance (if it was one), and the quota demanded was assessed on the premises for a loss which happened subsequent to the transfer. The points made in the case arise out of the construction of the 6th and 8th sections of the act of Virginia, passed the 22d of December, 1794. The 6th section is in these words: "If the funds should not be sufficient, a repartition among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her, or their share, according to the sum insured, and rate of hazard at which the building stands, agreeably to the rate of premium, for which purpose it is hereby declared that the subscribers, as soon as they shall insure their property in the Assurance Society aforesaid, do mutually, for **281*]** themselves, *their heirs, executors, ad-

ministrators and assigns, engage their property insured as security, and subject the same to be sold, if necessary, for the payment of such quotas." And the 8th section is in these words: "To the end that purchasers or mortgagees of any property insured, by virtue of this act, may not become losers thereby, the subscriber selling, mortgaging, or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance; and indorse to him or them the policy thereof. And in every case of such change the purchaser or mortgagee shall be considered as a subscriber in the room of the original, and the property so sold, mortgaged, or otherwise transferred, shall still remain liable for the payment of the quotas, in the same manner as if the right thereof had remained in the original owner."

In the argument two points were made: 1st. That property pledged to the society remained liable for the quota to a purchaser without notice. 2d. That the purchaser, by the purchase of such property, although without notice, became, by virtue of the 8th section, a member of the society, and liable, in all respects, as such.

The second of these questions is now withdrawn from the consideration of this court by an agreement entered on record. And it must be admitted, that whatever may be the strict construction of the 8th section and its operation in the state of Virginia, so far as it is intended to force on the purchaser a personal character or liability, it could have no operation in the town of Alexandria at the date of this transfer. *The laws of Virginia had then [**282** ceased to be the laws of Alexandria, and it could only be under an actually existing law, operating at the time of the transfer, that the character of membership in the Virginia company would be forced upon the purchaser. This is not one of those cases in which tenure attaches to an individual a particular characteristic or obligation; such cases arise exclusively between the occupant of the soil and the sovereignty which presides immediately over the territory. The transfer, therefore, of the District of Alexandria to the national government, put an end to the operation of the 8th section, so far as it operated by mere force of law, independent of his own consent, to fasten on the purchaser the characteristics of a member. But it is otherwise with regard to the soil. The idea is now exploded that a mere change of sovereignty produced any change in the state of rights existing in the soil. In this respect everything remains in the actual state, whether the interest was acquired by law, under a grant, or by individual contract.¹

We consider the question, then, as reduced

1.—*Vide* 6 Cranch, 199, *Korn v. The Mutual Assurance Society*.

with Great Britain again took place, in consequence of Mr. Erskine's arrangement not being ratified.

On the 1st of May, 1810, the trade with both Great Britain and France was opened, under a law of Congress, that whenever either power should rescind its orders or decrees, the President should issue a proclamation to that effect; and in case the other party should not, within three months, equally withdraw its orders or decrees, that the non-importation act should go into effect with respect to that power.

Wheat. 1.

On the 2d of November, 1810, the President issued his proclamation, declaring the Berlin and Milan decrees to be so far withdrawn as no longer to affect the neutral rights of America; and the orders in council not being rescinded,

On the 2d of February, 1811, the importation of British goods, and the admission of British ships into America, were prohibited.

On the 4th of April, 1812, an embargo was laid in the United States, and on the 18th of June following, war was declared against Great Britain.

to this: Does property, pledged to the society, continue liable for assessments in the hands of a *bona fide* purchaser without notice, notwithstanding that he does not become a member by the transfer?

Here we give no opinion on the extent or meaning of the words "property insured," how far they will operate to charge the lands on which buildings stand. The question was **283*** not made in the argument, and is *probably of no consequence in this or any other case. We only notice it in order that such a construction may not be supposed admitted, as is too often concluded, because a court passes over a question *sub silentio*.

Whatever be the property thus pledged, it is very clear that the words of the 6th section are abundantly sufficient to create in it a common law lien, not only in the hands of the original subscriber, but by express words in those of his assignee. If the case rested here, there would be no doubt or difficulty; but every law, and every contract, must be construed with a reference to the subject of that law or contract, and which it is designed to answer. In this view we readily concede that the duration of the lien could not extend beyond the duration of the liability of the subscriber to pay the premium; nor could the liability of the subscriber extend beyond the liability of the company to indemnify him. On the other hand, it would seem that as long as the company could exact of the subscriber the premium, they ought to be held liable to indemnify him. It will, then, be conceded that the liability of the subscriber, and of the company, are mutual, correlative, and co-extensive, and it remains to be examined how this concession affects the case.

It is very clear that there are but three ways by which a subscriber can cease to be a member: 1st. By the consumption of the buildings insured, which results from the nature of the contract. 2d. By complying with the stipulations of the 9th article of the rules and regulations **284*** of the society. *3d. By substituting a vendee in his place, in conformity with the 8th section of the act of the 22d December, 1794. If, then, a subscriber has not become discharged in one of these three ways, what is to prevent the society from pursuing their summary remedy against him? They are not bound to search for his vendee, or to raise the money by a sale of the property pledged; much less are they bound to prosecute their remedy against a purchaser whose name is unknown to them, or who may be absent from the state, or from the United States, or insolvent, or protected, at the time, by some legal privilege. Their contract is with the original subscriber; their rules point out the mode in which he is to extricate himself from this liability, and if he has not pursued it, what defense is left him against a suit instituted by the society? The court cannot imagine one that could avail him. He cannot urge that he has parted with the property. The rules point out to him the conduct that he is to pursue in that event. He may give notice to the vendee of the insurance, and tender an assignment. If the vendee refuse to receive it, he is bound to remain but six weeks longer under the obligation to pay his quotas and indemnify the vendee, at the end of which time he will be entitled to a discharge, upon giving

due notice, and complying with the other requisitions of the 9th section. Nor can he urge that he has no longer any interest in the thing insured; this, if any plea at all, is none in his lips. It belongs to the insurer to avail himself of it, if it belongs to anyone. But it is a plea not true in fact; for he continues *to indemnify his vendee against the [**285** quotas that may be assessed, which, by possibility, may reach to the value of the whole property sold or insured; and, if correct in principle or fact, still this plea could not avail him, since it is in consequence of his own folly or laches that he continues liable to pay the premium of insurance for another's property. And should it be urged that this would be converting an actual insurance into a wager policy, two answers may be given to it, either of which is sufficient; that there is nothing illegal in a wager policy, in itself, and if there were, it is no objection in this case, when it results from the constitution and laws of the society.

But it may be contended that the insurer is discharged, and, therefore, the liability for the quotas ceases.

It is unquestionably true, as a general principle, that where an insurer runs no risk, equity does not consider him entitled to a premium; and, although there exist some reasons in the policy and constitution of this society to apply it, in its fullest extent, to this case, yet, to give the argument its utmost weight, we are disposed to concede it. But what has occurred in this case to discharge the underwriters from their contract? The subscriber was clearly not discharged from his liability to them, and this single consideration furnishes a strong reason for holding them still bound under their contract. What has the subscriber done inconsistent with that contract? The only act he can be charged with, is alienating, without indorsing, the policy. But alienation *alone is perfectly [**286** consistent with the contract, for the policy issues to him and his assigns; and so far from interposing any obstruction to alienation, provision is made for that very case, and unlimited discretion vested in the subscriber to indorse his policy to whom he pleases. Nor is alienation, without indorsing the policy, considered in any more offensive light; inasmuch as the 8th section which enforces the assignment declares expressly that it is for the benefit of purchasers and mortgagees, "to the intent that they may not become losers thereby." It is not pretended that it is for the society's own security; nor do they ever require notice to be given them in case of such transfer of the policy. As to them, therefore, it is an innocent act, and we see no ground on which the society can be discharged, either to the vendor or vendee; they certainly remain liable, and although it may be a question to which of them equity would decree the money, yet to one or the other it certainly would be adjudged; but it is not material to this argument which, as it is a question between the vendor and vendee.

If, then, the case presents no legal ground for discharging either insurer or insured from the contract, and the lien created by the 6th section be commensurate with the liability of the insured, it will follow that the plaintiffs, in this case, ought to have a decree in their favor.

But we will examine, at a closer view, the liability of the property in the hands of the vendee. That he is not liable to the summary remedy is evident from a variety of considerations. He must, then, be "brought into chancery to have his property subjected to the consequences of the lien, whenever a loss happens and a quota is assessed. In that case his defense will always be just what it is in this—that he purchased without notice. But this was never held to be a defense to a bill to foreclose a mortgage, which is precisely a similar case to this. Nor is it any better defense to urge that he could derive no benefit under the policy in case of a loss; for this is precisely the same defense, a little varied, as will be seen by supposing that the vendee of a mortgageor should plead, to a bill of foreclosure, that the money borrowed did not come to his use. But his case is not as good as that of the vendee of the mortgageor in the case supposed; for the 8th section makes provision for his relief. That section says: "To the end that purchasers, or mortgagees, of any property insured, may not become losers thereby" the vendor shall give them notice, and indorse the policy over. In what manner shall the purchasers, or mortgagees, become losers, unless the lien is to continue on the property in their hands? If the vendor be guilty of the folly of paying the quotas, and the vendee never receives notice of the lien, through a demand from the society, there is no damage sustained. If he should be assailed with such a demand, he has a right to require of the vendee an assignment of the policy; and as there existed an original duty to make such an assignment, it may well be held to operate, *nunc pro tunc*, and carry with it all the benefits of an original assignment. **288*** But it is contended that the 8th section explains and limits the 6th section in such a manner as to restrict the duration of the lien in the hands of the vendee to those cases only in which the transfer of the policy also takes place.

This consequence cannot be logically maintained. The argument is, that the words "such change" mean only a change of the property, attended with an assignment of the policy, and that if the legislature had supposed that property sold would, in the hands of the vendee, remain subject to the lien, they would not expressly have subjected it in such a case. But this section will, with philological correctness, admit of a different construction, and a construction more consistent with legal principles, inasmuch as it will not admit of an implication inconsistent with the preceding section, and even with other parts of the same section. Nor, if the construction on which this argument is founded were unavoidable, would the conclusion follow which the argument asserts. The question is, what is the meaning of the words "in every change," in the section under consideration? The solution is only to be found by referring to the preceding and only other clause of the same section; and there we find that a general provision is inevitably to be made for every possible change of sale or purchase. The operation of the clause will, then, be only to confirm and support the general words of the sixth section, and if it left any doubt with regard to the duration of the lien in the hands of the vendee, Wheat. 1.

to remove those doubts by express provision. This construction is also the most consistent with the recital *in the first clause of [*289 the same section, which, as has been before observed, with another view, is founded altogether on the idea that property sold remained pledged to the society in the hands of the vendee, whether with or without notice; as, in that case alone, could vendees, or mortgagees, need the protection held out to them in that clause.

But if a different construction could legally be given to that section, so as to restrict the words "every such case" to mean those cases only which were attended with an assignment of the policy, it would not follow that the lien ceased its operation in all others. To apply to this case the maxim, *expressio unius est exclusio alterius*, would be a glaring sophism. For, the only principle on which such a conclusion could be founded would be that the repetition of a legal provision, included, with many others, in another law, produced a repeal of all others by necessary implication. Such an implication may be resorted to in order to determine the intention of the legislature in a case of doubtful import, but cannot operate to destroy the effect of clear and unequivocal expressions. An obvious and unanswerable objection to giving this effect to this clause is, that it puts it in the power of the subscriber to exonerate the property from the lien by the single act of sale, not even sustaining it for the term of six weeks after the notice given of his intention to withdraw; an effect glaringly inconsistent, no less with the express words than with the general view of the law on this subject. For there is nothing in the act which obliges the vendee to accept an assignment. *A tender to [*290 him, therefore, cannot subject him to any onerous consequences. He does no more than what he may lawfully do. If, then, the lien ceases, unless he accepts the assignment, and it is legally at his option to accept or refuse, the subscriber, in having the right to sell to whom he pleases, has also the duration of the lien submitted to his will.

Some difficulty has also existed in the minds of some of the court on the contingent nature of this lien, whether the lien was complete to all purposes at any period before the assessment of a quota. But, on this subject the majority are of opinion that, as to legal incumbrance, or duration of a lien, it makes no difference whether its object is to secure an existing debt or a contingent indemnity. In the case of *Black et al., mortgagees of Gardner, v. Kraig & Mitchell*, this court sustained a mortgage, given to secure an indorser against notes which he might indorse, where he had entered into no stipulation to indorse for the mortgageor. And in the case of bonds given for the discharge of duties, offices, or annuities, it never was maintained as an objection that the object of the lien was future, contingent, or uncertain. In this case the mutual stipulation to indemnify each other against losses operates as a purchase of the lien, and places the parties on strong equitable grounds as to each other.

Some cases were cited in the argument from the reports of decisions which have been made in the courts of Virginia. This court uniformly acts under the influence of a desire to conform its decisions to those of the state courts on their

291*] local laws; and *would not hesitate to pay great respect to those decisions, if they had appeared to reach the question now under consideration. But they are persuaded that those cases do not come up to the present. In the case of *Greenhow et al. v. Barton* (1 Munf., 598), it is true that the decision of the District Court, which was finally confirmed, was in favor of the purchaser without notice. But it was solely on the question whether he was liable to the summary remedy, or, in other words, liable generally, as a member. And the case of *Anne Byrd*, reported in the cases of the General Court, was likewise the case of a motion for a summary judgment. In the latter case, the court went much further in charging the vendee than this court is called upon to proceed in the present case. But in neither of those cases was a bill filed to charge the vendee, as in the present; nor was the question brought up in either detached from that of his general liability as a member.

The decree below will be reversed, and a decree ordered to be entered for the complainants.

LIVINGSTON, J., and STORY, J., dissented.

Decree reversed.

Cited—1 Cliff. 439; 6 Wheat. 606.

292*] *[LOCAL LAW.]

WALDEN v. THE HEIRS OF GRATZ.

Under the Act of Assembly of Kentucky of 1798, entitled, "An Act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession.

The statute of limitations of Kentucky, does not differ essentially from the English statute of the 21st James I., c. 1, and is to be construed as that statute, and all other acts of limitation founded upon it, have been construed. The whole possession must be taken together; when the statute has once begun to run it continues, and an adverse possession under a survey, previous to its being carried into grant may be connected with a subsequent possession.

ERROR to the Circuit Court for the District of Kentucky. This was an action of ejectment in which the defendants in error were the lessors of the plaintiff in the court below. The declaration in ejectment was returned to the November term of that court, 1813. At the May term, 1814, the suit was abated as to one defendant; judgment by default was entered against Joseph Day, another defendant; and the defendants were admitted to defend instead of the casual ejector. The lessors of the plaintiff claimed under a patent issue to John Craig, in November, 1784. On the 20th of April, 1791, John Craig conveyed the lands mentioned in the declaration, in trust, to Robert Johnson, Elijah Craig, and the survivor of them. On the 11th of February, 1813, Robert Johnson, 293*] styling himself surviving *trustee, conveyed to the lessors of the plaintiff. The defendants below, now plaintiffs in error, claimed under a patent issue to John Coburn in September, 1795, founded on a survey made for Benjamin Netherland in May, 1782. John Coburn, claiming under the said survey, enter-

ed thereon about the year 1790, and dwelt in a house within the limits of said survey, but without the lines of Craig's patent. On the trial, the counsel for the defendants below moved the court to instruct the jury,

1st. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee to the lessors of the plaintiff, that deed did not pass such title as would enable them to recover in this suit.

2d. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee to the lessors of the plaintiff, and had held such adverse possession for twenty years next before said time, that said deed did not pass such title as would enable the plaintiffs to recover in this suit.

3d. That if the defendants, and those under whom they claim, have had possession of the land in question, or any part thereof, for twenty years next before the commencement of this suit, that the plaintiff cannot recover the lands so possessed for twenty years.

On the two first points, the court instructed the jury that, according to the principles of the common law, the deed from Craig's trustee to the lessors of *the plaintiff, would not [*294 pass the title to the lessors of the plaintiff; but that under the operation of the act of assembly of the state of Kentucky, of 1798, the said deed was valid, and did pass the title to the lessors of the plaintiffs, notwithstanding the adverse possession of the defendants. The court refused to give the last instruction applied for, but did instruct the jury that if Coburn entered upon the land in controversy, under the survey on which his patent was founded, and he, and those holding under him, held the said lands for twenty years and upwards, prior to the commencement of this suit, yet, as the patent to Coburn did not issue until 1795, such possession could not avail the defendants claiming under the said Coburn, but that the plaintiffs could recover, notwithstanding such possession. To these opinions and instructions, given by the court, the counsel for the defendants below excepted, and the cause was brought by writ of error into this court.

Hardin, for the plaintiff in error, and defendant in ejectment. 1. No person out of possession can grant; first, because at common law there must be livery of seizin; second, because the grantee could not purchase a mere right of action. Coburn was in possession adversely; therefore, the deed from Craig's trustee to the lessors of the plaintiffs was void. 2. The limitation of twenty years' possession by the defendant before notice of the ejectment was a complete bar. 3. The deed of trust was joint, and it was incumbent upon the plaintiff to prove that one of the trustees was dead. The recital in the deed of conveyance, that [*295 E. Craig was dead, was no sufficient evidence of that fact, except as between the grantor and grantee. 4. There is error in the judgment by default against Day.

Hughes and Talbot, contra. 1. Before the act of 1798, "concerning champerty and maintenance," no title could pass without an actual possession of the grantor; but this statute has abrogated the common law in that particular.

Wheat. 1.

But, in fact, Coburn was not in possession adversely, and a grant from the commonwealth of vacant lands gives the patentee a right to convey. 2. A person leaving it equivocal what his possession was, cannot have an instruction in his favor. It does not appear what part the defendant possessed, nor was the instruction asked under an adverse possession. Twenty years' possession was no bar; the local courts adhere to the English principle, that when the statute has once begun to run, it continues; but the act of assembly differs materially from the English act of 21 James I., c. 1.; and, after the statute has begun to run, it stops if the title passes to a person under any legal disability, and recommences after the disability is removed.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The act of assembly, on which the opinion of the court below, on the first question, was given, is entitled, "An act concerning champerty and maintenance." It enacts, "that no person ~~296~~ purchasing, or *procuring an interest in any legal or equitable claim to land held, &c., shall be precluded from prosecuting or defending said claim, under such purchase or contract; neither shall any suit, or suits, brought to establish such purchase, or make good the title to such claim, be considered as coming within the provisions, either at common law or by statute, against champerty or maintenance," &c. This court is of opinion that this statute enabled the lessors of the plaintiff to maintain a suit in their own name for the lands conveyed to them, and that there is no error in this instruction of the Circuit Court.

On the third question the Circuit Court instructed the jury that an adverse possession under a survey, previous to its being carried into grant, could not be connected with a subsequent possession, but that the computation must commence from the date of the patent. In giving this opinion, the court unquestionably erred. No principle can be better settled than that the whole possession must be taken together.

The counsel for the defendants in error have endeavored to sustain this opinion by a construction of the statute of limitations of Kentucky. They contend that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed as that statute, and all other acts ~~297~~ of limitation *founded on it, have been construed. This court is therefore of opinion that there is error in the instruction given by the Circuit Court to the jury on the third prayer of the plaintiff in error.

It has been contended by the counsel for the plaintiff, that there is also error in the judgment rendered against Joseph Day by default; but of his case the court can take no notice, as he is

not one of the plaintiffs in error, and the judgment rendered against him is not before us. The judgment must be reversed for error in the directions of the court to the jury on the third point, on which instructions were given.

JUDGMENT.—This cause came on to be heard on the transcript of the record, from the Circuit Court for the District of Kentucky, and was argued by counsel. On consideration whereof this court is of opinion that there is error in the proceedings and judgment of the Circuit Court in this, that the judge thereof directed the jury that the tenants in possession could not connect their adverse possession previous to the date of the patent under which they claimed with their adverse possession subsequent thereto, but in the length of time which would bar the action could compute that only which had passed subsequent to the emanation of their grant. Wherefore it is considered by the court that the judgment of the Circuit Court [*298 be reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to award a new trial therein.

Judgment reversed.

Cited—9 Otto, 168; 2 Sawy. 518.

[PRIZE.]

THE HARRISON. HERBERT, *Claimant.*

If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors.

In prize causes this court has an appellate jurisdiction only, and a claim cannot for the first time be interposed here; but where the court below had proceeded to adjudication before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, &c.

APPEAL from the Circuit Court for the District of Maryland. The libel filed by the captors, in this case, in the District Court, alleged that the goods for which condemnation was sought were captured and taken out of a Spanish vessel. No claim was filed for the goods in either of the courts below. But, upon hearing, the District Court dismissed the libel, upon the ground that the property, to whomsoever belonging, was protected by the 15th article of the treaty of 1795 with Spain, by [*299 which free ships make free goods; and this decree was affirmed, upon the same principle, in the Circuit Court. The captors brought the cause, by appeal, to this court; and a motion was made by *Winder*, in behalf of Elry Herbert, an asserted claimant, to be admitted to file a claim in this court.

STORY, *J.*, delivered the opinion of the court:

We have considered this question with a view to the general rules of practice. Whenever a prize is brought to adjudication in the admiralty, if, upon the hearing of the cause upon the ship's papers, and the evidence taken in pre-

1.—*Vide* 4. T. R. 300; Doe, ex dem., Durouse v. Jones.

Wheat. 1.

paratory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person having title to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed to a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy and default of the supposed owner. In the present case the prescribed period had not elapsed at the time when the District Court proceeded to decree a dismissal of the libel. A claim cannot, by the practice of this court, be for the first time interposed here. In prize causes this court can exercise only an appellate jurisdiction, and between **300*** parties who have litigated in the court below. We are all, therefore, of opinion that this cause ought to be remanded to the Circuit Court, with directions to allow the claim to be filed in that court; and, also, to allow the libel to be amended so as to conform to the general allegation of prize, and enable the captors to obtain condemnation of the property, if the asserted claim shall not be sustained, and the property shall not appear entitled to the protection of the Spanish treaty.

*Case remanded.*¹

Cited—5 Wall. 412; Blatchf. Pr. 54.

[COMMON LAW.]

HARDEN v. FISHER ET AL.

Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens; the parties must show that the title to the land for which the suit was commenced was in them, or their ancestors, at the time the treaty was made.

ERROR to the Circuit Court for the District of New York. This case was argued, with great learning and ability, by *Hoffman* for the plaintiff in error, and defendant in ejectment, and by *Stockton*, for the defendants in **301*** error and plaintiffs in ejectment. But, as the court gave no judgment upon the points discussed, the argument has been omitted.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

This is an action of ejectment, brought by the defendants in error, in the Circuit Court for the District of New York, to recover certain lands, which they claim as the heirs of Donald Fisher, deceased. A special verdict was found in the case, which shows that Donald Fisher was a British subject, residing in the City of New York, and departed this life in the year

1798, leaving the lessors of the plaintiffs in ejectment his heirs at law, who are also British subjects. The plaintiffs, being thus found to be British subjects, are incapable of maintaining an action for real estate in the state of New York, unless they are enabled to do so by the 9th article of the treaty between the United States and Great Britain, made in the year 1794, which provides that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, should not be considered as aliens. To avail themselves of this treaty, the lessors of the plaintiff below must show that their ancestors held the lands for which this suit was instituted at the time when it was made. The court does not mean to say that they must show a seizin in fact, or an actual possession of the land, but that the title was in him at the time. This must be *shown in order to bring the case [**302** within the protection afforded by the treaty.

The jurors find that Donald Fisher was, on the 1st day of January, in the year 1777, seized in his demesne, as of fee, of the lands and tenements in the declaration mentioned, and was in the actual possession thereof, and continued so seized and possessed, until the rendering the judgment herein after mentioned.

On the 17th day of April, in the year 1780, the grand jury, for the county of Charlotte, in the state of New York, found an indictment, stating that Donald Fisher (who is the ancestor under whom the lessors of the plaintiffs claim) did, on the 14th day of July, in the year 1777, voluntarily with force and arms, adhere to the enemies of the state. The record proceeds to state that "the said Donald Fisher having, according to the form of the act of the legislature, entitled 'an act for the forfeiture and sale of the estates of persons who have adhered to the enemies of the state,' &c., been notified to appear and traverse the said indictment, and not having appeared and traversed within the time, and in the manner in and by the said act limited and required, it is therefore considered that the said Donald Fisher do forfeit all and singular the estate, both real and personal, whether in possession, reversion, or remainder, had or claimed by him in this state." This judgment was signed on the 29th day of December, 1783, and is the judgment referred to in the special verdict, as herein before mentioned. Under these proceedings the lands in the declaration mentioned *were sold, [**303** and the defendants, in the court below, hold under that sale.

There are other points raised in the special verdict, and urged by counsel; but it will be unnecessary to notice them, and the court does not mean to give any opinion on them. The court gave judgment for the plaintiffs below, and that judgment is now before this court on a writ of error.

It is contended by the defendants in error that this judgment having been rendered subsequent to the treaty of peace of 1783, and in direct repugnance thereto, is not merely voidable, but absolutely void. By the plaintiffs it is alleged to be voidable only.

This court cannot now decide that question. The verdict does not find that Donald Fisher held his title until the treaty of 1794 was made,

Wheat. 1.

1—Vide Appendix, note II.

and although nothing is found to show that he has parted with it, yet the court cannot presume that he did not part with it. The verdict ought to have shown that the title was in Donald Fisher when the treaty was made, and continued in him to the time of his death. For this essential defect, the verdict is too imperfect to enable the court to decide on the case. The judgment of the Circuit Court must therefore be reversed, and the cause remanded to that court, with directions to award a *venire facias de novo*.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of New York, and was 304*] argued by counsel; *all which being considered, this court is of opinion that there is error in the judgment of the Circuit Court for the District of New York, in this, that the said court ought not to have rendered judgment on the said verdict in favor of the plaintiffs in ejectment, because it does not appear certainly, in the said verdict, that the ancestor, under whom they claim, held in law, or in fact, the lands mentioned in the declaration, when the treaty of 1794, between the United States and Great Britain, was made; therefore, it is considered by this court that the said judgment be reversed and annulled, and that the cause be remanded to the Circuit Court for the District of New York, with directions to award a *venire facias de novo*.

*Judgment reversed.*¹

Cited—4 Wheat. 464; 9 Wheat. 496; 14 Pet. 413.

[CONSTITUTIONAL LAW.]

MARTIN, Heir at law and devisee of FAIRFAX,
v.
HUNTER'S LESSEE.

The appellate jurisdiction of the Supreme Court of the United States extends to a final judgment or decree in any suit in the highest court of law or equity of a state; where is drawn in question the validity of a treaty, or statute of, or an authority 305*] exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or the construction of a treaty, or statute of, or commission held

1.—Vide 11 Johns. Rep. 418, Jackson v. Decker.

NOTE.—Where by the statutes of a state it is necessary in order to appeal from an inferior state court to the highest court of the state, that leave of such highest court or of a judge thereof should be first obtained, and where that leave has been refused, a writ of error, if there be in the case "a federal question," properly lies, under section 709 of the U. S. revised statutes, to the inferior, and not to such highest court. Gregory v. McVeigh, 23 Wall. 294, 307.

It is necessary in order to give the Supreme Court jurisdiction over a judgment of a state court, that it should appear that one of the questions mentioned in the statute was raised and presented to the state court; and that such question was decided by the state court against the title, right, privilege or immunity, specially set up or claimed Wheat. 1. U. S., Book 4.

under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission.

Such judgment or decree may be re-examined by writ of error in the same manner as if rendered in a circuit court.

If the cause has been once remanded before, and the state court decline or refuse to carry into effect the mandate of the Supreme Court thereon, this court will proceed to a final decision of the same, and award execution thereon.

If the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself.

The return of a copy of the record, under the seal of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case.

It need not appear that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.

THIS was a writ of error to the Court of Appeals of the State of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals, rendered on the mandate: "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not *extend to this court under a sound [*306 construction of the constitution of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non iudice* in relation to this court, and that obedience to its mandate be declined by the court."

The original suit was an action of ejectment, brought by the defendant in error, in one of the district courts of Virginia, holden at Winchester, for the recovery of a parcel of land, situate within that tract, called the northern neck of Virginia, and part and parcel thereof. A declaration in ejectment was served (April, 1791,) on the tenants in possession; whereupon Denny Fairfax (late Denny Martin), a British subject, holding the land in question,

by the plaintiff in error, under the constitution, treaty, statute, commission or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case. Murdock v. City of Memphis, 20 Wall. 591.

If such claim of right of the plaintiff in error was erroneously decided, by the state court, still, if the judgment of the state court can be sustained upon any other ground or issue adjudged in it, the judgment will be affirmed. *Idem*.

This court has no jurisdiction to re-examine the judgment of a state court, where a federal question was not in fact passed upon and where a decision of it was unnecessary in the view which the court below took of the case; or where the error was one of the jury alone, the charge of the court being correct. McMaun v. O'Sullivan, 1 Otto, 578; Bol-

very cheerfully admit), it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and **347*** given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout **348*** the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before

the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the ***349** security which the constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, ***and** ***350** enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal

cases, there would at once be an end of all [351*] control, and the *state decisions would be paramount to the constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. [352*] It *is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws, of the United States, and the decision is in favor of such their validity; or of the constitution, or of a treaty

Wheat. 1.

or statute of, or commission held under, the United *States, and the decision is [353 against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned question of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, therefore, equivalent to a perpetual stay of proceedings upon *the mandate, and a per- [354 petual denial of all the rights acquired under it. The case, then, falls directly within the terms of the act. It is a final judgment in a suit in a state court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate, and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment. In our opinion no legal distinction exists between the cases.

In causes remanded to the circuit courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of state courts as of the circuit courts; and in its terms provides for proceeding where the same cause may be a second time brought up on writ of error before the Supreme Court. There is no limitation or description of the cases to which the second writ of error may be applied; and it ought, therefore, to be co-extensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

But it is contended that the former judgment of this court was rendered upon a case not within the purview of this section of the judicial act, and that as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain

355* any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admitted that, upon this writ of error, the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined.

In this case, however, from motives of a public nature, we are entirely willing to waive all objections, and to go back and re-examine the question of jurisdiction as it stood upon the record formerly in judgment. We have great confidence that our jurisdiction will, on a careful examination, stand confirmed as well upon principle as authority. It will be recollected that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging **356*** to Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts in the nature of a special verdict, upon which the District Court of Winchester, in 1793, gave a general judgment for the defendant, which judgment was afterwards reversed in 1810, by the Court of Appeals, and a general judgment was rendered for the plaintiff; and from this last judgment a writ of error was brought to the Supreme Court. The statement of facts contained a regular deduction of the title of Lord Fairfax until his death, in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff, under the state of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax, and the supposed escheat or forfeiture thereof as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on either side.

It is apparent, from this summary explanation, that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and complete, if it was protected by the treaty of 1783. If, therefore, this court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the 25th

section of the act; for there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty; and if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the act.

The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and, *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. In support of this objection much stress is laid upon the last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the construction of the treaty, &c., in dispute.

If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons **358** against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires, that the error upon which the appellate court is to decide shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of **359** course, be within the cognizance of the court.

Wheat. 1.

The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defenses, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all, and in such cases it was the intention of Congress to limit what would otherwise have unquestionably attached to the court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions specified in the section; and in this view, it has an appropriate sense, consistent with the preceding clauses. We are, therefore, satisfied, that, upon principle, the case was rightfully before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

But the point has been already decided by this court upon solemn argument. In *Smith v. The State of Maryland* (6 Cranch, 296), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. That case was, in some respects, stronger than the present; for the court below decided, expressly, that the party had no title, and, therefore, the treaty could not operate **360*** upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

It has been asserted at the bar that, in point of fact, the Court of Appeals did not decide either upon the treaty or the title apparent upon the record, but upon a compromise made under an act of the legislature of Virginia. If it be true (as we are informed) that this was a private act, to take effect only upon a certain condition, viz., the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand how the court could take judicial cognizance of the act, or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider that the court did decide upon the facts actually before them.

The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of the decision in the Court of Appeals and in this court, another treaty had intervened, which attached itself to the title in controversy, and, of course, must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view that this court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was, at all events, perfect under the treaty of 1794.

361* The remaining questions respect more the practice than the principles of this court. The forms of process, and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the legislature Wheat. 1.

to be regulated and changed as this court may, in its discretion, deem expedient. By a rule of this court, the return of a copy of a record of the proper court, under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record, in this case, is duly certified by the clerk of the Court of Appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the judiciary act.

We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not; for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary appears, **[*362]** that every judge who signs a citation has obeyed the injunctions of the act.

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence, that it is consistent with the constitution and laws of the land.

We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue a writ of *mandamus* to the Court of Appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause.

It is the opinion of the whole court that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby affirmed.

JOHNSON, J. It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

In this view I acquiesce in their opinion, but not altogether in the reasoning, or opinion, of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way.

*I have another reason for expressing **[*363]** my opinion on this occasion. I view this question as one of the most momentous importance; as one which may affect, in its consequences, the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union, and one of the greatest states in the Union, on a point the most delicate and difficult to be ad-

justed. On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained consecrated and intangible, that I could borrow the language of a celebrated orator, and exclaim: "I rejoice that Virginia has resisted."

Yet here I must claim the privilege of ex-
364*] pressing *my regret that the opposition of the high and truly respected tribunal of that state had not been marked with a little more moderation. The only point necessary to be decided in the case then before them was, "whether they were bound to obey the mandate emanating from this court." But in the judgment entered on their minutes, they have affirmed that the case was, in this court, *coram non judge*, or, in other words, that this court had not jurisdiction over it.

This is assuming a truly alarming latitude of judicial power. Where is it to end? It is an acknowledged principle of, I believe, every court in the world, that not only the decisions, but everything done under the judicial process of courts, not having jurisdiction, are, *ipso facto*, void. Are, then, the judgments of this court to be reviewed in every court of the Union? and is every recovery of money, every change of property, that has taken place under our process, to be considered as null, void, and tortious?

We pretend not to more infallibility than other courts composed of the same frail materials which compose this. It would be the height of affectation to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the state tribunals. But there is one claim which we can with confidence assert in our own name upon those tribunals—the profound, uniform, and unaffected respect which this court has always exhibited for state decisions, give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people;—365*] in this court, every state in *the Union is represented; we are constituted by the voice of the Union, and when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the state tribunals. It is the nature of the human mind to press a favorite hypothesis too far, but magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

112

In the case before us, the collision has been, on our part, wholly unsolicited. The exercise of this appellate jurisdiction over the state decisions has long been acquiesced in, and when the writ of error, in this case, was allowed by the president of the Court of Appeals of Virginia, we were sanctioned in supposing that we were to meet with the same acquiescence there. Had that court refused to grant the writ in the first instance, or had the question of jurisdiction, or on the mode of exercising jurisdiction, been made here originally, we should have been put on our guard, and might have so modeled the process of the court as to strip it of the offensive form of a mandate. In this case it might have been brought down to what probably the 25th section of the judiciary act meant it should be, to wit, an alternative judgment, either that the state court may finally proceed, at its option, to carry into effect the judgment of this court, or, if it declined doing so, that then this court would proceed itself to execute it. The language, sense, and operation of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to causes brought up by writ of error from the circuit courts *of the [366 United States, this court is instructed not to issue executions, but to send a special mandate to the Circuit Court to award execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt as to the ulterior measures; compulsory process might, unquestionably, be resorted to. Nor, indeed, was there any reason to suppose that they ever would refuse; and, therefore, there is no provision made for authorizing this court to execute its own judgment in cases of that description. But not so in cases brought up from the state courts; the framers of that law plainly foresaw that the state courts might refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this court, in case of reversal of the state decision, to execute its own judgment. In case of reversal only was this necessary; for, in case of affirmance, this collision could not arise. It is true that the words of this section are, that this court may, in their discretion, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way; as it could only be necessary in case of the refusal of the state courts; and this idea is fully confirmed by the words of the 13th section, which restrict this court in issuing the writ of *mandamus*, so as to confine it expressly to those courts which are constituted by the United States.

*In this point of view the legislature [367 is completely vindicated from all intention to violate the independence of the state judiciaries. Nor can this court, with any more correctness, have imputed to it similar intentions. The form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will, perhaps, not be too much, in such cases, to expect of those who are conversant in the forms, fictions, and technicality of the law, not to give the process of

Wheat. 1.

courts too literal a construction. They should be considered with a view to the ends they are intended to answer, and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them.

Had the decision of the court of Virginia been confined to the point of their legal obligation to carry the judgment of this court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this court is now called to decide on.

In doing this, it is necessary to do what, although, in the abstract, of very questionable propriety, appears to be generally acquiesced in, to wit, to review the case as it originally came **368*** up to this court *on the former writ of error. The cause, then, came up upon a case stated between the parties, and under the practice of that state, having the effect of a special verdict. The case stated brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia, and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtained prior to the treaty of 1794, but before the case was adjudicated in this court, the treaty of 1794 had been concluded.

The difficulties of the case arise under the construction of the 25th section above alluded to, which, as far as it relates to this case, is in these words: "A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the construction of any clause of the constitution or of a treaty," "and the decision is against the title set up or claimed by either party under such clause, may be re-examined and reversed, or affirmed." "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said treaties," &c.

The first point decided under this state of the case was, that the judgment being a part of the record, if that judgment was not such as, upon that case, it ought to have been, it was an error **369*** apparent on the *face of the record. But it was contended that the case there stated presented a number of points upon which the decision below may have been founded, and that it did not, therefore, necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the court held, that as the reference was general to the law arising out of the case, if one question arose, which called for the construction of a treaty, and the decision negatived the right set up under it, this court will reverse that decision, and that it is the duty of the party who would avoid the inconvenience of this principle, so to mould the case as to obviate the am-

Wheat. 1.

U. S., Book 4.

biguity. And under this point arises the question whether this court can inquire into the title of the party, or whether they are so restricted in their judicial powers as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case on which an opinion may be given with confidence, it is this, whether we consider the letter of the statute, or the spirit, intent, or meaning, of the constitution and of the legislature, as expressed in the 27th section, it is equally clear that the title is the primary object to which the attention of the court is called in every such case. The words are, "and the decision be against the title," so set up, not against the construction of the treaty contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state courts to the contrary; and in that case the *party is entitled to the **[*370]** benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities, or defects in state jurisprudence against which the constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on a mere hypothetical case—to give a construction to a treaty without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt, and weighed in the case of *Smith and the State of Maryland*, and that decision was founded upon the idea that this court was not thus restricted.

But another difficulty presented itself: The treaty of 1794 had become the supreme law of the land since the judgment rendered in the court below. The defendant, who was at that time an alien, had now become confirmed in his rights under that treaty. This would have been no objection to the correctness of the original judgment. Were we, then, at liberty to notice that treaty in rendering the judgment of this court?

Having dissented from the opinion of this court in the original case, on the question of title, this difficulty did not present itself in my way in the view I then took of the case. But the majority of this court determined that, as a public law, the treaty was a part of the law of every case depending in this court; that, as such, it was not necessary that it should be spread upon the record, and that it was obligatory upon *this court, in rendering judgment **[*371]** upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion I yielded my hearty consent; for it cannot be maintained that this court is bound to give a judgment unlawful at the time of rendering it, in consideration that the same judgment would have been lawful at any prior time. What judgment can now be lawfully rendered between the parties is the question to which the attention of the court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed. So, too, if the plaintiff

in error die, pending suit, and his land descend on an alien, it cannot be contended that this court will maintain the suit in right of the judgment, in favor of his ancestor, notwithstanding his present disability.

It must here be recollected that this is an action of ejectment. If the term formerly declared upon expires pending the action, the court will permit the plaintiff to amend, by extending the term. Why? Because, although the right may have been in him at the commencement of the suit, it has ceased before judgment, and without this amendment he could not have judgment. But suppose the suit were really instituted to obtain possession of a leasehold, and the lease expire before judgment, would the court permit the party to amend in opposition to the right of the case? On the contrary, if the term formerly declared on were more extensive than the lease in which the legal title was founded, could they give judgment for more than costs? It must be recollected that, under this judgment, a writ of restitution is the fruit of the law. This, in its very nature, has relation to, and must be founded upon, a present existing right at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this:

Does the judicial power of the United States extend to the revision of decisions of state courts, in cases arising under treaties? But, in order to generalize the question, and present it in the true form in which it presents itself in this case, we will inquire whether the constitution sanctions the exercise of a revising power over the decisions of state tribunals in those cases to which the judicial power of the United States extends.

And here it appears to me that the great difficulty is on the other side. That the real doubt is, whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends.

Some cession of judicial power is contemplated by the third article of the constitution: that which is ceded can no longer be retained. In one of the circuit courts of the United States, it has been decided (with what correctness I will not say) that the cession of a power to pass an uniform act of bankruptcy, although not acted on by the United States, deprives the states of the power of passing laws to that effect. With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the states could resume it, if the United States should abolish the courts vested with that jurisdiction; yet, it is blended with the other cases of jurisdiction, in the second section of the third article, and ceded in the same words. But it is contended that the second section of the third article contains no express cession of jurisdiction; that it only vests a power in Congress to assume jurisdiction to the extent therein expressed. And under this head arose the discussion on the construction proper to be given to that article.

On this part of the case I shall not pause long. The rules of construction, where the nature of the instrument is ascertained, are familiar to

everyone. To me the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. It is returning in a circle to contend that it professes to be the exclusive act of the people, for what have the people done but to form this compact? That the states are recognized as parties to it is evident from various passages, and particularly that in which the United States guaranty to each state a republican form of government.

The security and happiness of the whole was the object, and, to prevent dissension and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive irritability of sovereign states, where their wills or interests clash, they placed themselves, with regard to each other, on the footing of sovereigns upon the ocean; where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. And to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice, where the rights of others come in question, or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.

Nor shall I enter into a minute discussion on the meaning of the language on this section. I have seldom found much good result from hypercritical severity, in examining the distinct force of words. Language is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made, which would annihilate the powers intended to be ceded. The words are, "shall extend to;" now, that which extends to, does not necessarily include in, so that the circle may enlarge until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word *shall*, in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the constitution is: "We are about forming a general government—when that government is formed, its powers shall extend," &c. I therefore see nothing imperative in this clause, and certainly it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises from using it in a future sense, and the constitution everywhere assumes, as a postulate, that wherever power is given it will be used, or, at least, used as far as the interests of the American people require it, if not from the natural proneness of man to the exercise of power, at least from a sense of duty, and the obligation of an oath.

Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States courts over the cases of the first and second description, comprised in that section. "Shall extend to controversies," appears to me as comprehensive in effect as "shall extend to all cases."

Wheat. 1.

For, if the judicial power extend "to controversies between citizen and alien," &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to all controversies.

But I will assume the construction as a sound one, that the cession of power to the general government means no more than that they may assume the exercise of it whenever they think it advisable. It is clear that Congress have hitherto acted under that impression, and my own opinion is in favor of its correctness. But does it not then follow that the jurisdiction of the state court, within the range ceded to the general government, is permitted, and **376*** "may be withdrawn whenever Congress think proper to do so? As it is a principle that every one may renounce a right introduced for his benefit, we will admit that as Congress have not assumed such jurisdiction, the state courts may, constitutionally, exercise jurisdiction in such cases. Yet, surely, the general power to withdraw the exercise of it includes in it the right to modify, limit, and restrain that exercise. "This is my domain, put not your foot upon it; if you do, you are subject to my laws, I have a right to exclude you altogether; I have, then, a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace, but I reserve to myself the right of judging how far your acts are conformable to my laws." Analogy, then, to the ordinary exercise of sovereign authority, would sustain the exercise of this controlling or revising power.

But it is argued that a power to assume jurisdiction to the constitutional extent, does not necessarily carry with it a right to exercise appellate power over the state tribunals.

This is a momentous question, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough, at present, to have shown that Congress has not asserted, and this court has not attempted, to exercise that kind of authority *in personam* over the state courts which would place them in the relation of an inferior responsible body without their own acquiescence. And I have too much confidence in the state tribunals to believe that a case ever will occur **377*** in which it will be necessary "for the general government to assume a controlling power over these tribunals. But is it difficult to suppose a case which will call loudly for some remedy or restraint? Suppose a foreign minister, or an officer, acting regularly under authority from the United States, seized to-day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred, in other countries. The angry vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope forever to escape their baleful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the Union must be dissolved. At present the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases; on the contrary, the general government has, in more than one instance, exhibited their confidence, Wheat. 1.

by a wish to vest them with the execution of their own penal law. And extreme, indeed, I flatter myself, must be the case in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so.

But we know that by the 3d article of the constitution, judicial power, to a certain extent, is vested in the general government, and that by the same instrument power is given to pass all laws necessary to carry into effect the provisions of the constitution. At present it is only necessary to vindicate the "laws which ***378** they have passed affecting civil cases pending in state tribunals.

In legislating on this subject, Congress, in the true spirit of the constitution, have proposed to secure to everyone the full benefit of the constitution, without forcing anyone necessarily into the courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the state courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there originally, if he choose, or to the defendant to force the plaintiff into the courts of the United States where they have jurisdiction, and the former has instituted his suit in the state courts. In this case they have not made it legal for the defendant to plead to the jurisdiction; the effect of which would be to put an end to the plaintiff's suit, and oblige him, probably at great risk or expense, to institute a new action; but the act has given him a right to obtain an order for a removal, on a petition to the state court, upon which the cause, with all its existing advantages, is transferred to the Circuit Court of the United States. This, I presume, can be subject to no objection; as the legislature has an unquestionable right to make the ground of removal a ground of plea to the jurisdiction, and the court must then do no more than it is now called upon to do, to wit, give an order or a judgment, or call it what we will, in favor of that defendant. And so far from asserting the inferiority of the state tribunal, this act is rather that of a superior, inasmuch as the Circuit Court of the United States becomes bound, "by that order, to take jurisdiction of ***379** the case. This method, so much more unlikely to affect official delicacy than that which is resorted to in the other class of cases, might, perhaps, have been more happily applied to all the cases which the legislature thought it advisable to remove from the state courts. But the other class of cases, in which the present is included, was proposed to be provided for in a different manner. And here, again, the legislature of the Union evince their confidence in the state tribunals; for they do not attempt to give original cognizance to their own circuit courts of such cases, or to remove them by petition and order; but still believing that their decisions will be generally satisfactory, a writ of error is not given immediately as a question within the jurisdiction of the United States shall occur, but only in case the decision shall finally, in the court of the last resort, be against the title set up under the constitution, treaty, &c.

In this act I can see nothing which amounts to an assertion of the inferiority or dependence

of the state tribunals. The presiding judge of the State Court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is, in substance, no more than a mode of compelling the opposite party to appear before this court, and maintain the legality of his judgment obtained before the **380*** state tribunal. An exemplification of a record is the common property of everyone who chooses to apply and pay for it, and thus the case and the parties are brought before us; and so far is the court itself from being brought under the revising power of this court that nothing but the case, as presented by the record and pleadings of the parties, is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this court in forming their own opinions.

The absolute necessity that there was for Congress to exercise something of a revising power over cases and parties in the state courts, will appear from this consideration.

Suppose the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the constitution, for two reasons:

1st. Although the plaintiff may, in such case, have the full benefit of the constitution extended to him, yet the defendant would not; as the plaintiff might force him into the court of the state at his election.

2d. Supposing it possible so to legislate as to give the courts of the United States original jurisdiction in all cases arising under the constitution, laws, &c., in the words of the 2d section of the 8d article (a point on which I have some doubt, and which in time might, perhaps, under some *quo minus* fiction, or a willing construction, greatly accumulate the jurisdiction of those courts), yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a court of **381*** competent jurisdiction in the principal case must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the Union upon the constitution, treaties and laws, of the United States; a subject on which the tranquillity of the Union, internally and externally, may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case were I not firmly convinced that they are practical, and may be acted upon without compromising the harmony of the Union, or bringing humility upon the state tribunals. God forbid that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence. Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved by the knowledge that what we do is not final between the parties. And no sense of dependence can be felt from the knowledge that the parties, not the court, may be summon-

ed before another tribunal. With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which Congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjiciendum*, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the *benefits of it to the individual, without [***382** ever resorting to compulsory or restrictive process upon the state tribunals; a right which, I repeat again, Congress has not asserted; nor has this court asserted, nor does there appear any necessity for asserting.]

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

Judgment affirmed.

Rev'g—4 Munf. 1.

Cited—3 Wheat. 641; 5 Wheat. 49, 69; 6 Wheat. 423; 2 Pet. 250; 4 Pet. 429; 5 Pet. 232; 6 Pet. 557, 565; 10 Pet. 308, 396; 12 Pet. 422, 644, 721; 14 Pet. 412, 416, 624, 632; 16 Pet. 250, 321, 665, 669; 3 How. 425, 426; 6 How. 40; 12 How. 124, 315; 15 How. 466; 18 How. 528; 19 How. 616; 20 How. 481; 22 How. 203, 204; 4 Wall. 428, 454; 6 Wall. 253; 7 Wall. 271; 12 Wall. 129, 532, 626, 664; 13 Wall. 288; 17 Wall. 284, 290; 19 Wall. 227; 8 Otto, 137; 4 Otto, 113, 499; 5 Otto, 143; 6 Otto, 726; 10 Otto, 262, 269, 270, 286, 291, 295, 299; 12 Otto, 162, 253; 1 Bond. 561; 1 Bald. 284, 403, 406; 2 Paine. 203; 1 Brown, 21; 1 Wood. & M. 70, 71, 72, 89, 455, 501, 597; 2 Wood. & M. 110, 132; 2 Dill. 235; 5 Blatchf. 113; 1 Abb. U. S. 26; 3 Ware, 251; 1 Brown, 21, 98; Blatchf. & H. 251; Woolw. 365; 5 Cranch, C. C. 249, 250; 1 Mason, 86; 3 Woods. 234, 240; 3 Cliff. 560.

[PRIZE.]

THE COMMERCE. LINDGREN, Claimant.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.

Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.

Freight is never due to the neutral carrier of contraband.

Quære, in what cases the vehicle of contraband is confiscable.

A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

It makes no difference in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

A PPEAL from the Circuit Court for the District of Massachusetts. This was a case of a Swedish vessel captured on the 16th [***383** of April, 1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilbao, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and, as well by the official papers of the custom-house as by the private letters of the shippers, it appears to have been shipped under the special per-

Wheat. 1.

mission of the government, for the sole use of His Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfillment of this object. At the hearing in the District Court of Maine, the cargo was condemned as enemy's property, and the vessel restored with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and, upon the appeal to the Circuit Court of Massachusetts, the decree, as to freight, was reversed, and from this last sentence an appeal was prosecuted to this court.

Key, for the appellant and claimants. 1. The general principle of law allows freight to the neutral carrier of enemy's property. It is incumbent upon the captors to show that this case forms an exception to the rule, which they can only do by alleging this to be an unlawful interposition in the war between the United States and Great Britain; but an interposition in the Peninsular war, was not necessarily an interposition in the American war. Were it **384*** *so*, it would follow that the Spaniards and Swedes might not trade with the United States, they being the allies of Great Britain; as the prize courts of England decide, that the subjects of an ally cannot lawfully trade with the common enemy. Bynkershoek puts the case of two powers allied during a truce, but before enemies.¹ What would be the situation of neutrals? If they came to the assistance of either, they might be liable to be treated as enemies by the other. In the present instance, if the British forces had been so situated as that they might operate against the United States as well as France, it would alter the case. But remote and uncertain consequences cannot be held to affect the conduct of neutrals with illegality. 2. There is no proof or presumption that the master knew the special destination of the cargo. His act cannot be unlawful, unless done knowingly and willfully, as in the case of carrying enemy's dispatches, where Sir William Scott at first went entirely on the ground of the master's privity; afterwards he adopted a rule more strict and severe; but still knowledge was held to be necessary, and presumed wherever there was a want of extraordinary diligence on the part of the master. It is conceded that the *onus* is on the claimant to show his ignorance of the contents of the papers concerning the cargo, which, if the present testimony is not sufficient, may be done upon further proof. **385*** *STORY, J.* Ignorance of the master was not pretended in the court below.

Dexter, for the respondents and captors. The rule that the neutral carrier of enemy's property is entitled to freight, is a mitigated rule, and Bynkershoek argues with much force against its reasonableness.² But the master, in the present case, is not entitled to the benefit of it, having, by his conduct, made himself an enemy, *pro hac vice*. The principle; as to the nature of the Spanish war, was settled when the court determined that to carry goods to Lisbon, un-

der a British license, was cause of confiscation. Can a party in a similar predicament be entitled to freight? Can a neutral stand on any better ground than a citizen? Either the British troops in the peninsula were enemies or friends. If enemies, this is an interposition which cannot be permitted to neutrals. Being at war, the British fleets and armies were hostile in every quarter of the globe. Where shall the line be drawn to mark when they became our enemies? At what period from the time of their landing in Portugal, until their crossing the Pyrenees, and embarking at Bordeaux for the United States? It is impossible to aid the operations of our enemy in any part of the world without strengthening his means of annoying us. The very men fed by this trade came here to fight us on our own soil, and to destroy our capital. It is said that this involves the consequence that we were at war **with* **386** Spain and Portugal; but it depends upon the councils of every country to judge what acts of hostility shall render it expedient to make war; it depended on us to be at war with the allies of our declared enemy. It is a general rule that it is not unlawful to carry provisions to a neutral country; but if the enemy be there, and the articles are destined for his use, it is unlawful. The whole evidence shows that the master knew he was carrying provisions for the supply of the British forces, and his ignorance of the law is immaterial. But even if it were material, the inflated rate of freight shows that he was conscious of the risk he run.

Harper, in reply. The principle contended for by the captors is *stricti juris*, and extreme in its application to this particular case, where there is nothing like moral guilt in the conduct of the master, who did not intend to interfere in our distinct war. There is no adjudged case that comes up to this; and freight is refused from analogy to the general principle established by the British prize courts as to neutral interposition in the war. But an interference in the coasting and colonial, or other privileged trade of the enemy, and relief to him, is a direct assistance, and the rule cannot justly be extended to a remote and consequential aid not contemplated by the party. The license cases determined by this court, went on the ground of an adoption of the enemy character, and an incorporation with enemy interests; the case of *The Liverpool Packet*, determined by the same learned judge who tried this cause, shows the distinction **between this and the license* **387** cases.³ The rule of the war of 1756, even supposing it to be well established, does not apply to the relative situation of Great Britain and the United States. The former had hung out no signals of depression and defeat in the peninsular war, and required no neutral aid as a relief from the pressure of her enemies.⁴

STORY, J., delivered the opinion of the court:

The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight, is now too firmly establish-

1.—Q. J. Pub. L. 16, p. 126, of Du Ponceau's Translation.

2.—Q. J. Pub. c. 14, p. 111, of Du Ponceau's Translation.

Wheat. 1.

3.—1 Gallison, 513.

4.—Vide Appendix, note III.

ed to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.¹ By the modern **388*** law of nations, provisions ^{are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.}² If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.³ Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the

supply of the enemy, but he has assisted him by taking off his surplus commodities.* But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or how ever well adapted to warlike purposes. But if such goods are destined for the direct and ^{avowed use of the enemy's army or} **[*389]** navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.⁵ Strictly speaking, however, this is ^{not a question of contraband; for that} **[*390]** can arise only when the property belongs to a neutral, ^{and here the property belong-} **[*391]** ed to an enemy, and, therefore, was liable, at all events, to condemnation. But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged that being engaged in the transport service, or in the conveyance of military persons in his employ, are

1.—Bynk. Quest. J. Pub. c. 14, 1 Rob. 237. The Sarah Christina; Id. 288; The Haase; Id. 296. The Emanuel; 2 Rob. 101. The Immanuel; Id. 299. The Atlas; Id. 104. The Rising Sun; 4 Rob. 169. The Maddona del Burso; 3 Rob. 295. The Neutralitat; 2 Rob. 128. The Welvart; 6 Rob. 420. The Friendship.

2.—1 Rob. 189. The Jonge Margaretha.

3.—Ibid.

4.—Ibid.

5.—Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so under particular circumstances. Grotius, de J. B. ac P. l. 3, c. 1, s. 5; Vattel, l. 3, c. 7, s. 112. Among the latter class are included naval stores and provisions; though Vattel considers naval stores as always contraband, whilst he holds that provisions only become so under peculiar circumstances. "Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrebande. Telles sont les armes, les munitions de guerre, les bols, et tout ce qui sert à la construction, et à l'armement des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espère de réduire l'ennemi par la faim." But Bynkershoek reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. 2 J. Pub. l. 1, c. 10. He, however, states that materials for building ships may be prohibited under certain circumstances. "Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit. Quum Ordines Generales in s. 2, edicti contra Lysitanos Dec. 31, 1667, lis, quae communi populorum usu contrabanda censentur, Lysitanos Juvari vetulissent, specialiter addunt in s. 3, ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam lis advehere vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum

instrumentis belli in s. 2, d. Edicti contra Anglos Dec. 5, 1652, et in Edicto Ordinum Generalium contra Francos 9, Mart. 1659. Sed sunt haec exceptiones, quae regulam confirmant." So also of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. 4 Rob. 161, The Apollo. And the benefit of the principle is extended to maritime countries exporting the produce of neighboring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. Id. 364. The Evert. But the law of France and Spain does not consider provisions as contraband. Ordonnance de la Marine, l. 3, tit. 3, des Prises, art. 11. D'Habreux sobre las Presas, part 1, c. 10, p. 136. And Vallin states that, both by the law of France and the common law of nations, provisions are contraband only when destined to besieged or blockaded places. But he asserts that naval stores were contraband at the time he wrote (1758) and had been so since the beginning of that century, which they were not formerly. Sur'l' Ord. Ib. Pothier, commenting on the same article of the ordinance, observes: "A l'égard des munitions de bouche que des sujets des puissances neutres envoient à nos ennemis, elles ne sont point censées de contrebande, ni par conséquent sujettes à confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée." De Propriété, No. 104. By the Swedish ordinance of 1715, contraband articles are declared to be those "qui peuvent être employées pour la guerre." The Danish ordinance of 1660 (provided for the subsisting war with Sweden), contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States since they were an in-

acts of hostility which subject the property to confiscation.¹ And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty.² And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, **392*** and "assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might **393*** lawfully supply a British "fleet stationed on our coast? We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the

ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In *The Friendship* (6 Rob., 420, 426), Sir W. Scott, speaking on this subject, declares: "It signifies nothing whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of draughts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant *whether [**394** this or that case may be connected with the immediate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow against us; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged or not; it is sufficient that his armies are everywhere our enemies, and every assistance offered to them must, directly, or indirectly, operate to our injury.

On the whole, the court are of opinion that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.³

dependent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1796 with Spain, which embraces the munitions of war only. The treaty of 1794 with Great Britain declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares that when provisions and other articles, not generally contraband, shall become such according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar, and pitch (unless destined to a port of naval equipment) were added to the naval stores excepted in the treaty of 1794.

1.—4 Rob. 256, *The Carolina*; 6 Rob. 420, *The Friendship*; Ib. 430, *The Orozemo*.

Wheat. 1.

2.—6 Rob. 440, *The Atlanta*; Ib. 461, *The Constantia*. Note.

3.—As to the penalty for the carrying of contraband, see 3 Rob. 182, note (n). Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sail cloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles. 3 Rob., 91, *The Neptunus*. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo. 1st. Where the ship and the contraband articles belong to the same person. 1 Rob., 31, *The Staadt Emden*; Ib., 330, *The Young Tobias*. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. 3 Rob., 217, *The*

395*] *MARSHALL, *Ch. J.* As a principle, which I think new, and which may certainly, in future, be very interesting to the United States, has been decided in this case, I trust I may be excused for stating the reasons which have prevented my concurring in the opinion that has been delivered.

In argument this sentence of the Circuit Court has been sustained on two grounds: 1st. That **396*]** the exportation *of grain from Ireland is generally prohibited, and, therefore, that a neutral cannot lawfully engage in it during war. 2d. That the carriage of supplies to the army of the enemy is to take part with him in the war, and, consequently, to become the enemy of the United States so far as to forfeit the right to freight.

The first point has been maintained, on its supposed analogies to certain principles which have been, at different times, avowed by the great maritime and belligerent powers of Europe respecting the colonial and coasting trade, and which are generally known in England, and in this country, by the appellation of the rule of 1756. Without professing to give any opinion on the correctness of those principles, it is sufficient to observe that they do not appear to me to apply to this case. The rule of 1756 prohibits a neutral from engaging in time of war in a trade in which he was prevented from participating in time of peace, because that trade was, by law, exclusively reserved for the vessels of the hostile state. This prohibition stands upon two grounds: 1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the arms of the enemy, and in order to obtain relief from that pressure. The neutral who interposes to relieve the belligerent under such circumstances rescues him from the condition to which the arms of his enemy has reduced him, restores to him those resources which have been wrested from him by the **397*]** *arms of his adversary, and deprives that adversary of the advantages which successful war has given him. This the opposing belligerent pronounces a departure from neutrality, and an interference in the war to his prejudice, which he will not tolerate. 2d. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy, to his own vessels, identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character. Neither the one nor the other of these reasons applies to the case under consideration. The trade was not a trade confined to British vessels during peace, and

opened to neutrals during war under the pressure created by the arms of the enemy. It was prohibited for political reasons, entirely unconnected with the interests of navigation, and thrown open from motives equally unconnected with maritime strength. Neither did the neutral employed in it engage in a trade then, or at any time, reserved for British vessels, and, therefore, did not identify himself with them. He was not performing functions exclusively appertaining to the enemy, and, consequently, in performing them did not assume that character.

The second point presents a question of much more difficulty. That a neutral carrying supplies to the army of the enemy does, under the mildest interpretation of international law, expose himself to the loss of freight, is a proposition too well settled to be controverted. That it is a general rule, admitting of few, if any, exceptions, is not denied by the *counsel [**398** for the appellants. But they contend that this case is withdrawn from that rule by its peculiar circumstances. The late war between the United States and Great Britain was declared at a time when all Europe, including our enemy, was engaged in a war with which ours had no connection, and in which we professed to take no interest. The allies of our enemy, engaged with him in a common war, the most tremendous and the most vitally interesting to the parties that has ever desolated the earth, were our friends. We kept up with them the mutual interchange of good offices, and declared our determination to stand aloof from that cause which was common to them and Great Britain. They, too, considered this war as entirely distinct from that in which they were engaged. Although at a most critical period we had attacked their ally, they did not view it as an act of hostility to them. They did not ascribe it to a wish to affect, in any manner, the war in Europe, but solely to the desire of asserting our violated rights. They seemed almost to consider the Britain who was our enemy, as a different nation from that Britain who was their ally.

How long this extraordinary state of things might have continued it is impossible to say; but it certainly existed when the *Commercen* was captured. What its effect on that capture ought to be, must depend more on principle than on precedent. It has been said, and truly said, by the counsel for the captors, that we were at war with Great Britain in every part of the world. We were enemies everywhere. Her troops in Spain, or elsewhere, as *well [**399** as her troops in America, were our enemies. It was a conflict of nation against nation. This is conceded; and, therefore, the cargo of

Franklin; 4 Rob., 89, *The Edward*; 5 Rob., 290, *The Richmond*; 6 Rob., 125, *The Hanger*. 3d. Where the owner of the ship is bound, by the obligation of treaties between his own country and the capturing power, to refrain from carrying contraband to the enemy. 3 Rob., 206, *The Neutralitet*. By the ancient prize law of France, contraband goods were subject to pre-emption only. *Ordonnance de 1584*, art. 69. The ordinance of 1681 subjected the contraband articles only to confiscation; but by the regulation of 1778 the same penalty was extended to the ship, in case three-fourths of the cargo consisted of contraband articles. The law of Holland confiscates the contraband articles only, but refus-

es freight; the principle of which is vindicated by Bynkershoek. "Idque longe verissimum est, nam mercedes non debentur, nisi itinero perfecto et, ne perficeretur, hostis jure prohibuit. Deinde publicatur contrabanda vel ex delicto, et ita nihil commiserunt navarchi, quam ipsi mercium vetitarum domini, vel, quod magis est ex re, ex ipsa nimis transvectione: quamvis enim amico nostro non possumus commercio interdicare cum hoste nostro, possumus tamen prohibere, ne in bello illi prodest in necem nostram. Atque ita, quod publicatur publicabitur citra ullum ullius hominis respectum, et habebitur, ac si divina perisset, extincto sic jure pignoris."

the Commerce, being British property, was condemned as prize of war. But, although this must be conceded, the corollary which is drawn from it, that those who furnish their armies in Spain with provisions, aid them to our prejudice, and, therefore, take part in the war, and are guilty of unneutral conduct, must be examined before it can be admitted. It is not true that every species of aid given to an enemy is an act of hostility which will justify our treating him who gives it, or his vessels, as hostile to us. The history of all Europe, and especially of Switzerland, furnishes many examples of the truth of this proposition. Those examples need not be quoted particularly, because they stand on principles not entirely applicable to this case. It is the peculiarity of this war which requires the adoption of rules peculiar to a new state of things, in adopting which we must examine the principle on which a nation is justified in treating a neutral as an enemy. That a neutral is friendly to our enemy, and continues to interchange good offices with him, can furnish no subject of complaint; for, then, all commerce with one belligerent would be deemed hostile by the other. The effect of commerce is to augment his resources, and enable him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral, and manifesting no hostility to the opposing belligerent. It cannot, therefore, be molested by him **400*** while the same good offices ***are** allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a remote and consequential effect of an act is not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be direct and immediate. It is also necessary that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot convert a friend into an enemy.

If these principles be correct, and they are believed to be so, let us apply them to the present case. When hostilities commenced between the United States and Great Britain, that country was carrying on a war with France, in which the great powers of Europe were combined. We did not expect, and certainly had no right to expect, that our declaration of war against one of the allies would, in any manner, affect the operations of their common war in Europe. The armies of Portugal and Spain were united to those of Britain, and unquestionably aided and assisted our enemy, but they did not aid and assist him against us, and, therefore, did not become our enemies. Had any other of the combined powers equipped a military expedition for the purpose of re-inforcing the armies of Britain in any part of Europe, or had a new ally engaged in the war, that would have been no act of hostility against the United States, although it would have aided our enemy. But if a military expedition to the United States had been undertaken, the case would have assumed a different aspect. Such expedition would be hostile to this country, and the power **401*** undertaking it would ***become** our enemy. It would have been an interference operating directly to our prejudice. The declaration of war against Great Britain had, without doubt, a remote and consequential effect on the war in Wheat. 1.

Europe. The force employed against the United States must be subducted from that employed in support of the common cause in Europe, or greater exertions must be made which might sooner exhaust those resources which enabled her to continue her gigantic efforts in their common war. Consequently, the declaration of war by the United States remotely affected the war in Europe, to the advantage of one party and the injury of the other. Yet no one of the allies considered this declaration as taking part in that war, and placing America in the condition of an enemy. But, had the United States employed their force on the peninsula against the British troops, or had they interfered in the operations of the common war, it may well be doubted whether they might not have been rightfully considered as taking part against the allies, and arranging themselves on the side of the common enemy.

In answer to arguments of this tendency, made at the bar, it was said that nations are governed by political considerations, and may choose rather to overlook conduct at which they might justly take offense, than unnecessarily to increase the number of their enemies, or provoke increased hostility; but that courts of justice are bound by the law, and must inflexibly adhere to its mandate. While this is conceded, it is deemed equally true that those acts which will justify the condemnation of a ***neu-** **[*402]** tral as an enemy, would also justify the treating his nation as an enemy, if they were performed or defended by the nation. There is a tacit compact that the hostile act of the individual shall not be ascribed to his government; and that, in turn, the government will not protect the individual from being treated as an enemy. But if the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. Thus contraband of war, though belonging to a neutral, is condemned as the property of an enemy, and his government takes no offense at it; but should his government adopt the act, and insist upon the right to carry articles deemed contraband, and support that right, it would furnish just ground of war. The belligerent might choose to overlook this hostile act, but the act would be, in its nature, hostile. The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently, the King of Sweden might have ordered his troops to co-operate with those of Britain, in any place, against the common enemy. He might have ordered a re-inforcement to the British army on the peninsula, and this re-inforcement might have been transported by sea. An attempt on the part of the United States to intercept it, because it was ***aiding** their **[*403]** enemy, would certainly have been an interference in the war in Europe which would have provoked, and would have justified, the resentment of all the allied powers. It would have been an interference not to be justified by our war with Britain, because those troops were not to be

employed against us. If, instead of a re-inforcement of men, a supply of provisions were to be furnished in that part of the allied army which was British, would that alter the case? Could an American squadron intercept a convoy of provisions, or of military stores, of any description, going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done without interfering in that war, and taking part in it against all the allies? If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British or any other division of the allied armies, had a right to pass unmolested by American cruisers. It is not believed that any act which, if performed by the government, would not be deemed an act of hostility, is to be so deemed if performed by an individual. Had the provisions then on board the *Commercen* been Swedish property, the result of this reasoning is that it would not have been confiscated as prize of war. Being British property, it is confiscable; but the Swede is guilty of no other offense than carrying enemy's property, an offense not enhanced in this particular case by the character of that property. He is, therefore, as much entitled **404*** to freight as if his cargo had been *of a different description. His trade was not more illicit than the carriage of enemy's goods for common use would have been.

If the cases in which neutrals have been condemned for having on board articles, the transportation of which clothe them with the enemy character, be attentively considered, it is believed that they will not be found to contravene the reasoning which has been urged. To carry dispatches to the government has been considered as an act of such complete hostility as to communicate the hostile character to the vessel carrying them. But this decision was made in a case where the dispatches could only relate to the war between the government of the captors and that to which the dispatches were addressed. They were communications between a colonial government, in danger of being attacked, and the mother country. In a subsequent case, it was determined that a neutral vessel might bear dispatches to a hostile government without assuming the belligerent character, if they were from an ambassador residing in the neutral state. Yet such dispatches might contain intelligence material to the war. But this is a case in which the belligerent right to intercept all communications addressed to the enemy, by the officers of that enemy, is modified and restrained by the neutral right to protect the diplomatic communications which are necessary to the political intercourse between belligerents and neutrals. It is a case in which the right of the belligerent is narrowed and controlled by the positive rights of a neutral; still more reasonably may they *be narrowed and controlled by the positive rights of a belligerent engaged in a war in which we have no concern and in which we ought not to interfere. To transport troops, or military persons, belonging to the enemy, from one place to another, has also been determined to subject the vessel to condemnation; but, in those cases, the service in which it was supposed the persons, so conveyed, were to be

employed, was against the government of the captors. The transportation of these persons was to aid the views of one belligerent against the other, and was, therefore, to take part in the war against that other. It is an act, the operation of which is direct and immediate.

It may be said that this reasoning would go to the protection of British troops passing to the peninsula, and of British supplies transported in British vessels for their use; that it therefore proves too much, and must, consequently, be unsound.

It is admitted that, pressed to its extreme point, the argument would go this extent, an extent which cannot be maintained; but it does not follow that it is unsound in every stage of its progress. In every case of conflicting rights, each must yield something to the other. The pretensions of neither party can be carried to the extreme. They meet—they check—they limit each other. The precise line which neither can pass, but to which each may advance, is not easily to be found and marked; yet such a line must exist, whatever may be the difficulty of discerning it. To attack an enemy, or to take his property, if either can be done without violating the sovereignty *of a friend, **[406]** is of the very essence of war. None can be offended at the exercise of this right, who may not be offended at the declaration of war itself. The injury which the allies of our enemy, in a war common to them (but in which we are not engaged), sustain, by this occasional interruption, is incidental, while, on our part, it is the exercise of a direct and essential right. But when we attack a friend who is carrying on military operations conjointly with our enemy, but not against us, we are not making direct war, but are using those incidental rights which war gives us, against those direct rights which are exercised by a belligerent not our enemy, and which constitute war itself. In either case it would seem to me that the incidental must yield to the direct and essential right.

Upon this view of the subject, I have at length, not, it is confessed, without difficulty, come to the conclusion that the *Commercen* being a Swedish vessel, whose nation was engaged in a war, common to Great Britain and Sweden, against France, and to which the United States were not a party, might convey military stores for the use of the British armies engaged in that war, as innocently as she could carry British property of any other description, and is, therefore, as much entitled to freight as she would be had the property belonged to the enemy, but been destined for ordinary use.

LIVINGSTON, J. I concur in the opinion of the Chief Justice. Considering Sweden an ally of Great Britain, in the war which the latter was carrying on *in the peninsula, **[407]** either the King of Sweden himself might send transports with provisions for the use of the British army, while engaged in any common enterprise, or his subjects might lawfully aid in such transportation, without a violation of their neutral character as it regarded the United States. If the American government had asserted the right of capturing and condemning Swedish vessels, or depriving them of their freight, on the ground on which it has been denied to the *Commercen*, I am not certain that

Sweden would not have thought it a very serious aggression, and would not have had a right to consider it, if persisted in, as an act of hostility.

JOHNSON, *J.* I also concur in the opinion of the Chief Justice; and I do it without the least doubt or hesitation. Sweden was an ally in the war going on in the peninsula, and her subjects had an indubitable right to transport provisions in aid of their nation, or its allies. The owner, therefore, had a right to his freight; for he did no act inconsistent with our belligerent rights, while in the direct and ordinary exercise of those rights which a state of war conferred on himself.

Sentence of the Circuit Court affirmed.

Att'g—2 Gall. 261.

Cited—6 Wall. 58; Blatchf. Pr. 406, 506.

408*]

*[PRIZE.]

THE GEORGE, THE BOTHNEA, AND THE JANSTAFF.

In cases of joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

APPEAL from the Circuit Court for the District of Massachusetts.

These were British vessels captured and brought in by the private armed vessels the *Fly* and the *Washington*, and libeled as prize of war. In each of them the United States interposed a claim, charging that the capture was collusive, and that the whole property ought, on that account, to be forfeited to the United States. In each case the captors applied for permission to make further proof. In that of the *George*, it was allowed in the District Court, and partially received; but the application to make still further proof, and to introduce into the record testimony already taken, was rejected in the Circuit Court, and was again offered in this court. In the two last cases further proof was refused, both in the district and circuit courts. In all the cases, the vessels and cargoes were condemned to the United States, and from each of these sentences of condemnation the captors appealed to this court.

409*] *The first case was argued by *Dexter* and *G. Sullivan* for the appellants and captors, and by the *Attorney-General* for the United States. The two last by *Winder* and *Harper* for the appellants and captors, and by *Dexter* and *Pinkney* for the United States.

MARSHALL, *Ch. J.*, delivered the opinion of the court as follows:

The first question to be discussed is the propriety of allowing further proof. It is certainly a general rule in prize causes that the decision should be prompt; and should be made, unless some good reason for departing from it exist, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred in Wheat. 1.

that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the captured vessel be plainly an enemy, immediate condemnation is certain and proper. But the vessel and cargo may be neutral, and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not to be increased by prolonging his detention, in the hope that something may be discovered from some other source, which may justify condemnation. If his papers are all clear, and if the examinations in *preparatorio* all show his neutrality, he is and ought to be immediately discharged. In a fair transaction this will often be the case. If anything suspicious appears in the papers, which involves the neutrality of the claimant *in doubt, [*410 he must blame himself for the circumstance, and cannot complain of the delay which is necessary for the removal of those doubts. The whole proceedings are calculated for the trial of the question of prize or no prize, and the standing interrogatories on which the preparatory examinations are taken are framed for the purpose of eliciting the truth on that question. They are intended for the controversy between the captors and the captured; intended to draw forth everything within the knowledge of the crew of the prize, but cannot be intended to procure testimony respecting facts not within their knowledge. When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony in *preparatorio* is taken, is no longer the question in controversy. If another question arises, for instance, as to the proportions in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize vessel, or the depositions of her crew, but elsewhere, and liberty must, therefore, be given to adduce this testimony. The case of a joint capture has been mentioned, and we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted to establish their rights. They are not, and ought not to be, confined to the testimony which may be extracted from the crew. And yet the standing interrogatories are, in some degree, adapted to this case. Each individual of the crew is always asked *whether, [*411 at the time of capture, any other vessel was in sight. Notwithstanding this, the claimants to a joint interest in the prize are always permitted to adduce testimony drawn from other sources to establish their claim. The case before the court is one of much greater strength. The captors are charged with direct and positive fraud, which is to strip them of rights claimed under their commissions. Even if exculpatory testimony could be expected from the prize crew, the interrogatories are not calculated to draw it from them. Of course, it will rarely happen that testimony taken for the sole purpose of deciding the question whether the captured vessel ought to be condemned or restored, should furnish sufficient lights for determining whether the capture has been *bona fide* or collusive. If circumstances of doubtful appearance occur, justice requires that an opportunity

to explain those circumstances should be given; and that fraud should never be fixed on an individual until he has been allowed to clear himself from the imputation, if in his power.

Under these impressions, the case must be a strong one, indeed; the collusiveness of the capture must be almost confessed before the court could think a refusal to allow other proof than is furnished by the captured vessel justifiable. In the cases before the court there are certainly many circumstances of great suspicion, but none which do not admit of explanation.

In the case of *The George*, captured by the privateer *Fly*, the circumstances relied on to prove the collusiveness of the capture are:

412*] 1st. The force of the *Fly*. 2d. The shipping articles. 3d. The cargo of the *George*. 4th. The number of her crew. 5th. The place, and other circumstances of her capture. 6th. The sending the mariners on shore, instead of bringing them into the United States.

First. The force of the *Fly* may probably neither require nor admit of explanation.

Second. The shipping articles unquestionably furnish ground of suspicion. But some light may be thrown on this point by testimony showing whether it was, or was not, common for small cruisers in the Bay of Fundy to give wages to the crew instead of prize money. It may be of still more importance to determine whether each of the crew, like Gilley, who was examined, was to receive twenty dollars, in addition to his wages, for each prize.

Third. Respecting the cargo it is not probable that further testimony can be adduced.

Fourth. Respecting the number of mariners on board the captured vessel, the court would require some further information. On the one part it is asserted that they are insufficient, and on the other that they are sufficient for the alleged voyage. There is no evidence which can incline the court the one way or the other.

Fifth. On the place and other circumstances of capture further information may certainly be given. The *George* appears to have sailed from St. Johns, New Brunswick, for the Havana, on the 8th, and to have been captured in Long Island harbor, at anchor, on the 13th 413*] of January, 1814. The distance *between these places is said to be five hours' sail, with a favorable wind and tide. Where did she linger during this interval? Was she in Etang harbor during any part of the time? Why did she leave that harbor? Did she expect a convoy? Did a convoy sail about that time? Was it usual for vessels to wait for a convoy at the island of Grand Menan? Could a vessel be desecrated from the sea lying at anchor in Long Island harbor? Satisfactory answers to these questions might certainly throw some light on this part of the case, and better enable the court to form an opinion on it.

Sixth. It may not, perhaps, be easy to account for not bringing in the crew. Yet, it would contribute, in some degree, to the elucidation of the transaction, if the practice in that part of the country could be laid before the court. It might also be of some importance to know whether the sum of \$100 was usually paid by government for every merchant seaman brought into the country, whether he was a British subject or the subject of a neutral power.

124

In the cases of *The Janstaff* and *The Bothnea* there are some points to be explained which are common to those cases with the *George*, and some which are peculiar to themselves.

Of the latter class are the inquiries:

First. Whether it frequently happened that unarmed vessels, without a convoy, sailed from that port, either for New London or for any other port of the United States, or for a foreign port.

*Second. What is the character, and [*414 what the occupation, of the two passengers who were found, one on board the *Bothnea*, and the other on board the *Janstaff*? Are they acquainted with the coasts in or about Long Island sound? Are they capable of being supercargoes? How came they at Halifax?

In both cases it will be desirable to know whether any previous acquaintance existed between the captors and the owners of the captured vessels, and whether the captors had had any previous communication with the places from which the captured vessels sailed. In the cases of *The Janstaff* and *Bothnea* all the circumstances attending the capture will be important. If, as is not expected, any further or better reason can be given for putting the whole crew on shore, it may throw some light on the cases. Each case depends, in some degree, on the points which have been suggested. They are stated for the purpose of showing that points on which the judgment of the court may, in some degree, depend, are susceptible of explanation, and, therefore, ought to be explained so far as it may be in the power of the parties to explain them. It is not, however, intended to confine them to the particular points which have been stated. Full liberty is given to both parties to adduce further proof on every point in the case.

Further proof ordered.

S. C.—2 Wheat. 278.
Cited—8 Wheat. 264.

*[CONSTITUTIONAL LAW.] [*415

THE UNITED STATES

v.

COOLIDGE ET AL.

Quære, whether the courts of the United States have jurisdiction of offenses at common law against the United States.

THIS was an indictment in the Circuit Court for the District of Massachusetts, against the

NOTE.—The courts of the U. S. have no jurisdiction over crimes, except such as is conferred by statute upon them. They cannot exercise jurisdiction under the common law alone. *Hubbard v. North*, R. Co. 3 Blatchf., 84; S. C. 24 Vt. 715; *Ex parte Cabrera*, 1 Wash. C. C. 232; *Shute v. Davis*, 1 Pet. C. C. 431; *Livingston v. Jefferson*, 1 Brock. Marsh. 203; *U. S. v. Hudson*, 7 Cranch, 32; *McIntyre v. Wood*, 7 Cranch, 504; *U. S. v. Bevans*, 3 Wheat. 336; *Moffat v. Soley*, 2 Paine, 108; *Ex parte Bollman*, 4 Cranch, 75; *U. S. v. Libby*, 1 Wood. & M. 221; *U. S. v. New B. Bridge*, 1 Wood. & M. 401; *U. S. v. Wilson*, 3 Blatchf. 435; *U. S. v. Lancaster*, 2 McLean, 431; *U. S. v. Irwin*, 5 McLean, 178; *U. S. v. Ramsay*, Hempst. 481. Except offenses committed on the high seas, or in such places, there are no felonies against the United States, cognizable by courts of the United States, except those which are expressly made so by act of Congress. *U. S. v. Shepherd*, 1 Hugh, 520.

Wheat. 1.

defendants, for forcibly rescuing a prize, which had been captured and taken possession of by two American privateers. The captured vessel was on her way, under the direction of a prize-master and crew, to the port of Salem for adjudication. The indictment laid the offense as committed upon the high seas. The question made was, whether the Circuit Court has jurisdiction over common law offenses against the United States, on which the judges of that court were divided in opinion.

The *Attorney-General* stated that he had given to this case an anxious attention; as much so, he hoped, as his public duty, under whatever view of it, rendered necessary. That he had also examined the opinion of the court, delivered at February term, 1813, in the case of *The United States v. Hudson and Goodwin*. That considering the point as decided in that case, whether with or without argument, on the part of those who had preceded him as the representative *of the government in this court, he desired respectfully to state, without saying more, that it was not his intention to argue it now.

STORY, J. I do not take the question to be settled by that case.

JOHNSON, J. I considered it to be settled by the authority of that case.

WASHINGTON, J. Whenever counsel can be found ready to argue it, I shall dearest myself of all prejudice arising from that case.

LIVINGSTON, J. I am disposed to hear an argument on the point. This case was brought up for that purpose, but until the question is re-argued, the case of *The United States v. Hudson and Goodwin* must be taken as law.

JOHNSON, J., delivered the opinion of the court:

Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the *Attorney-General* has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of *The United States v. Hudson and Goodwin*, or draw it into [*417] doubt. They *will, therefore, certify an opinion to the Circuit Court in conformity with that decision.

Certificate for the defendant.

Rev'g—1 Gall. 488.

Cited—7 How. 537; 6 Wall. 488; 8 Otto, 345; 10 Otto, 275; 1 Wood. & M. 428, 448, 472; 3 Blatchf. 438; 3 Cliff. 55.

[PRIZE.]

THE ST. NICHOLAS.

MEYER ET AL., Claimants.

A question of proprietary interest.

Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former.

1.—*Vide* 1 Gallison, 488, for the learned and elaborate opinion of Mr. J. Story, in the Circuit Court, in this case, tending to show that all offenses within the admiralty jurisdiction are cognizable by the Circuit Court, and in the absence of positive law, are punishable by fine and imprisonment.

Wheat. 1.

APPEAL from the Circuit Court of Georgia. This vessel and the cargo were libeled as prize of war. The ship was claimed by John E. Smith, the supercargo, in behalf of John Meyer, alleged to be a Russian subject residing at St. Petersburg. The cargo consisted of logwood and cotton, 200 bales of which were claimed by Smith, in behalf of Platzman & Gosler, also alleged to be Russian merchants of St. Petersburg. The remainder of the cargo, consisting of 950 bales of cotton, and 58 tons of logwood, were *claimed in behalf of [*418] John Inerarity, a Scotchman, domiciled at Pensacola, and an adopted Spanish subject. The vessel was restored in the District Court, and the cargo condemned, except the logwood, which was restored. Both parties appealed to the Circuit Court, and the cause was then heard and considered; but that court, under the influence of personal considerations, rendered only a *pro forma* decree, affirming the sentence of the District Court, at the same time expressing a strong opinion that both vessel and cargo were liable to condemnation. The cause had been continued at the last term of this court for further proof, but no further proof was produced at the present term.

The cause was argued by *Key* and *Harper* for the appellants and claimants, and by *Pinkney* and *Charlton* for the respondents and captors.

JOHNSON, J., delivered the opinion of the court as follows:

This case presents itself in this court under a cloud of circumstances unusually threatening. There is scarcely wanting in it one of those characteristics by which courts of admiralty are led to the detection of neutral fraud. Whether we consider the persons who conduct the voyage, the original character of the vessel, the time and circumstances of the transfer, the trade she has since been engaged in, the funds with which that trade has been transacted, or the manner in which it has been conducted, we find all the hopes and wishes of the adventure centering *in the hostile country. La [*419] French, the master, is a native Dane, a naturalized American citizen, a Russian subject, and finally, domiciled and his family residing in Great Britain, but (as he declares himself) having no particular residence. Smith, the supercargo, is a native Englishman, but a naturalized citizen of the United States. He has resided nearly 80 years in Baltimore, where the war finds him. He sails for Libson; from thence to Great Britain; and is almost immediately, without showing any pretensions to such credit, employed by an opulent house of trade to take charge of this adventure, with a latitude of discretion which could be the result only of long acquaintance, or very strong recommendations. Such men are the proper instruments of belligerent or neutral fraud; they are the avowed panders of the mercantile world; their consciences are in the market. Having no national character or feeling, and but very few qualms of any other kind, their talents and fidelity to their employers, like those of the bravo, are sought out by the projectors of iniquitous adventure. And who are Meyer, and Platzman and Gosler? They are introduced in the bills of the day as very important person-

ages; the one was the owner of the ship, the other of the cargo; but we find them acting a part conspicuous only for its insignificance. They cross the stage and disappear. It is a circumstance which scarcely admits of explanation, that Meyer never exercised a single act of ownership over this vessel. He resides at St. Petersburg, she is lying at Cronstadt. He purchases her, for aught we know, without having **420*** ever seen *her, of a person whom nobody knows, and whom nothing connects with the vessel; is introduced by a Mr. Nicholas, of Virginia, to the master, leaves him in command, and, from that time to the present, does not give him one order, nor writes a single letter to him. If we could suppose it possible that there was no correspondence between them from the 31st of July, 1812, when the ship was purchased, to the 22d December, when she was chartered to Platzman & Gosler, at least he would have written at that time and inclosed the master a copy of the charter-party, and a letter of instructions to regulate his conduct in the distant and perilous voyage on which he was about to enter. But we find La French without one scrap of instruction from the supposed owner, and, in all things, yielding implicit obedience to the supposed agent of Platzman & Gosler, whose interests might very well have been in many things inconsistent with those of the charterer. And what is not less remarkable, although he acknowledges that he must have been eighteen months or two years master of the same ship prior to the sale to Meyer, we find nothing about him or the vessel by which we can discover who the former owner was, and when he is asked who executed the bill of sale to Meyer, his reply is, he does not know; thus leading, fairly, to a conclusion that reasons exist now, and existed formerly, for rendering such a correspondence either unnecessary or unsafe to accompany the ship. As to Platzman & Gosler, the same observation is strikingly applicable to them. From the moment they launch their bark upon the ocean she **421*** becomes, as to them, *a perfect derelict. Not one anxious inquiry, not one expression of feeling, is communicated by letter to their agent in London. Such, at least, we have a right to infer from the non-production of any such correspondence upon the order for further proof. And, upon the supposition of the fairness of this transaction, the existence of letters to prove it fair was unavoidable; for the letter of the 22d December expressly calls for correspondence prior to that date, and having relation to this adventure. Besides that, as difficulties thickened upon the adventure in Pensacola, bills on bills were drawn upon the British house, and letters on letters sent under cover to them, it would have followed that communications would be made to the Russian house, and bills drawn for re-imbursement. But over all this there rests an ominous silence.

Nor is there any intrinsic skill in the machinery of this transaction. It can neither claim the praise of genius in its invention nor of skillful execution in the adaptation of its parts. The very inception of it is laid in a bungling artifice that would not cheat a novice in the arts of commercial evasion. It bears, on the face of it, the record of its own conviction, and confesses itself to be, what it was intended to be, nothing but a

neutral cloak. The correspondents, Simpson & Co., to whom the letter of the 22d of December is addressed, are expressly instructed to attach that letter to the invoice and bill of lading, in order to support the Russian national character. This, of itself, is conclusive to show that this evidence constituted no part of the mercantile transaction *between the parties. **[422]** For, when was it ever heard of that a letter, which contains in it the whole evidence upon which a correspondent purchases, advances, and negotiates to a great amount, is thus to be thrown to the winds, or returned to the hands of him who is interested in suppressing it? And every step that we advance in the progress of this transaction, we find new light breaking in upon us to make manifest its real characteristics. The letter itself, in which the whole adventure originates, bears, on the face of it, obvious symptoms of that over anxiety which never fails to accompany a conscience ill at ease. In a letter to a man, to whom such facts must have been wholly indifferent, it brings together, into one view, a number of facts to which the English merchants (at least) know that courts of admiralty are in the habit of attaching importance in deciding on questions of fraud or belligerent rights; as, for instance, to show that the ship had been previously engaged in neutral trade, they say: "After the discharge of a cargo of Russian produce at this port." And that it may appear that this adventure had not recently originated, they say: "Our friends, Messrs. A. Glennie, Son & Co., with whom we have some time corresponded on this subject," &c. This letter, which is all-important to the decision of the cause, calls forth some more remarks. It contains a singular congeries of powers, instructions and facts. It is the only evidence we have that the vessel ever was chartered for this voyage. The only article of instructions to Meyer is to be found here; the only evidence of the right of A. Glennie & Co. *to act for **[423]** Platzman & Gosler, is contained in it. Nor is there anything else that would have directed the house of Simpson & Co. in their transactions, had that house been in existence when the vessel arrived at Pensacola. It may well be asked, would A. Glennie & Co. have been satisfied to part with so important a voucher for their transactions as agents in this large adventure, had there been anything real in it? Or would so many persons have been satisfied to stake their fortunes on this itinerant document, which was to give its light and pass on, perhaps never to return again? But if it did not bear upon the face of it such palpable marks of its fictitious character, the conduct of the several persons who affected to be governed by it would sufficiently show that it was a paper of no authority. It is to be remarked that on some points this letter of the 22d of December, in which alone Platzman & Gosler appear in a tangible form, is explicit and positive. On others, it yields unbounded discretion to A. Glennie & Co. to instruct Simpson & Co., to whom it is directed, in his conduct in that agency. With regard to two things, it yields no discretion: First, as to the article which is to be purchased, which is expressly limited to cotton. Secondly, as to the homeward destination of the ship and cargo, which is exclusively to Gottenburgh. Yet we find that on the 22d of February and

Wheat. 1.

the 2d of March, 1813, A. Glennie & Co. give Smith instructions authorizing a deviation from the orders of their principal, not only as to the articles of which the cargo might consist, but as [*424*] to the voyage from New Orleans, *empowering him even to charter the vessel, and limiting him in the purchase of cotton to the price of eight cents, when Platzman & Gosler prescribe no limits, and, in fine, taking the power, both as to vessel and cargo, out of the hands of Simpson & Co., to whom the letter of Platzman & Gosler is directed, and placing the adventure altogether under the control of Smith, a man whom they appoint, for aught we know, without any authority from their principal, and whose presence was altogether unnecessary, under the supposition that Platzman & Gosler had really addressed themselves to Simpson & Co., to load the vessel on their account. But this is not all; in every step of this transaction, the parties betray a consciousness of the necessity of artifice, and in every attempt to resort to it, betray more of a disposition than a talent for fraud. Well aware that it is necessary to keep up a correspondence with the supposed neutral, Smith resorts to a method in which he supposes he may covertly correspond with the English house, while he keeps up the appearance of corresponding with the neutral claimant. We find a most minute detail of all his transactions, and the events of the voyage contained in a series of letters directed to Platzman & Gosler, but uniformly transmitted open, and under cover to the persons really to be informed—the hostile house. This is a shallow artifice. The belligerent must be fatuous who could be duped by it. And, unfortunately for the claimants, the letters, on the face of them, contain evidence to prove for whom they were really intended. Strike out [*425*] the names of *Platzman & Gosler, and insert that of A. Glennie & Co., and they will be found to be written with a view to satisfy several passages in his general letter of instructions, of the 2d of February, from A. Glennie & Co.

This affected correspondence with Platzman & Gosler commences on the 24th of May, 1813, and in the letter of that date, and that of the 3th of June following, there are very striking proofs of the nature and views of that correspondence. In the letter of the 25th of December, 1813, which may be called the *magna charta* of this adventure, it will be recollected Platzman & Gosler are made to say, that as they live in so remote a place as St. Petersburg, Simpson must receive his instructions about the cargo of cotton altogether from A. Glennie & Co.; and in the letters of the 2d of February and 5th of March, above referred to, Smith receives his instructions altogether from A. Glennie & Co., and yet, when he writes to Platzman & Gosler on the 24th of May, and announces his intended voyage to Liverpool (in express violation of their orders), he adds: "There I shall hope to receive your instructions about the disposal of the cargo." This, to the London house of A. Glennie & Co., was perfectly intelligible. It will also be recollected that in the letters from A. Glennie & Co., of the 2d of February, Smith is expressly instructed to communicate all necessary information, so as to govern them in making insurance; and yet in these letters to Platzman & Gosler he affectedly observes that he sends them open to A. Glennie & Co., in order to direct

Wheat. 1.

their conduct *in case Platzman & Gos- [*426*] ler should have instructed them to make insurance. When to all these considerations we add that this adventure, in fact, originates in a hostile country, and never appears to look to any other termination, and that the funds on which it was projected were altogether English, we are satisfied that the ship, and the 200 bales of cotton, laden professedly on account of Platzman & Gosler, are not owned as claimed. With regard to the ship some additional reasons might be urged; but the foregoing, as applying to that whole claim, we deem sufficient.

With regard to the claim of Inerarity, the question there rests between positive swearing and irreconcilable circumstances. And it is a melancholy truth, that forces itself upon the observation of everyone who is conversant with courts of admiralty, that positive oaths are too often the most unsatisfactory evidence that can be resorted to. A species of casuistry or moral sophistry seems to have acquired too great an ascendancy over the witnesses who sometimes appear in those courts.

With regard to the logwood, nothing can be said against it, except that we find it in bad company. There is no evidence in the case which can induce a belief that it belonged to anyone but Inerarity. Not so with the cotton; except in his own oath, and in the invoice, he is nowhere recognized, among the acting parties, as owner of this cargo. The evidence of an invoice on such a subject is literally reduced to nothing in the prize courts; and his own affidavit will be considered in due time. We will inquire into *the circumstances which [*427*] involve him in suspicion, and see how these circumstances are explained.

It is in evidence that on the arrival of Smith at Pensacola, and his ascertaining the impracticability of loading the ship on account of his owners, at the limited price, Inerarity himself advised him, as he says, in his letter of the 24th of May, to go to New Orleans for the purpose of endeavoring to obtain freight. From this it is evident that at that time he had no intention to embark in a shipment of cotton. The opportunity of securing this vessel at such a time would otherwise have been eagerly caught at. On going to New Orleans, Smith falls in with Milne, who finally ships the whole of this parcel of cotton through Inerarity.

The bills of lading and invoice are made out to Inerarity, but Milne transmits the cotton to him, not generally, but expressly to be laden on board this ship. In all this transaction, Milne is the real *dux facti*. He procures the cargo, for which Smith pays him a commission; he transmits the cotton; Inerarity never appears but as the agent of Milne. And when Smith speaks of the shipper, which he often does in his letters to La French, he speaks of him as Inerarity's friend.

But it is contended that, by this expression, we are to understand Inerarity himself; that he was the neutral Spaniard spoken of as the shipper in Smith's letters to Platzman & Gosler, and as no other shipper appears in the case but Inerarity's friend, and Inerarity himself, they must mean the same person. This idea is ingeniously taken up from an expression *in Smith's answer of the 12th October, [*428*] to Inerarity's letter of the 6th, relative to the

ed to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.¹ By the modern **388*** law of nations, provisions ^{are} not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.² If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.³ Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the

supply of the enemy, but he has assisted him by taking off his surplus commodities.⁴ But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or how ever well adapted to warlike purposes. But if such goods are destined for the direct and ^{avowed} use of the enemy's army or **[*389]** navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.⁵ Strictly speaking, however, this is ^{not} a question of contraband; for that **[*390]** can arise only when the property belongs to a neutral, ^{and} here the property belong- **[*391]** ed to an enemy, and, therefore, was liable, at all events, to condemnation. But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged that being engaged in the transport service, or in the conveyance of military persons in his employ, are

1.—Bynk. *Quest. J. Pub. c. 14*, 1 Rob. 237, *The Sarah Christina*; *Ib.* 288; *The Haase*; *Ib.* 236, *The Emanuel*; 2 Rob. 101, *The Immanuel*; *Ib.* 236, *The Atlas*; *Ib.* 104, *The Rising Sun*; 4 Rob. 169, *The Maddona del Burso*; 3 Rob. 295, *The Neutralitat*; 2 Rob. 123, *The Welvart*; 6 Rob. 420, *The Friendship*.

2.—1 Rob. 189, *The Jonge Margaretha*.

3.—*Ibid.*

4.—*Ibid.*

5.—Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so under particular circumstances. *Grotius de J. B. ac P. l. 3, c. 1, s. 5*; *Vattel*, l. 3, c. 7, s. 112. Among the latter class are included naval stores and provisions; though *Vattel* considers naval stores as always contraband, whilst he holds that provisions only become so under peculiar circumstances. "Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrebande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armement des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espère de réduire l'ennemi par la faim." But *Bynkershoek* reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. 2 *J. Pub. l. 1, c. 10*. He, however, states that materials for building ships may be prohibited under certain circumstances. "Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commodum bellum gerere haud possit. *Quum Ordines Generales in s. 2, edicti contra Lysitanos Dec. 31, 1657, iis, quae communis populorum usu contrabanda censentur, Lysitanos juvari vetuissent, specialiter addunt in s. 3, ejusdem edicti, quia nihil nisi mari a Lysitanos metuelant, ne quis etiam navium materiam iis advenire vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum*

instrumentis belli in s. 2, d. Edicti contra Anglos Dec. 5, 1652, et in Edicto Ordinum Generalium contra Francos 9, Mart. 1689. Sed sunt haec exceptiones, quae regulam confirmant." So also of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. 4 Rob. 161, *The Apollo*. And the benefit of the principle is extended to maritime countries exporting the produce of neighboring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. *Ib.* 354, *The Evert*. But the law of France and Spain does not consider provisions as contraband. *Ordonnance de la Marine*, l. 3, tit. 9, des Prises, art. 11. *D'Habreux* sobre las Presas, part 1, c. 10, p. 138. And *Valin* states that, both by the law of France and the common law of nations, provisions are contraband only when destined to be besieged or blockaded places. But he asserts that naval stores were contraband at the time he wrote (1758) and had been so since the beginning of that century, which they were not formerly. *Suri' Ord. Ib.* *Pothier*, commenting on the same article of the ordinance, observes: "A l'égard des munitions de bouche que des sujets des puissances neutres envoient à nos ennemis, elles ne sont point censées de contrebande, ni par conséquent sujettes à confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée." *De Propriété*, No. 104. By the Swedish ordinance of 1715, contraband articles are declared to be those "qui peuvent être employées pour la guerre." The Danish ordinance of 1659 (provided for the subsisting war with Sweden), contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States since they were an in-

acts of hostility which subject the property to confiscation.¹ And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty.² And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, [392*] and *assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might [393*] lawfully supply a British *fleet stationed on our coast? We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the

ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In *The Friendship* (6 Rob., 420, 426), Sir W. Scott, speaking on this subject, declares: "It signifies nothing whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of draughts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant *whether [394*] this or that case may be connected with the immediate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow against us; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged or not; it is sufficient that his armies are everywhere our enemies, and every assistance offered to them must, directly, or indirectly, operate to our injury.

On the whole, the court are of opinion that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.³

dependent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1796 with Spain, which embraces the munitions of war only. The treaty of 1794 with Great Britain declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares that when provisions and other articles, not generally contraband, shall become such according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar, and pitch (unless destined to a part of naval equipment) were added to the naval stores excepted in the treaty of 1794.

1.—4 Rob. 256, *The Carolina*; 6 Rob. 420, *The Friendship*; Ib. 430, *The Orozumbo*.

Wheat. 1.

2.—6 Rob. 440, *The Atlanta*; Ib. 461, *The Constantia*. Note.

3.—As to the penalty for the carrying of contraband, see 3 Rob. 182, note (a). Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sail cloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles. 3 Rob. 91, *The Neptunus*. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo. 1st. Where the ship and the contraband articles belong to the same person. 1 Rob., 31, *The Staadt Emden*; Ib., 330, *The Young Tobias*. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. 3 Rob., 217, *The*

ed to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.¹ By the modern **388*** law of nations, provisions ^{are} not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.² If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.³ Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the

supply of the enemy, but he has assisted him by taking off his surplus commodities.* But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or how ever well adapted to warlike purposes. But if such goods are destined for the direct and ^{avowed} use of the enemy's army or ^{388'} navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral, in time of war, a British fleet was lying in a neutral port, would it be lawful a neutral to carry provisions or munitions war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct position in the war, and an essential aid to enemy in his hostile preparations? In such case the goods, even if belonging to a neutral would have had the taint of contraband; most offensive character, on account of destination; and the mere interposition of a neutral port would not protect them from forfeiture.* Strictly speaking, however, ^{not} a question of contraband; for that can arise only when the property belongs to a neutral, ^{and} here the property belonged to an enemy, and, therefore, was liable in all events, to condemnation. But was it lawful, and such as a neutral could give good faith, and without a forfeiture, if it has been solemnly adjudged that baggage in the transport service, or in the conveyance of military persons in the em-

1.—Bynk. *Quest. J. Pub. c. 14, 1 Rob. 237, The Sarah Christina*; *Ib. 238; The Haase*; *Ib. 208, The Emanuel*; *2 Rob. 101, The Immanuel*; *Ib. 299, The Atlas*; *Ib. 104, The Rising Sun*; *4 Rob. 189, The Maddona del Burso*; *3 Rob. 295, The Neutralitat*; *2 Rob. 128, The Welvart*; *6 Rob. 420, The Friendship*.

2.—*1 Rob. 189, The Jonge Margaretha*.

3.—*Ibid.*

4.—*Ibid.*

5.—Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so under particular circumstances. *Grotius, de J. B. ac P. l. 3, c. 1, s. 5; Vattel, l. 3, c. 7, s. 112.* Among the latter class are included naval stores and provisions; though Vattel considers naval stores as always contraband, whilst he holds that provisions only become so under peculiar circumstances. "*Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrebande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armement des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espère de réduire l'ennemi par la faim.*" But Bynkershoek reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. *2 J. Pub. l. 1, c. 10.* He, however, states that materials for building ships may be prohibited under certain circumstances. "*Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit. Quum Ordines Generales in s. 2, edicti contra Lysitanos Dec. 31, 1657, his, quae communis populorum usu contrabanda consentur, Lysitanos juvari vetissent, specialiter addunt in s. 3, ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam his advenire vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum*

instrumentis belli in s. 2, d. Edicti contra Dec. 5, 1652, et in Edicto Ordinum contra Francos 9, Mart. 1689. Sed sunt rationes, quae regulam confirmant." So provisions, they are not, in general, contraband, if the produce of an enemy's country, destined for the ordinary sustenance of life, but for military or naval use, ^{is} contraband, according to the law of *Edicti*, the growth of the neutral exporting country, are not contraband, though carried to another country. *4 Rob. 161.* And the benefit of the principle is maritime countries exporting the produce of their interior districts, whose ports are usually employed in the ordinary course of their trade. *Evert.* But the law of France and ^{we} consider provisions as contraband *de la Marine, l. 3, tit. 9, des Prises, breu sobre las Presas, part 1, c. 10.* Valin states that, both by the law the common law of nations, provisions are only when destined to besiege places. But he asserts that naval contraband at the time he wrote (1758) since the beginning of that century were not formerly. *Sur l'Ord. l. 1, mentioning on the same article of the serves: "A l'égard des munitions de guerre, les puissances neutres envoient, elles ne sont point censées de par conséquent sujettes à confiscation, un seul cas, qui est lorsqu'elles sont destinées à une place assiégée ou bloquée."*

104. By the Swedish ordinance of 1719, articles are declared to be those employed for the war. "*The Ord. of 1659 (provided for the subsidies), contains a long list of commodities among which are included naval stores. The modern conventions generally excluded provisions from the list of contraband, and made by the United States since*

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justed. On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must, be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained consecrated and intangible, that I could borrow the language of a celebrated orator, and exclaim: "I rejoice that Virginia has resisted."

Yet here I must claim the privilege of ex-
364*] pressing *my regret that the opposition of the high and truly respected tribunal of that state had not been marked with a little more moderation. The only point necessary to be decided in the case then before them was, "whether they were bound to obey the mandate emanating from this court." But in the judgment entered on their minutes, they have affirmed that the case was, in this court, *coram non judge*, or, in other words, that this court had not jurisdiction over it.

This is assuming a truly alarming latitude of judicial power. Where is it to end? It is an acknowledged principle of, I believe, every court in the world, that not only the decisions, but everything done under the judicial process of courts, not having jurisdiction, are, *ipso facto*, void. Are, then, the judgments of this court to be reviewed in every court of the Union? and is every recovery of money, every change of property, that has taken place under our process, to be considered as null, void, and tortious?

We pretend not to more infallibility than other courts composed of the same frail materials which compose this. It would be the height of affectation to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the state tribunals. But there is one claim which we can with confidence assert in our own name upon those tribunals—the profound, uniform, and unaffected respect which this court has always exhibited for state decisions, give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people
365*] ple; in this court, every state in *the Union is represented; we are constituted by the voice of the Union, and when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the state tribunals. It is the nature of the human mind to press a favorite hypothesis too far, but magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

In the case before us, the collision has been, on our part, wholly unsolicited. The exercise of this appellate jurisdiction over the state decisions has long been acquiesced in, and when the writ of error, in this case, was allowed by the president of the Court of Appeals of Virginia, we were sanctioned in supposing that we were to meet with the same acquiescence there. Had that court refused to grant the writ in the first instance, or had the question of jurisdiction, or on the mode of exercising jurisdiction, been made here originally, we should have been put on our guard, and might have so modeled the process of the court as to strip it of the offensive form of a mandate. In this case it might have been brought down to what probably the 25th section of the judiciary act meant it should be, to wit, an alternative judgment, either that the state court may finally proceed, at its option, to carry into effect the judgment of this court, or, if it declined doing so, that then this court would proceed itself to execute it. The language, sense, and operation of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to causes brought up by writ of error from the circuit courts *of the
366 United States, this court is instructed not to issue executions, but to send a special mandate to the Circuit Court to award execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt as to the ulterior measures; compulsory process might, unquestionably, be resorted to. Nor, indeed, was there any reason to suppose that they ever would refuse; and, therefore, there is no provision made for authorizing this court to execute its own judgment in cases of that description. But not so in cases brought up from the state courts; the framers of that law plainly foresaw that the state courts might refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this court, in case of reversal of the state decision, to execute its own judgment. In case of reversal only was this necessary; for, in case of affirmance, this collision could not arise. It is true that the words of this section are, that this court may, in their discretion, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way; as it could only be necessary in case of the refusal of the state courts; and this idea is fully confirmed by the words of the 18th section, which restrict this court in issuing the writ of *mandamus*, so as to confine it expressly to those courts which are constituted by the United States.

*In this point of view the legislature
367 is completely vindicated from all intention to violate the independence of the state judiciaries. Nor can this court, with any more correctness, have imputed to it similar intentions. The form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will, perhaps, not be too much, in such cases, to expect of those who are conversant in the forms, fictions, and technicality of the law, not to give the process of

courts too literal a construction. They should be considered with a view to the ends they are intended to answer, and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them.

Had the decision of the court of Virginia been confined to the point of their legal obligation to carry the judgment of this court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this court is now called to decide on.

In doing this, it is necessary to do what, although, in the abstract, of very questionable propriety, appears to be generally acquiesced in, to wit, to review the case as it originally came **368*** up to this court *on the former writ of error. The cause, then, came up upon a case stated between the parties, and under the practice of that state, having the effect of a special verdict. The case stated brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia, and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtained prior to the treaty of 1794, but before the case was adjudicated in this court, the treaty of 1794 had been concluded.

The difficulties of the case arise under the construction of the 25th section above alluded to, which, as far as it relates to this case, is in these words: "A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the construction of any clause of the constitution or of a treaty," "and the decision is against the title set up or claimed by either party under such clause, may be re-examined and reversed, or affirmed." "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said treaties," &c.

The first point decided under this state of the case was, that the judgment being a part of the record, if that judgment was not such as, upon that case, it ought to have been, it was an error **369*** apparent on the *face of the record. But it was contended that the case there stated presented a number of points upon which the decision below may have been founded, and that it did not, therefore, necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the court held, that as the reference was general to the law arising out of the case, if one question arose, which called for the construction of a treaty, and the decision negatived the right set up under it, this court will reverse that decision, and that it is the duty of the party who would avoid the inconvenience of this principle, so to mould the case as to obviate the am-
Wheat. 1. U. S., Book 4.

biguity. And under this point arises the question whether this court can inquire into the title of the party, or whether they are so restricted in their judicial powers as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case on which an opinion may be given with confidence, it is this, whether we consider the letter of the statute, or the spirit, intent, or meaning, of the constitution and of the legislature, as expressed in the 27th section, it is equally clear that the title is the primary object to which the attention of the court is called in every such case. The words are, "and the decision be against the title," so set up, not against the construction of the treaty contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state courts to the contrary; and in that case the *party is entitled to the **[*370]** benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities, or defects in state jurisprudence against which the constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on a mere hypothetical case—to give a construction to a treaty without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt, and weighed in the case of *Smith and the State of Maryland*, and that decision was founded upon the idea that this court was not thus restricted.

But another difficulty presented itself: The treaty of 1794 had become the supreme law of the land since the judgment rendered in the court below. The defendant, who was at that time an alien, had now become confirmed in his rights under that treaty. This would have been no objection to the correctness of the original judgment. Were we, then, at liberty to notice that treaty in rendering the judgment of this court?

Having dissented from the opinion of this court in the original case, on the question of title, this difficulty did not present itself in my way in the view I then took of the case. But the majority of this court determined that, as a public law, the treaty was a part of the law of every case depending in this court; that, as such, it was not necessary that it should be spread upon the record, and that it was obligatory upon *this court, in rendering judgment **[*371]** upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion I yielded my hearty consent; for it cannot be maintained that this court is bound to give a judgment unlawful at the time of rendering it, in consideration that the same judgment would have been lawful at any prior time. What judgment can now be lawfully rendered between the parties is the question to which the attention of the court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed. So, too, if the plaintiff

in error die, pending suit, and his land descend on an alien, it cannot be contended that this court will maintain the suit in right of the judgment, in favor of his ancestor, notwithstanding his present disability.

It must here be recollected that this is an action of ejectment. If the term formerly declared upon expires pending the action, the court will permit the plaintiff to amend, by extending the term. Why? Because, although the right may have been in him at the commencement of the suit, it has ceased before judgment, and without this amendment he could not have judgment. But suppose the suit were really instituted to obtain possession of a leasehold, and the lease expire before judgment, would the court permit the party to amend in opposition to the right of the case? On the contrary, if the term formerly declared on were more extensive than the lease in which the legal title was founded, could they give judgment for more than costs? It must be recollected that, under this judgment, a writ of restitution is the fruit of the law. This, in its very nature, has relation to, and must be founded upon, a present existing right at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this:

Does the judicial power of the United States extend to the revision of decisions of state courts, in cases arising under treaties? But, in order to generalize the question, and present it in the true form in which it presents itself in this case, we will inquire whether the constitution sanctions the exercise of a revising power over the decisions of state tribunals in those cases to which the judicial power of the United States extends.

And here it appears to me that the great difficulty is on the other side. That the real doubt is, whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends.

Some cession of judicial power is contemplated by the third article of the constitution: that which is ceded can no longer be retained. In one of the circuit courts of the United States, it has been decided (with what correctness I will not say) that the cession of a power to pass an uniform act of bankruptcy, although not acted on by the United States, deprives the states of the power of passing laws to that effect. With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the states could resume it, if the United States should abolish the courts vested with that jurisdiction; yet, it is blended with the other cases of jurisdiction, in the second section of the third article, and ceded in the same words. But it is contended that the second section of the third article contains no express cession of jurisdiction; that it only vests a power in Congress to assume jurisdiction to the extent therein expressed. And under this head arose the discussion on the construction proper to be given to that article.

On this part of the case I shall not pause long. The rules of construction, where the nature of the instrument is ascertained, are familiar to

everyone. To me the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. It is returning in a circle to contend that it professes to be the exclusive act of the people, for what have the people done but to form this compact? That the states are recognized as parties to it is evident from various passages, and particularly that in which the United States guaranty to each state a republican form of government.

The security and happiness of the whole was the object, and, to prevent dissension and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive irritability of sovereign states, where their wills or interests clash, they placed themselves, with regard to each other, on the footing of sovereigns upon the ocean; where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. And to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice, where the rights of others come in question, or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.

Nor shall I enter into a minute discussion on the meaning of the language on this section. I have seldom found much good result from hypercritical severity, in examining the distinct force of words. Language is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made, which would annihilate the powers intended to be ceded. The words are, "shall extend to;" now, that which extends to, does not necessarily include in, so that the circle may enlarge until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word *shall*, in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the constitution is: "We are about forming a general government—when that government is formed, its powers shall extend," &c. I therefore see nothing imperative in this clause, and certainly it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises from using it in a future sense, and the constitution everywhere assumes, as a postulate, that wherever power is given it will be used, or, at least, used as far as the interests of the American people require it, if not from the natural proneness of man to the exercise of power, at least from a sense of duty, and the obligation of an oath.

Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States courts over the cases of the first and second description, comprised in that section. "Shall extend to controversies," appears to me as comprehensive in effect as "shall extend to all cases."

Wheat. 1.

For, if the judicial power extend "to controversies between citizen and alien," &c., to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to all controversies.

But I will assume the construction as a sound one, that the cession of power to the general government means no more than that they may assume the exercise of it whenever they think it advisable. It is clear that Congress have hitherto acted under that impression, and my own opinion is in favor of its correctness. But does it not then follow that the jurisdiction of the state court, within the range ceded to the general government, is permitted, and 376*] *may be withdrawn whenever Congress think proper to do so? As it is a principle that every one may renounce a right introduced for his benefit, we will admit that as Congress have not assumed such jurisdiction, the state courts may, constitutionally, exercise jurisdiction in such cases. Yet, surely, the general power to withdraw the exercise of it includes in it the right to modify, limit, and restrain that exercise. "This is my domain, put not your foot upon it; if you do, you are subject to my laws, I have a right to exclude you altogether; I have, then, a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace, but I reserve to myself the right of judging how far your acts are conformable to my laws." Analogy, then, to the ordinary exercise of sovereign authority, would sustain the exercise of this controlling or revising power.

But it is argued that a power to assume jurisdiction to the constitutional extent, does not necessarily carry with it a right to exercise appellate power over the state tribunals.

This is a momentous question, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough, at present, to have shown that Congress has not asserted, and this court has not attempted, to exercise that kind of authority *in personam* over the state courts which would place them in the relation of an inferior responsible body without their own acquiescence. And I have too much confidence in the state tribunals to believe that a case ever will occur 377*] in which it will be necessary *for the general government to assume a controlling power over these tribunals. But is it difficult to suppose a case which will call loudly for some remedy or restraint? Suppose a foreign minister, or an officer, acting regularly under authority from the United States, seized to-day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred, in other countries. The angry vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope forever to escape their baleful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the Union must be dissolved. At present the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases; on the contrary, the general government has, in more than one instance, exhibited their confidence, Wheat. 1.

by a wish to vest them with the execution of their own penal law. And extreme, indeed, I flatter myself, must be the case in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so.

But we know that by the 3d article of the constitution, judicial power, to a certain extent, is vested in the general government, and that by the same instrument power is given to pass all laws necessary to carry into effect the provisions of the constitution. At present it is only necessary to vindicate the *laws which [378 they have passed affecting civil cases pending in state tribunals.

In legislating on this subject, Congress, in the true spirit of the constitution, have proposed to secure to everyone the full benefit of the constitution, without forcing anyone necessarily into the courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the state courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there originally, if he choose, or to the defendant to force the plaintiff into the courts of the United States where they have jurisdiction, and the former has instituted his suit in the state courts. In this case they have not made it legal for the defendant to plead to the jurisdiction; the effect of which would be to put an end to the plaintiff's suit, and oblige him, probably at great risk or expense, to institute a new action; but the act has given him a right to obtain an order for a removal, on a petition to the state court, upon which the cause, with all its existing advantages, is transferred to the Circuit Court of the United States. This, I presume, can be subject to no objection; as the legislature has an unquestionable right to make the ground of removal a ground of plea to the jurisdiction, and the court must then do no more than it is now called upon to do, to wit, give an order or a judgment, or call it what we will, in favor of that defendant. And so far from asserting the inferiority of the state tribunal, this act is rather that of a superior, inasmuch as the Circuit Court of the United States becomes bound, *by that order, to take jurisdiction of [379 the case. This method, so much more unlikely to affect official delicacy than that which is resorted to in the other class of cases, might, perhaps, have been more happily applied to all the cases which the legislature thought it advisable to remove from the state courts. But the other class of cases, in which the present is included, was proposed to be provided for in a different manner. And here, again, the legislature of the Union evince their confidence in the state tribunals; for they do not attempt to give original cognizance to their own circuit courts of such cases, or to remove them by petition and order; but still believing that their decisions will be generally satisfactory, a writ of error is not given immediately as a question within the jurisdiction of the United States shall occur, but only in case the decision shall finally, in the court of the last resort, be against the title set up under the constitution, treaty, &c.

In this act I can see nothing which amounts to an assertion of the inferiority or dependence

of the state tribunals. The presiding judge of the State Court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is, in substance, no more than a mode of compelling the opposite party to appear before this court, and maintain the legality of his judgment obtained before the **380** *] state tribunal. An exemplification of a record is the common property of everyone who chooses to apply and pay for it, and thus the case and the parties are brought before us; and so far is the court itself from being brought under the revising power of this court that nothing but the case, as presented by the record and pleadings of the parties, is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this court in forming their own opinions.

The absolute necessity that there was for Congress to exercise something of a revising power over cases and parties in the state courts, will appear from this consideration.

Suppose the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the constitution, for two reasons:

1st. Although the plaintiff may, in such case, have the full benefit of the constitution extended to him, yet the defendant would not; as the plaintiff might force him into the court of the state at his election.

2d. Supposing it possible so to legislate as to give the courts of the United States original jurisdiction in all cases arising under the constitution, laws, &c., in the words of the 2d section of the 8d article (a point on which I have some doubt, and which in time might, perhaps, under some *quo minus* fiction, or a willing construction, greatly accumulate the jurisdiction of those courts), yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a court of **381** *] competent *jurisdiction in the principal case must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the Union upon the constitution, treaties and laws, of the United States; a subject on which the tranquillity of the Union, internally and externally, may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case were I not firmly convinced that they are practical, and may be acted upon without compromising the harmony of the Union, or bringing humility upon the state tribunals. God forbid that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence. Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved by the knowledge that what we do is not final between the parties. And no sense of dependence can be felt from the knowledge that the parties, not the court, may be summon-

ed before another tribunal. With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which Congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjiciendum*, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the *benefits of it to the individual, without [***382** ever resorting to compulsory or restrictive process upon the state tribunals; a right which, I repeat again, Congress has not asserted; nor has this court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

Judgment affirmed.

Rev'g—4 Munf. 1.

Cited—3 Wheat. 641; 5 Wheat. 40, 69; 6 Wheat. 428; 2 Pet. 250; 4 Pet. 429; 5 Pet. 232; 6 Pet. 537, 565; 10 Pet. 308, 398; 12 Pet. 492, 644, 721; 14 Pet. 412, 416, 624, 632; 16 Pet. 250, 321, 665, 669; 3 How. 425, 426; 6 How. 40; 12 How. 124, 315; 15 How. 466; 18 How. 528; 19 How. 616; 20 How. 481; 22 How. 203, 204; 4 Wall. 428, 454; 6 Wall. 253; 7 Wall. 271; 12 Wall. 129, 532, 626, 664; 13 Wall. 288; 17 Wall. 284, 290; 19 Wall. 227; 3 Otto, 137; 4 Otto, 113, 499; 5 Otto, 143; 6 Otto, 726; 10 Otto, 262, 269, 270, 286, 291, 295, 299; 12 Otto, 162, 253; 1 Bond. 561; 1 Bald. 284, 403, 406; 2 Paine. 203; 1 Brown, 21; 1 Wood. & M. 70, 71, 72, 89, 455, 501, 507; 2 Wood. & M. 110, 132; 2 Dill. 225; 5 Blatchf. 113; 1 Abb. U. S. 26; 3 Ware, 251; 1 Brown, 21, 96; Blatchf. & H. 251; Woolw. 365; 5 Cranch, C. C. 249, 250; 1 Mason, 86; 3 Woods. 234, 240; 3 Cliff. 560.

[PRIZE.]

THE COMMERCE. LINDGREN, Claimant.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.

Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.

Freight is never due to the neutral carrier of contraband.

Quære, in what cases the vehicle of contraband is confiscable.

A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

It makes no difference in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

A PPEAL from the Circuit Court for the District of Massachusetts. This was a case of a Swedish *vessel captured on the 16th [***383** of April, 1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilbao, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and, as well by the official papers of the custom-house as by the private letters of the shippers, it appears to have been shipped under the special per-

Wheat. 1.

mission of the government, for the sole use of His Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfillment of this object. At the hearing in the District Court of Maine, the cargo was condemned as enemy's property, and the vessel restored with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and, upon the appeal to the Circuit Court of Massachusetts, the decree, as to freight, was reversed, and from this last sentence an appeal was prosecuted to this court.

Key, for the appellant and claimants. 1. The general principle of law allows freight to the neutral carrier of enemy's property. It is incumbent upon the captors to show that this case forms an exception to the rule, which they can only do by alleging this to be an unlawful interposition in the war between the United States and Great Britain; but an interposition in the Peninsular war, was not necessarily an interposition in the American war. Were it **384*** so, it would follow that the Spaniards and Swedes might not trade with the United States, they being the allies of Great Britain; as the prize courts of England decide, that the subjects of an ally cannot lawfully trade with the common enemy. Bynkershoek puts the case of two powers allied during a truce, but before enemies:¹ What would be the situation of neutrals? If they came to the assistance of either, they might be liable to be treated as enemies by the other. In the present instance, if the British forces had been so situated as that they might operate against the United States as well as France, it would alter the case. But remote and uncertain consequences cannot be held to affect the conduct of neutrals with illegality. 2. There is no proof or presumption that the master knew the special destination of the cargo. His act cannot be unlawful, unless done knowingly and willfully, as in the case of carrying enemy's dispatches, where Sir William Scott at first went entirely on the ground of the master's privity; afterwards he adopted a rule more strict and severe; but still knowledge was held to be necessary, and presumed wherever there was a want of extraordinary diligence on the part of the master. It is conceded that the *onus* is on the claimant to show his ignorance of the contents of the papers concerning the cargo, which, if the present testimony is not sufficient, may be done upon further proof. **385*** *STORY, J.* Ignorance of the master was not pretended in the court below.

Dexter, for the respondents and captors. The rule that the neutral carrier of enemy's property is entitled to freight, is a mitigated rule, and Bynkershoek argues with much force against its reasonableness.² But the master, in the present case, is not entitled to the benefit of it, having, by his conduct, made himself an enemy, *pro hac vice*. The principle; as to the nature of the Spanish war, was settled when the court determined that to carry goods to Lisbon, un-

der a British license, was cause of confiscation. Can a party in a similar predicament be entitled to freight? Can a neutral stand on any better ground than a citizen? Either the British troops in the peninsula were enemies or friends. If enemies, this is an interposition which cannot be permitted to neutrals. Being at war, the British fleets and armies were hostile in every quarter of the globe. Where shall the line be drawn to mark when they became our enemies? At what period from the time of their landing in Portugal, until their crossing the Pyrenees, and embarking at Bordeaux for the United States? It is impossible to aid the operations of our enemy in any part of the world without strengthening his means of annoying us. The very men fed by this trade came here to fight us on our own soil, and to destroy our capital. It is said that this involves the consequence that we were at war *with **[386]** Spain and Portugal; but it depends upon the councils of every country to judge what acts of hostility shall render it expedient to make war; it depended on us to be at war with the allies of our declared enemy. It is a general rule that it is not unlawful to carry provisions to a neutral country; but if the enemy be there, and the articles are destined for his use, it is unlawful. The whole evidence shows that the master knew he was carrying provisions for the supply of the British forces, and his ignorance of the law is immaterial. But even if it were material, the inflated rate of freight shows that he was conscious of the risk he run.

Harper, in reply. The principle contended for by the captors is *stricti juris*, and extreme in its application to this particular case, where there is nothing like moral guilt in the conduct of the master, who did not intend to interfere in our distinct war. There is no adjudged case that comes up to this; and freight is refused from analogy to the general principle established by the British prize courts as to neutral interposition in the war. But an interference in the coasting and colonial, or other privileged trade of the enemy, and relief to him, is a direct assistance, and the rule cannot justly be extended to a remote and consequential aid not contemplated by the party. The license cases determined by this court, went on the ground of an adoption of the enemy character, and an incorporation with enemy interests; the case of *The Liverpool Packet*, determined by the same learned judge who tried this cause, shows the distinction *between this and the license **[387]** cases.³ The rule of the war of 1756, even supposing it to be well established, does not apply to the relative situation of Great Britain and the United States. The former had hung out no signals of depression and defeat in the peninsular war, and required no neutral aid as a relief from the pressure of her enemies.⁴

STORY, J., delivered the opinion of the court:

The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight, is now too firmly establish-

1.—Q. J. Pub. L. 16, p. 125, of Du Ponceau's Translation.

2.—Q. J. Pub. c. 14, p. 111, of Du Ponceau's Translation.

Wheat. 1.

3.—1 Gallison, 513.

4.—Vide Appendix, note III.

ed to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.¹ By the modern **388*** law of nations, provisions ^{are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.}² If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.³ Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the

supply of the enemy, but he has assisted him by taking off his surplus commodities.⁴ But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or how-ever well adapted to warlike purposes. But if such goods are destined for the direct and ^{avowed use of the enemy's army or} **[389]** navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.⁵ Strictly speaking, however, this is ^{not a question of contraband; for that} **[390]** can arise only when the property belongs to a neutral, ^{and here the property belong-} **[391]** ed to an enemy, and, therefore, was liable, at all events, to condemnation. But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged that being engaged in the transport service, or in the conveyance of military persons in his employ, are

1.—Bynk. Quest. J. Pub. c. 14, 1 Rob. 237, The Sarah Christina; Ib. 238; The Haase; Ib. 236, The Emanuel; 2 Rob. 101, The Immanuel; Ib. 239, The Atlas; Ib. 104, The Rising Sun; 4 Rob. 169, The Maddona del Burso; 3 Rob. 235, The Neutralitat; 2 Rob. 128, The Weivart; 6 Rob. 420, The Friendship.

2.—1 Rob. 139, The Jonge Margaretha.

3.—Ibid.

4.—Ibid.

5.—Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so under particular circumstances. Grotius, de J. B. ac P. l. 3, c. 1, s. 5; Vattel, l. 3, c. 7, s. 112. Among the latter class are included naval stores and provisions; though Vattel considers naval stores as always contraband, whilst he holds that provisions only become so under peculiar circumstances. "Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrebande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armement des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espère de réduire l'ennemi par la faim." But Bynkershoek reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. 2 J. Pub. l. 1, c. 10. He, however, states that materials for building ships may be prohibited under certain circumstances. "Quandoque tamen accedit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit. Quam Ordines Generales in s. 2, edicti contra Lysitanos Dec. 31, 1657, his, quae communi populorum usu contrabanda censentur, Lysitanos Juvari vetuissent, specialiter addunt in s. 3, ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam his advehere vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum

instrumentis belli in s. 2, d. Edicti contra Anglos Dec. 5, 1652, et in Edicto Ordinum Generalium contra Franceses 9, Mart. 1659. Sed sunt haec exceptiones, quae regulam confirmant." So also of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. 4 Rob. 161, The Apollo. And the benefit of the principle is extended to maritime countries exporting the produce of neighboring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. Ib. 354, The Evert. But the law of France and Spain does not consider provisions as contraband. Ordonnance de la Marine, l. 3, tit. 9, des Prises, art. 11. D'Habreux sobre las Presas, part 1, c. 10, p. 136. And Vallin states that, both by the law of France and the common law of nations, provisions are contraband only when destined to be besieged or blockaded places. But he asserts that naval stores were contraband at the time he wrote (1758) and had been so since the beginning of that century, which they were not formerly. Sur'l' Ord. Ib. Pothier, commenting on the same article of the ordinance, observes: "A l'égard des munitions de bouche que des sujets des puissances neutres envoient à nos ennemis, elles ne sont point censées de contrebande, ni par conséquent sujettes à confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée." De Propriété, No. 104. By the Swedish ordinance of 1715, contraband articles are declared to be those "qui peuvent être employées pour la guerre." The Danish ordinance of 1659 (provided for the subsisting war with Sweden), contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States since they were an in-

acts of hostility which subject the property to confiscation.¹ And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty.² And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, [392*] and *assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might [393*] lawfully supply a British *fleet stationed on our coast? We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the

ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In *The Friendship* (6 Rob., 420, 426), Sir W. Scott, speaking on this subject, declares: "It signifies nothing whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of draughts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant *whether [394 this or that case may be connected with the immediate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow against us; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged or not; it is sufficient that his armies are everywhere our enemies, and every assistance offered to them must, directly, or indirectly, operate to our injury.

On the whole, the court are of opinion that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.³

dependent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1795 with Spain, which embraces the munitions of war only. The treaty of 1794 with Great Britain declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares that when provisions and other articles, not generally contraband, shall become such according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar, and pitch (unless destined to a port of naval equipment) were added to the naval stores excepted in the treaty of 1794.

1.—4 Rob. 258, *The Carolina*; 6 Rob. 420, *The Friendship*; Ib. 430, *The Orozambo*.

Wheat. 1.

2.—6 Rob. 440, *The Atlanta*; Ib. 461, *The Constantia*. Note.

3.—As to the penalty for the carrying of contraband, see 3 Rob. 182, note (d). Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sail cloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles. 3 Rob., 91, *The Neptunus*. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo. 1st. Where the ship and the contraband articles belong to the same person. 1 Rob., 31, *The Stadt Emden*; Ib., 330, *The Young Tobias*. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. 3 Rob., 217, *The*

Tennessee was a part of that state, passed an act establishing the town of Nashville, and vesting 200 acres of land in trustees, to be laid off in lots, and sold, and conveyed in the manner prescribed by the act. On the 1st of July, 1784, subsequent to the passage of the act establishing the town, the trustees executed a deed regularly conveying the lot, for a moiety of which this suit was brought to Abednigo Lewellin. On the 1st of April, 1810, Shadrack Lewellin, heir at law of Abednigo, who had then attained his full age of twenty-one years, for seven years and upwards, executed a deed conveying the land in controversy to Francis May; after which, and previous to the institution of this suit, Francis May conveyed the same land to the lessor of the plaintiff. The defendant produced a deed dated the 2d of February, 1798, executed by a certain Josiah Love, and purporting to convey the land in controversy to William T. Lewis. It appeared in evidence that Lewis had purchased the land fairly, and paid a valuable consideration for it, and that at the time no person was in possession of it. Immediately after this conveyance, Lewis entered into, and took full possession of, the premises, made valuable improvements thereon, and continued so possessed until the 478*] 14th of February, 1810, when he sold and conveyed the same to William Easton, the defendant, who entered into and took possession, and continued peaceably possessed thereof, until the 12th of November, 1810, when this suit was instituted. Upon this testimony, the defendant's counsel moved the court to instruct the jury that the defendant was protected in his possession of the premises by the laws of the land, and that by virtue of the said laws the plaintiff was barred from recovering the said parcel of ground and premises. On this question the judges were divided in opinion, which question and division have been certified to this court as prescribed by law.

The evidence is not so stated on the record as to present any point for the consideration of this court, other than the question whether a possession of seven years is, in this case, a bar to the plaintiff's action. This question depends on the construction of an act of the legislature of Tennessee, passed in the year 1797, to explain an act of the legislature of North Carolina, passed in the year 1715.

The act of 1715, after affirming, in the first and second sections, certain irregular deeds, previously made, under which possession had been held for seven years, enacts, in the third section, "that no person, or persons, or their heirs, which hereafter shall have any right, or title, to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years after his, her, or their right or title 479*] shall descend or accrue; and in default thereof such person or persons so not entering or making default shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section contains the usual savings in favor of infants, &c., who are authorized within three years after their disabilities shall cease "to commence his or her suit, or make his or her entry." Persons beyond sea are allowed eight years after their return; "but that all possessions held without suing such claim as aforesaid, shall be a per-

petual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land."

The judges and lawyers of the state of North Carolina have been much divided on the construction of this act; some maintaining that, like other acts of limitation, it protects mere naked possession; others, that the first and second sections (which are retrospective) have such an influence on the third and fourth (which are prospective) as to limit their operation to a possession acquired and held by color of title. This court is relieved from an investigation of these doubts by a case decided in the Supreme Court of North Carolina, in which it was finally determined that the act of 1715 afforded protection to those only who held by color of title. This contest was maintained as strenuously in Tennessee after its separation from North Carolina as in the present state. Anterior to the decision of the Supreme Court of North Carolina, which has been mentioned, "the legislature passed an act to settle [*480 "the true construction of the existing laws respecting seven years' possession," in which it is enacted, "that in all cases wherever any person, or persons, shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person, or persons, so holding possession as aforesaid, shall be entitled to hold possession in preference to all other claimants, such quantity of land as shall be specified in his, her, or their said grant, or deed of conveyance, founded on a grant as aforesaid." The act then proceeds to bar the claim of those who shall neglect, for the term of seven years, to avail themselves of any title they may have. As not unfrequently happens, this explanatory law generated as many doubts as the law it was intended to explain. On the one part it was contended, that being designed for the sole purpose of removing all uncertainty respecting the construction of the act of 1715, its provisions ought to be limited to its avowed object, and a doubt had never existed whether it was necessary for a person in possession to show more than a color of title, a deed acquired in good faith, in order to protect himself under that act; so, nothing farther ought to be required in order to enable him to avail himself of the act of 1797. That if it should be necessary to trace a title up to a grant, the act of 1797, instead of quieting possession, would, in process of time, strip a very long possession of that protecting quality which the [*481 policy of all other countries bestowed upon it; that the act of 1797 was obviously drawn with so much carelessness as, in some of its parts, to exclude the possibility of a literal construction; and, for this reason, a more liberal construction would be admissible in order to effect its intent. It was therefore insisted not to be necessary for the defendant, holding possession under a *bona fide* conveyance of lands which had been actually granted, to deduce his title from the grant; but that it was sufficient to show that the land had been granted, and that he held a peaceable possession of seven years under a

deed. On the other part it was contended, that on this point there is no ambiguity in the words of the act. The seven years' possession to be available, must be "by virtue of a grant, or of a deed founded on a grant." It is as essential that the deed should be founded on a grant as that a deed should exist. A possession of seven years does no more in the one case than in the other bar a legal title. The words of the act being perfectly clear, they must be understood in their natural sense. When confined to different deeds, founded on the same patent, or to deeds founded on different patents, for the same land, although some cases of fair possession may be excluded from their operation, yet they will apply to the great mass of cases arising in the country.

This question, too, has, at length, been decided in the Supreme Court of the state. Subsequent to the division of opinion on this question, in the Circuit Court, two cases have been **482*** decided in the Supreme Court for the state of Tennessee, which have settled the construction of the act of 1797. It has been decided that a possession of seven years is a bar only when held "under a grant, or a deed founded on a grant." The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be "founded on a grant" which gives a title not derived in law or equity from that grant; and the words *founded on a grant* are too important to be discarded. The act of assembly vesting lands in the trustees of the town of Nashville, is a grant of those lands, and as the defendant shows no title under the trustees, nor under any other grant, his possession of seven years cannot protect his title, nor bar that of the plaintiff. And this is to be certified to the Circuit Court for the District of West Tennessee.

Certificate for the plaintiff.

Overruled—6 Pet. 301.
Cited—4 Wheat. 234 (n); 5 Wheat. 121 (n); 9 Wheat. 530; 2 Pet. 241; 6 Pet. 208, 206; 11 How. 435; 1 Wall. 212, 213; 1 McLean, 19.

[LOCAL LAW.]

ROSS AND MORRISON v. REED.

Where the plaintiff in ejectment claimed title to lands in the state of Tennessee, under a grant from said state, dated the 26th of April, 1809, founded on an entry made in the entry-taker's office, of Washington county, dated the 2d of January, 1779, in the name of J. M'Dowell, on which a warrant issued on the 17th of May, 1779, to the plaintiff, as the assignee of J. M'Dowell, and the defendants claimed under a grant from the state of North Carolina, dated **483*** the 9th of August, 1787, it was determined that the prior entry might be attached to a junior grant so as to overreach an elder grant; and that a survey having been made, and a grant issued upon M'Dowell's entry, in the name of the plaintiff, calling him assignee of M'Dowell, was *prima facie* evidence that the entry was the plaintiff's property; and that a warrant is sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place.

ERROR to the Circuit Court for the District of East Tennessee.

The defendant in error, who was plaintiff in Wheat. 1.

the court below, claimed title under a grant from the state of Tennessee, bearing date the 26th day of April, 1809, founded on an entry made in the entry-taker's office of Washington county, No. 975, dated on the 2d day of January, 1779, in the name of John M'Dowell, for 500 acres of land, on which a warrant issued on the 17th day of May, 1779. The defendants in the court below, now plaintiffs in error, claim under a grant from the state of North Carolina to John Henderson, dated the 9th of August, 1787, and a deed of conveyance from John Henderson to the defendant, Ross, duly executed and registered. Morrison held as tenant under Ross.

At the trial of the cause, a bill of exceptions was taken by the defendants, in which was stated a transcript taken from the book procured from the office of the Secretary of State of the United States, which contains reports of the lands entered in Sullivan and Washington counties; also a copy of the warrant issued to John M'Dowell for 500 acres of land, both of which are certified by the clerk to the commissioner of East Tennessee. Also the grants under *which each party claims, the [**484** deed of conveyance from Henderson to Ross, together with the *visa voce* testimony of the witnesses produced. It then proceeds to state "that the defendants contended: 1st. That having the eldest grant, the plaintiff could not recover, unless he had shown a prior entry, which the law would consider special for the place now claimed, and produced satisfactory evidence that the right was vested in him. That as no proof had been given that Reed had ever purchased or paid any consideration for M'Dowell's entry, he could not, in virtue of that entry, entitle himself to a verdict. That the mere statement in the survey and grant that Reed was assignee of M'Dowell, was no evidence whatever of that fact. 2d. That if such proof had been given, still he could not recover, because the proof shows that the objects called for in the entry existed at two places, some distance from each other; and, therefore, the entry was ambiguous and doubtful. But the court charged and instructed the jury that the circumstance of a survey having been made, and a grant issued upon M'Dowell's entry, in the name of Reed, calling him assignee of M'Dowell, was *prima facie* evidence that the entry was the property of Reed. And that it was true if the calls in an entry would equally well suit more than one place, it would not be considered special for either place; but it was for the jury to determine, from the evidence whether the place spoken of on the south side of Holston would as well suit the calls of the entry as the one on the north side; and that, except for James King's testimony, he had hardly *ever heard an entry [**485** better established than the one now under consideration."

There was a verdict and judgment in favor of the plaintiff, and the cause was brought up to this court by writ of error.

Todd, J., delivered the opinion of the court:

It is now objected by the plaintiffs in error that the transcript first mentioned contains nothing but a naked designation of number, date, person's name, and number of acres, but

no description of the land whatever; not even specifying the county where situate.

To this objection it may be answered, that it is a fact, which will appear from the reports of cases decided in the courts of Tennessee, that the books containing entries for land in the counties of Sullivan and Washington have been lost or destroyed. It is also a fact that the original of the transcript under consideration was directed, by a statute of Tennessee, to be procured and deposited in the commissioner's office; and copies therefrom, certified by the clerk, are declared to be evidence in the courts of that state; but a conclusive answer is furnished by an examination of the bill of exceptions; it was not objected to in the court below.

The same answers may also be given to the objection taken to the copy of the warrant.

Under the laws of North Carolina for appropriating the vacant lands, an entry is made with the entry-taker before a warrant issues; 486*] the warrant describes *the land specified in the entry; the special or locative calls for appropriation of the land can be seen and examined as well from a view of the warrant as from the entry. In consequence of various frauds respecting warrants, they were by law to be submitted to a board of commissioners, and if decided to be valid, the original was deposited with the commissioner, and copies, certified by the clerk, were to be received in evidence. The copy of the warrant, in this

142

case, corresponds with these regulations, and was properly received, nor was it objected to in the court below.

The practice in the courts of Tennessee, of attaching a prior entry to a junior grant, to overreach an elder grant in an action of ejectment, was brought into the view of, and recognized by, this court, in the case of *Polk v. Hill et al.*; it is, therefore, not now to be departed from.

The location in this case, upon the face of the warrant, appears to be sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place. These were questions properly submitted to the jury; there was, therefore, no error in the charge and instruction given on this point. Nor was there error in the residue of the instruction. It is a general principle to presume that public officers act correctly until the contrary be shown. It must, therefore, be presumed that the officer, when he surveyed M'Dowell's entry, in Reed's name, had sufficient evidence produced to *satisfy [*487 him that Reed was the owner of it, and this presumption is increased by the act of another officer in issuing the grant; these circumstances furnished *prima facie* evidence, at least, that he was the owner.

Judgement affirmed.

Cited—8 Wall. 83.

Wheat. 1.

APPENDIX.

[NOTE I.]

Extract from the Preface to Bibb's Reports of Cases in the Court of Appeals of Kentucky.

"The rules of landed property in Kentucky are, in an eminent degree, the creatures of the court—a species of judicial legislation. The disputes between claimants under the laws of Virginia have grown, principally, out of two requisitions in the statute of 1779. The one requiring of those claiming rights of settlement, or of pre-emption, to obtain certificates from the commissioners appointed for that purpose, mentioning the cause of the claim, the number of acres, and "describing, as near as may be, the particular location;" the other, requiring the holders of land warrants to lodge them with the surveyor, and in a book to be kept for that purpose, to "direct the location thereof so specially and precisely as that others may be enabled, with certainty, to locate warrants on the adjacent residuum." The text was short and novel; the commentary was left to the direction of the judges. The ancient depositories of the law gave but little light to guide the exercise of this discretion. The rules for construction of deeds gave some aid; but this was far short of what was wanted. For a time, unfettered by precedent, undirected by rule, each decision was but fact—multiplication of facts gave precedents, and precedents have grown into doctrine. The [490*] statute requires, first, a description *of the particular tract, specially and precisely; that is to say, that the description shall apply, certainly, to one identical tract, and not uncertainly, or equally to two, or divers. Next, that this description shall enable others to find and know the identical tract intended. The statute intends the entry in the surveyor's book to be notice to all persons of the appropriation. The question arising out of the entry is, does it contain that description which was sufficient to operate as notice of an appropriation of a particular tract? This question is analyzed into the identity and notoriety of the objects referred to in the location. That is to say, the entry must contain proper allusion and reference to known and certain objects, which shall serve as indices to the particular tract of land intended to be appropriated.

"Identity is absolutely necessary in the investigation of every question of *meum et tuum*. The propriety of making identity one subject of inquiry in testing entries needs no explanation. But in deciding upon what description is sufficient to give identity, or in-

dividuality to the location, various rules have been established, whereby entries, apparently admitting of diversity of figures, have been helped, and rendered identical by construction. A location, "to include his cabin," in matters of fact, admits of divers surveys, each of which may inclose the cabin, and yet have not an acre in common. If the locator could take any one of these circumjacent tracts, as whim or fancy may direct, it is evident that, until this choice was made known by some act posterior to his entry, others could not know the adjacent residuum, nor appropriate it with certainty. But as matter of law, the courts have established as a rule, in such cases, that the survey shall be in a square, with lines due north or south, east and west, the cabin at the intersection of the diagonals. Thus (the quantity being expressed), when the particular cabin is ascertained, the location is reduced to mathematical certainty, appropriate to one precise identical tract. This is one example, among many, of which you will read in these reports.

"The identity of the tract, being ascertained, the inquiry is, whether the description was, at the date of the location, with the surveyor, sufficient to enable others to find and know it.

"*This branch of the subject has [*491] called forth many decisions, and embraces the doctrine of notoriety, so frequently recurring in questions upon conflicting claims.

"This rule is, that the location must contain such expressions and allusions to objects, natural or artificial, as would enable others, using reasonable diligence of inquiry, to ascertain the particular tract intended to be appropriated. A reference to obscure objects, known to the locator only, without proper directions for finding them, could not satisfy the requisitions of the statute, although the figure of the land could be precisely described, if the beginning could be ascertained. For such reference to obscure objects, although it might enable the locator himself to appropriate the adjacent residuum, would not enable others to do it. This required reference to known objects, by their known appellations, or other distinguishing characteristics, is essential to every geographical description, and is founded in the very constitution of language, as the medium of communicating the ideas of one man to another. The geographer must draw his equator, and establish and make known his first meridian, before he can describe, intelligibly, the relative positions of the

1.—LL. V. Chan. Rev. 98; 1 Litt. E. L. K. 402-3.

2.—Chan. Rev. 95; 1 Litt. 410.

different parts of the earth, and of the countries he describes. The surveyor must have his first positions, from whence to take his bearings and distances, his latitude and departure. In language, the sign and the thing signified by articulate sounds must be agreed upon, and mutually made known, before men can converse intelligibly one with another. The substances must be pointed out, and the names repeated, before the child, or the for-eigner, understands what we mean by land, water, and cabin. There is no natural connection between words and the ideas they are intended to stand for, otherwise there would be but one language among all men. But sounds, as the representatives of ideas, are of mere arbitrary imposition; therefore, language is properly defined 'a system of articulate sounds, significant by compact.' This compact is established by common consent, use, and custom, in every country. It is this established use, custom, and common consent, which makes names, words, and terms, mark and signify particular ideas. All men, therefore, who speak intelligibly *to others, must use words which stand for ideas, and employ those words according to their common use and acceptance in the language of the country. A man who would use three to signify eight would deceive his hearers. He who would speak to others of substances and objects by sounds never before used to signify those things, without any explanation to make known his meaning, would be guilty of an abuse of language, by uttering empty sounds, and nothing else. From known ideas, the mind may be conducted to the knowledge of things new, and before unknown. But from things unknown to attempt to describe things more unknown, so far from helping us to knowledge, serves only the more to perplex and bewilder the mind. A locator using words which stand for ideas in his own mind, but which do not convey the same ideas, or no certain ideas, to the mind of others, has not complied with the requisitions of the statute. Should he allude to a water-course only by a name unheard of by others, and arbitrarily imposed by himself, he does not write intelligibly to others. So, 'to include a tree in a forest, whereon he has marked the initials of his name,' may identify the land in his own mind, but does not communicate to others a competent idea of the intended appropriation. Locators must have reference to objects known to others by their usual names, or by terms in common use and acceptance, describe and make known the objects intended.

"Notoriety is either absolute or relative. Absolute, as where the object is known so generally that, according to the usual courtesies and intercourse among men, the presumption is irresistible that anyone using ordinary inquiry might have been conducted to the place, as Lexington, Bryant's Station, the Lower Blue Licks, &c. Relative, as where the particular object is not actually known, but is ascertainable by reasonable diligence—as one mile east of the Lower Blue Licks, &c.

"As the record in the books of entries is to have the effect of general notice to all holders of warrants, the entry must contain apt reference to objects known to the generality of persons acquainted in the neighborhood of the in-

tended appropriation. Neither will the proof that the particular conflicting claimant had knowledge of the appropriation intended suffice to *help out an entry in a contro- [*493] versy with him, as is adjudged in several cases, and, as I think, very properly. 1st. That would be to make the entry valid as to some, and invalid as to others, as is more fully explained in *Craig v. Pelham*, Pr. Dec. 286-7. 2d. That would be to test the entry, not by the record, but by matters out of the scope of the record. 3d. It would put men's estates upon a tenure too slender and uncertain, without any sufficient safeguard against the perjury or mistakes of a solitary witness; whereas, evidence of notoriety being an appeal to general understanding and knowledge of the people of the neighborhood, is capable of being rebutted and disproved, if untrue, by calling upon other men who had equal opportunities of information on the subject. 4th. To admit proof that a particular person understood the entry, would be to test the signification and propriety of the language of the entry, not by the standard of general use and common acceptance, but by the particular ideas of two individuals.

"Notoriety must have been co-existent with the entry. The location, when made, if valid is to stand for notice of appropriation from that time. Words conveying to others no precise idea of appropriation, at the time used, because they were not conformable to objects then in existence; or, because the names and terms employed had not then been annexed, in common use and understanding of the neighborhood, to any individual object, being signs without anything signified, cannot, without abuse of language and of truth, be made to apply to after-made objects or after-acquired names. 'A enters for 400 acres, to include his cabin.' At the time he had no cabin, and, therefore, his entry was null, appropriating no land. One year afterwards A builds a cabin. Ought he to be permitted to hold land around it by virtue of his entry before the fact? If so, A has had one year to make his choice of the country. To suffer him to hold by relation to the time of his entry would be a fraud upon intermediate purchasers. To suffer him to hold against after-purchasers, would be: 1st. To make the same entry valid and invalid; good against some persons, and null as to others, of which enough has been said before. 2d. To refer his claim, not to the truth of the recorded entry, but to mere occupancy. 3d. To make an act not valid in the *beginning, grow valid [*494] and legal in the lapse, which is contrary to a maxim in law. '*Quod ab initio non valet, in tractu temporis non conualescit*.' (Noy's Max. 9.) In illustration of the maxim, Noy putteth the case of A 'remainder limited to A, the son of A. B having no such son, and afterwards a son is born to him, whose name is A, during the particular estate,' the remainder is void, whether the entry alluded to objects not then existing, or employed names, or terms, not then standing for signs of the existing objects, or signs of ideas among the generality of those acquainted in the neighborhood, the reason is the same for denying validity to the entry by means of after notoriety. To test the entry by any other

standard than the significance, or insignificance, of the words at its date, would produce an inconsistency and shifting of locations. Objects lose their old names, and acquire new ones. Names of streams are transposed in the progress of time, and of the settlement of the country. Upon the doctrine that after notoriety should apply to a previous entry, the

identity and validity of entries would be referred, not to one uniform standard expressed in the face of each entry, but to perplexed and different standards, according to the dates of the entries happening to conflict. Thus the date of a subsequent conflicting entry would make a part of a prior entry, and affect its validity or invalidity."

[NOTE II.]

ON THE PRACTICE IN PRIZE CAUSES.

IN SOME of the district courts of the United States (to which courts the exclusive jurisdiction in the first instance belongs) *great irregularities have crept into the practice in prize causes. These irregularities have been censured at the bar, and occasionally noticed, with expressions of regret, by the Supreme Court. It is hoped, therefore, that an attempt to sketch an outline of the regular practice of prize courts, in some of the more important particulars, may not be without use to the profession. This outline will be principally copied from the rules of the British courts, which, as far as cases have arisen to which they could apply, have been recognized and enforced by the Supreme Court of the United States; and, for the most part, are conformable with the prize practice of France, and other European countries, as will appear by a reference to the laws and treaties quoted in the margin. The letter of Sir William Scott and Sir John Nicholl, to Mr. Jay, written in September, 1794, which is printed in the appendix to Chitty's Law of Nations (American edition), and Wheaton on Captures, affords, as far as it goes, a very satisfactory and luminous view of the subject. Something more in detail, however, may be desirable to those who are not familiar with the admiralty practice.

As soon as a vessel or other thing captured as prize arrives in our ports, notice should be given thereof by the captors to the district judge, or to the commissioners appointed by him, that the examinations of the captured crew, who are brought in, may be regularly taken in writing, upon oath, in answer to the

standing interrogatories. These are usually prepared under the direction of the district judge, and should contain sifting inquiries upon all points which can affect the question of prize. The standing interrogatories used in the English High Court of Admiralty (1 Rob., 381) have been drawn up with great care, precision and accuracy, and are an excellent model for other courts. They were generally adopted during the late war by the district judges in the principal states, with a few additions, and scarcely any variations. The examinations upon these interrogatories are rarely taken by the district judge in person, for in almost all the principal ports within his district he appoints standing commissioners for prize proceedings, upon whom this duty devolves.

It is also the duty of the prize-master to deliver up to the district judge all the papers and documents found on board, *and, at [496 the same time, to make an affidavit that they are delivered up as taken, without fraud, addition, subduction, or embezzlement.¹

In general, the master and principal officers, and some of the crew of the captured vessel, should be brought in for examination. This is a settled rule of the prize courts, and was, during the late war, enforced by the express instructions of the president. The examination must be confined to persons on board at the time of the capture, unless the special permission of the court is obtained for the examination of others. (6 Rob., 185, *The Eliza and Katy*; 4 Rob., 43, 57, *The Henrick and Maria*.) In order to guard as much as possible against [497] frauds *and misstatements from after

1.—Aussôtôt que la prise aura été amenée en quelques rades ou ports de notre royaume, le capitaine qui l'aura faite, s'il y est en personne, sinon celui qu'il en aura chargé, sera tenu de faire son rapport aux officiers de l'amirauté; de leur représenter et mettre entre les mains les papiers et prisonniers; et de leur déclarer le jour et l'heure que le vaisseau aura été pris; en quel lieu ou à quelle hauteur; si le capitaine a fait refus d'amener les voiles, ou de faire voir sa commission ou son congé, s'il a attaqué ou s'il s'est défendu; quel pavillon il portait, et les autres circonstances de la prise et de son voyage. Ordonnance de la Marine, 1681, tit. 9, art. 21: Déclaration du 24 Juin 1773, art. 42. See also the Swedish Ordinance of 1715, art. 6, Coll. Mar. 168.

Wheat. 1.

U. S., Book 4.

2.—Thus, in a treaty of amity and commerce between Charles VIII., King of France, and Henry VII., of England, concluded at Boulogne, the 24th of May, 1497, and which may be considered as evidence of the prize practice of Europe at that period, is contained the following article: "Simili quoque Juramento solemmniter prestando promittent, quod de qualibet præda, captura, manubris, sive spoliis, adducent duos aut tres viros in capto navi principum locum obtinentes, ut magistrum, submagistrum, patronum, aut hujusmodi conditionis, quos Admiraldo, Vice-Admiraldo, aut eorum officialis exhibebunt, ut per eosdem, aut eorum alterum, debite examinetur ubi super quibus, et qualiter, navis sive bona capta sint; nec facient aut

contrivances, the examinations should take place as soon as possible after the arrival of the vessel, and the witnesses are not allowed to have communications with, or to be instructed by, counsel. The captors should also introduce all their witnesses in succession; for if the commissioners have taken the depositions of some of the crew, and transmitted them to the judge, they will not be at liberty, without a special order, to examine others who are afterwards brought by the captors before them. (2 Rob., 243, *The Speculation*.) On the other hand, an equal strictness is held over the conduct of the claimants. If they keep back any one of the captured crew for two or three days after the vessel comes into port, and then offer him, together with papers in his possession, the commissioners will be justified in not examining him. (1 Rob., 331. And see 4 Rob., 381, *The William and Mary*.) The ship's papers and other documents, found on board, which are not 498* delivered up to the district judge, or the commissioners, before, or at the time of, the examinations, will not be admitted as evidence. (*Ibid.*)

Although the examinations are to be on standing interrogatories, without the instructions of counsel, yet the witnesses are produced in the presence of the agents of the parties, before the commissioners, whose duty it is to superintend the regularity of the proceedings, and protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him. (5 Rob., 286, *The Apollo*.) And the commissioners should be careful that the various answers are taken fully and perfectly, so as to meet the stress of every question, and should not suffer the witness to evade a sifting inquiry, by vague and obscure statements. If the witness refuse to answer at all, or to answer fully, the commissioners are to certify the fact to the court, and, in addition to the other penal consequences to the owners of the ship and cargo from a suppression of evidence, he will be liable to close imprisonment for the contempt. The witnesses should be examined separately, and not in presence of each other, so as to prevent any fraudulent concert between them.

As soon as the examinations are completed,

they are to be sealed up and directed to the proper District Court, together with all the ship's papers, which have not been already lodged by the captors in the registry of the court.

It is upon the ship's papers, and depositions thus taken and transmitted, that the cause is, in the first instance, to be heard and tried. (1 Rob., 1, *The Vigilantia*.) This is not a mere *matter of practice or form: it is of the [*499 very essence of the administration of prize law; and it is a great mistake to admit the common law notions, in respect to evidence, to prevail in proceedings which have no analogy to those at common law. In some few of the district courts it was not unusual, during the late war, to allow the witnesses to be examined, orally, at the bar of the court long after their preparatory examinations had been taken, and full opportunities had been given to enable the parties to shape any new defense, or explain away any asserted facts. This was, unquestionably, a great irregularity, and, in many instances, must have been attended with great public mischiefs. By the law of prize, the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel. The captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony. It is, therefore, of the last importance to preserve the most rigid exactness as to the admission of evidence, since temptations would otherwise be held out to the captured crew to defeat the just rights of the captors by subsequent contrivances, explanations, and frauds. There can be no honest reason why the whole truth should not be told by the captured persons at the first examination; and if they then prevaricate, or suppress important facts, it must be from motives which would materially impair the credibility of their subsequent statements. Where the justice of the case requires the admission of new evidence, that may always be obtained, except where, by the rules of law, or the misconduct of the parties, the right to further proof has been forfeited. But whether such further proof be necessary or admissible can never be ascertained until the cause has been fully heard upon the facts, and the law arising out of the facts already in evidence. And in the Supreme Court, during the whole of the late war, no further proof was ever

fieri permittent aliquas prædæ, spoliis, mercibus, aut bonorum, per eos captendorum divisiones, partitiones, traditiones, permutationes, alienationes, pri usquam se viros captos, bona et merces, integre Dominis, Admiralo, Vice-Admiralo, aut eorum vices gerentibus representaverint; qui de illis disponi, si æquum putabunt, permittent, alias nihil hujusmodi permittent. Coll. Mar. 85.

De toutes les prises qui se feront en mer, soit par nos sujets, ou autres tenants nostre party, et tant sous ombre et couleur de la guerre qu'autrement, les prisonniers ou pour le moins deux ou trois des plus apparens d'iceux seront amenez à terre, devers nostre dit Amiral, ou son Vice-Amiral, ou Lieutenant, pour, au plustost que faire se pourra, estre par lui examinez et ouys, avant qu'aucune chose des dites prises soit descendue; afin de savoir le pays delà où ils seront, à qui appartiennent les navires et biens d'iceux, pour si la prise se trouve avoir esté bien faite, telle la déclarer, si non et où elle se trouverait mal faite, la restituer à qui elle appartiendra, &c. Ordonnance de 1584, art. 33: Ord. de 1400, art. 4, de 1543, art. 20; Déclaration du premier Février 1650, art. 9. Les officiers de l'amirauté entendront sur le fait de la prise, le maître ou commandant du vaisseau pris, même quelques officiers

et matelots du vaisseau preneur, s'il est besoin. (Ordonnance de la Marine, 1681, tit. 9, art. 24.) Si le vaisseau est amené sans prisonniers, charte-parties ni connaissements, les officiers, soldats et équipages de celui qu'il aura pris, seront séparément examinez sur les circonstances de la prise, et pourquoi le navire a été amené sans prisonniers, et seront, le vaisseau et les marchandises visités par experts pour connoître, s'il se peut, sur qui la prise aura été faite. Ib. art. 25.

1.—Il est ordonné, &c. que pleine et entière foi sera ajoutée aux dépositions des capitaines, matelots et officiers des vaisseaux pris, s'il n'y a contre eux aucun reproche valable proposé par les réclamateurs, ou quelque preuve de subornation et de seduction. Règlement du 26 Octobre, 1662. Veut que dans aucun cas, les pièces qui pourraient être rapportées, après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires desdits bâtimens qu'à ceux des marchandises qui pourraient avoir été chargées: Voulant qu'en tout occasions l'on n'ait égard qu'aux seules pièces trouvées abord. Règlement du 23 Juillet, 1773. See also the Swedish Ordinance of 1715, art. 7. Coll. Mar. 169.

admitted until the cause had been first heard upon the original evidence, although various applications were made to procure a relaxation of the rule. We shall have occasion hereafter to state some of the cases in which further proof is allowed or denied.

500*] *If a person wishes to procure the restitution of any property captured as prize, it is necessary that he should, after the prize libel is filed, and at, or before, the return of the monition thereon, or time assigned for the trial, enter his claim for such property before the proper court. And if the captors omit, or unreasonably delay to institute prize proceedings, any person claiming an interest in the captured property may obtain a monition against them, citing them to proceed to adjudication; which, if they omit to do, or show cause why the property should be condemned, it will be restored to the claimants proving an interest therein. And the same process is often resorted to where the property is lost or destroyed, through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention. (1 Rob., 93, *The Betsey*; 1 Rob., 181, *The Mentor*; 3 Rob., 239, *The Huldah*; *Ib.*, 129, *The Der Mohr*; *Ib.*, 212, *The George*; 4 Rob., 215, *The William*; 6 Rob., 48, *The Susanna*.) The claim should be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal.¹ The claim must be accompanied with an affidavit stating briefly the facts respecting the claim and its verity. This affidavit should be sworn to by the parties themselves if they are within the jurisdiction. But if they are absent from the country, or at a very great distance from the place where the court is held, the affidavit may be sworn to by an agent. Before a claim is made, and affidavit put in (which should always be special if the case stands on peculiar grounds), it is not permitted to the parties to examine the ship's papers, and the preparatory examinations in order to shape their claims; for **501*]** this might lead to great abuses. *But if it be necessary to ascertain the particulars of a claim, the court will, upon a special application, suffer so many of the papers to be examined as directly relate to such claim; but a sufficient reason is always expected to be shown on affidavit to sustain such an application. (3 Rob., 233, *The Port Mary*.) It is a general rule that no claim is to be admitted which stands in entire opposition to the ship's papers and to the preparatory examinations. (5 Rob., 15, 19, *The Vrow Anna Catharina*; 6 Rob., 1, *La Flora*.) But this only applies to cases arising during the war, and not to cases arising before the war. (5 Rob., 15, *The Anna Catharina*.) And it is not so inflexible as to exclude the in-

terest of a citizen, or subject, where there is an absolute necessity to simulate papers, as in the case of a trade with the enemy licensed by the state. (6 Rob., 1, *La Flora*.) It is also a general principle that no citizen, or subject, can be admitted to claim in a prize court where the transaction in which he is engaged is in violation of the municipal laws of his own country. (2 Rob., 77, *The Walsingham Packet*; 4 Rob., 262, note, *The Etrusco*; 5 Rob., 23, *The Cornelius and Maria*; *Ib.*, 251, *The Abby*; 6 Rob., 341, *The Recovery*.) Nor can a person be admitted to claim where the trade in which he is taken is forbidden by the law of nature, and by the municipal law of his own country, and that where the court is sitting. (Edinb. Review, vol. 16, No. 21, p. 426, *The Amédée*.) Nor can an enemy interpose a claim unless under the protection of a flag of truce, a cartel, license, pass, treaty, or some other act of the public authority suspending his hostile character. (1 Rob., 196, *The Hoop*.) And, even in the case where the capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution must be made, not by the enemy proprietor, but the neutral government. (5 Rob., 15, *The Vrow Anna Catharina*; 3 Rob., 162, note.)

Where no claim is interposed, it is not now usual to condemn the goods for want of a claim, until a year and a day has elapsed from the time of the return of the monition, except in cases where there is a strong presumption, and reasonable proof, that the property actually belongs to an enemy. (1 Rob., 26, 29, *The Stadt Embden*. And see 4 Rob., 43, *The Henrick and Maria*, Coll. Mar. 88, note.) But after a year *and a day has elapsed, [**502** condemnation goes of course, if there be no claim interposed.²

After a claim is once put in, it is not amendable of course; but if an amendment is wanted to correct the generality of the original claim, it will not be allowed unless a proper case is made out, and sufficient reasons given for the omission in the first instance. (3 Rob., 109, *The Graaf Bernstoff*. And see 3 Rob., 179, *The Sally*.)

It often happens that persons whose property has been captured apply to the court for a delivery upon bail, and under a mistaken notion that such a delivery, after an appraisement, was a matter of course, or was to be governed by the same rules as are prescribed in the case of municipal forfeitures under the act of the 2d of March, 1799, c. 128. Some of the district courts have allowed such applications before any hearing of the cause; and parties have thereby, sometimes, fraudulently obtained possession of goods at an under-valuation, where their title was totally defective, or grossly illegal. It is a settled rule of the prize court not to deliver a cargo on bail before the cause has been fully heard, unless by the consent of all parties; and if any inconvenience should result

1.—Il est fait très expresses inhibitions et défenses à toutes sortes de personnes de réclamer aucunes des prises faites par ses vaisseaux de guerre ou ceux des armateurs particuliers, ni faire aucune procédure en l'amirauté, sans être au préalable, porteurs de procurations en bonne forme de ceux pour qui ils feront les réclamations, et les avoir présentées aux officiers de l'amirauté des ports où les prises auront été conduites, à peine de six cents livres d'amende. Ordonnance du 30 Janvier, 1692. Réglement du 19 Juillet, 1778.

Wheat. 1.

2.—Si par la déposition de l'équipage et la vente du vaisseau et des marchandises, on ne peut découvrir sur qui la prise aura été faite, le tout sera inventorié et apprécié, et mis sous bonne et sûre garde, pour être restitué à qu'il appartiendra, s'il est réclamé dans l'an et jour; sinon, partagé comme épave de la mer, également entre nous, l'amiral et les armateurs. Ordonnance de la Marine de 1681, tit. 9 art. 26.

from this rule, as if the property be perishable, it may easily be avoided by an interlocutory sale. (3 Rob., 178, *The Copenhagen*.) After the hearing, if the claimant obtain a decree in his favor, or an order for further proof, the court will listen to an application for a delivery on bail; but if his claim be rejected, or be affected with the imputation of fraudulent [503*] or unlawful conduct, *the application will not be allowed notwithstanding an appeal is interposed. Where there is a decree of condemnation the captors are, in general, entitled to a delivery of the property, or the proceeds thereof, upon bail.

On an appeal to the Circuit Court, the property follows the appeal into that court, and is no longer subject to the interlocutory orders of the District Court. It is otherwise with regard to the Supreme Court, whose decrees are always remanded to the Circuit Court for execution; and, therefore, the property always remains in the custody of the latter. In cases of delivery on bail, a stipulation, according to the course of the admiralty, and not a bond, should be taken. [504*]

*Where further proof is admissible, it may, in the discretion of the court, be by affidavits and other papers introduced without any formal allegations, or by way of plea and proof, where formal allegations are made by each party in the nature of special pleadings; and it may be opened to the claimants only, or to the captors as well as claimants. Upon a simple order for further proof, the captors are not entitled to adduce any new evidence, unless by the special direction of the court; but upon plea and proof, both parties are at liberty to introduce new evidence to support their respective allegations, and the points put in issue. (1 Rob., 313, *The Adriana*.)

The court is in no case concluded by the original evidence, but may order further proof on a doubt arising from any cause or quarter (6 Rob., 351, *The Romeo*); and it will sometimes direct it where suspicion is produced by extrinsic evidence. (*Ib.*) But this is rarely done, unless there be something in the original evi-

dence which lays a suggestion for prosecuting the inquiry further. (3 Rob., 380, *The Sarah*.) And where the case is perfectly clear, and not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry. (6 Rob., 351, *The Romeo*.)

The most ordinary cases of further proof are where the cause appears doubtful upon the original papers, and the answers to the standing interrogatories; and, in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects by the introduction of new evidence. But further proof is, in no case, a matter of right, and rests in the sound discretion of the court. Further proof is in all cases necessary where the master does not swear to, or give any account of the property. (2 Rob., 1, *The Eenroom*. *Ib.*, 121, *The Juno*; 4 Rob., 201, *The Convenientia*.) Where the shipment, though stated to be on neutral account, is not stated to be on account of any particular person. (4 Rob., 79, *The Jonge Pieter*.) Where the ship has been purchased in the enemy's country. (1 Rob., 122, *The Welvaart*.) Where there has been any loss or suppression of material papers (2 Rob., 361, *The Polly*); *and, indeed, in [*505] all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence, in general, induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions. But it is not in every case where further proof is necessary that the parties will be permitted to introduce it; for the privilege may be forfeited by fraud or gross misconduct. And, in cases where further proof is necessary, if it is not allowed, the penal consequences are as fatal as if the property were originally hostile, since a condemnation certainly follows the denial. (1 Rob., 122, *The Welvaart*; *Ib.*, 124, *The Juffrow Anna*; 3 Rob., 109, *The Graaf Bernstoff*; 2 Rob., 1, *The Eenroom*.) Further proof is never allowed to the claimants where fraudulent papers have been used. (1 Rob., 122, *The Welvaart*; *Ib.*, 124, *The Juffrow Anna*; *Ib.*, 126, *The Juffrow Elbrecht*.) Where there has been a spoliation of papers. (2 Rob., 104, *The Rising Sun*.) Where there has been a fraudulent covering or suppression of an enemy's interest. (3 Rob., 109, *The Graaf Bernstoff*.)² Where there is a false destination, and

1.—Et si ab interlocutoris dictorum judicum partes appellare contigerit, nihilominus super principale usque ad sententiam definitivam inclusive, appellationibus illis non obstantibus, procedere poterunt. Sed si Sententia super bonorum restitutione seu principali foratur, illa executioni demandabitur, tractatum pacis insequendo, appellationibus etiam quibuscumque non obstantibus. *Poterit tamen supplicari ad Consilia Principum, modo supradicta, scilicet cautione præstita ab ea parte, contra quam supplicabitur, de bonis captis restituendis, in eventum contrarie Sententie, et a parte supplicante, de expensis damnis et interesse, si in causa succumbunt. Traité de Paix et de Commerce entre Charles VIII, Roi de France et de Navarre et Henry VII, Roi d'Angleterre, 1497, Coll. Mar. 101.*

Les marchandises qui ne pourront être conservées, seront vendues sur la réquisition des parties intéressées, et adjugées au plus offrant, &c. (Ordonnance de la Marine de 1681, tit. 9, art. 28. Le prix de la vente sera mis entre les mains d'un bourgeois solvable, pour être délivrée après le jugement de la prise, à qui il appartiendra. *Ib.* art. 29. Lorsque la rente ne se fait qu'après que la prise a été déclarée bonne, c'est toujours entre les mains de l'armateur que les deniers en provenance son remis, à la charge d'en compter; and afin qu'il en fût autrement, il faudroit que sa solvabilité fût bien suspecte. *Vain sur l'Ordonnance, Ib.* And, according to the French practice, where restitution is decreed by the council of prizes on the original hearing, the claimants are entitled to a delivery of the property on bail, notwithstanding an appeal to the council of state, on the part of the captors. 2 *Vain*, 335.

2.—Et pour ce qu'il pourroit advenir, qu'aucuns de nosdits Alliez et Conféderez, voudroient porter plus grande faveur à nosdits ennemis, et adversaires, que à nous et à nosdits sujets, et à ceste cause, voudroient dire et soutenir contre verité, que les navires pris en mer par nosdits sujets leur appartiendroient, ensemble la marchandise, pour en frauder nosdits sujets; voulons et ordonnons, qu'incontinent après la prise et abordement de navire, nosdits sujets fassent diligence de recouvrer la charte-partie, et autre lettres concernant la charge du navire; et incontinent à leur arrivement à terre, les mettre par devers le lieutenant de notre dit amiral, afin de cognoistre à qui le navire et marchandises appartiennent; et où ne seroit trouvée charte dedans lesdits navires, ou que le maître et compagnons l'eussent jetée en la mer, pour en celer le verité, voulons que les dits navires ainsi pris, avec les dits bien et marchandises estans dedans soient déclarés de bonne prise. Ordonnance de 1584, art. 70; Du 5 Septembre, 1708; Du 21 Octobre, 1744, art. 6.

Wheat. 1.

false papers. (3 Rob., 122, *The Nancy*; 6 Rob., 79, *The Mars*.) Nor in general, where the case appears incapable of fair explanation. (1 Rob., 163, *The Vrouw Hermina*.) Or where **506***] there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such a want of good faith as shows that the parties cannot safely be trusted with an order for further proof.

If, upon further proof ordered, no proof is adduced, or the proof be defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interests, or of such misconduct as authorizes condemnation. And it is a general rule of the prize court that the *onus probandi* that the property is neutral rests upon the claimant; and if he fails to show it, condemnation ensues. (6 Rob., 77, *The Walsingham Packet*; *Ib.* 343, *The Rosalie and Betty*; 4 Rob., 283, *The Countess of Lauderdale*.)

In cases where further proof is admitted on behalf of the captors they may introduce papers taken on board of another ship, if they are properly verified by affidavit. (6 Rob., 351, *The Romeo*; 1 Rob., 340, *The Maria*.) And they may also invoke papers from another

prize cause. (6 Rob., 350, *The Romeo*; 3 Rob., 330, *The Sarah*; 4 Rob., 166, *The Vrienschap*.) It has even been permitted to the captors to invoke the depositions of the claimant, given in another cause, to prove his domicile at the first hearing, and without an order for further proof. (4 Rob., 166, *The Vrienschap*.) And upon an order for further proof, the affidavits of the captors, as to facts within their own knowledge, are admissible evidence. (1 Rob., 340, *The Maria*; 6 Rob., 13, *The Resolution*.)

It is time to draw this note to a close, and in so doing, it is proper to inform the reader that, although authorities are cited to support some of the positions they will not always be found to support them in their full extent. Much of what is stated, as the general practice of prize courts, is to be gathered from lights scattered here and there in the books, and more frequently and accurately by attendance on the arguments of prize causes, where the points are discussed by counsel, or ruled incidentally by the court.

[*NOTE III.]

[*507

ON THE RULE OF THE WAR OF 1756.

The rule commonly called the rule of 1756, has acquired this denomination from its having been first judicially applied by the courts of prize in the war of that period. The French (then at war with Great Britain), finding the trade with their colonies almost entirely cut off by the maritime superiority of the British, relaxed their monopoly of that trade, and allowed the Dutch (then neutral) to carry on the trade between the mother country and her colonies, under special licenses, or passes, granted to Dutch ships for this special purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the just and true principle that by such employment they were, in effect, incorporated into the French navigation, having adopted the character and trade of the enemy, and identified themselves with his interests and purposes. They were, in the opinion of these courts, to be considered like transports in the enemy's service, and hence liable

to capture and condemnation, upon the same principle as property condemned by way of penalty for resistance to search, for breach of blockade, for carrying military persons or dispatches, or as contraband of war. In all these cases the property is considered, *pro hac vice*, as enemy's property, as so completely identified with his interests as to acquire a hostile character. So, where a neutral is engaged in a trade which is exclusively confined to the subjects of a country, in peace and in war, and is interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national that it must follow the hostile situation of the country.¹ There is all *the difference between this [**508** principle and the modern British doctrine, which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the belligerent state, protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption

1.—2 Rob., 52, *The Princessa*; 4 Rob., 118, *The Anna Catharina*; *Ib.* 121, *The Rendsburg*; 5 Rob., 150, *The Vrouw Anna Catharina*. In this last case Sir William Scott distinguishes from the ordinary colonial trade, "the strict exclusive colonial trade from Wheat. 1.

the colony to the mother country, where the trade is limited to native subjects, by the fundamental regulations of the state; and the national character is required to be established by oath, as in the case of the Spanish Register ships.

of such trade from capture. The former is clearly cause of confiscation, whilst the latter has no such effect.¹ The rule of the war of 1756 was founded upon the former principle, and likewise upon a construction of the treaties between Great Britain and Holland, in which, the former power contended, was conceded to the latter a freedom of commerce only as to her accustomed trade in time of peace. The rule lay dormant through the war of the American revolution; but was afterwards revived during the war of the French revolution, and extended to the prohibition of all neutral traffic whatsoever with the colonies, and upon the coasts of an enemy.

That this is a correct representation of the nature, origin, and subsequent application, of this celebrated rule of the British prize courts, will appear from its history.

It cannot be pretended that its origin can be traced, in judicial records, to an earlier source than that war from which it derives its name. It has, indeed, been attempted to seek, by the aid of historical lights, for earlier instances of the application of the rule. But it is evident that the property of the pretended neutrals, who, according to M. Arnold, were employed by the French administration to carry on the colonial trade during the war which ended with the peace of Utrecht, and that of 1744,² must have been condemned as enemy's property; because, [509*] "with all the advantages possessed by the advocates for the British doctrine of access to the records of the proceedings of the prize courts during those wars, no trace can be found in them of condemnations under the rule as applicable to the colonial trade, and because that trade was expressly adjudged to be lawful, by the Lords of Appeal, during the war of 1744."³ It has also been asserted that the treaty of 1668, renewed in 1674, between Great Britain and Holland, relaxed the primitive rigor of the law of nations in this particular, and that this relaxation was gradually extended by similar treaties to other nations.⁴ But this treaty was contended by Great Britain to be a declaration of the original and pre-existing law of nations on this subject; and the explanatory article signed on the 30th of December, 1675, was itself declaratory of the meaning of the treaty, and was drawn up at the request of the British minister, Sir William Temple.⁵ It is true, it contains a proviso, "that this declaration shall not be alleged by either party for matters which happened before the late peace, February, 1673-4." But, before that peace, the two parties were at war with one another, and could not claim the rights of neutrality against each other, and previous to that war they were at peace with all the world; so that this reservation could not imply that vessels had been recently drawn into judgment on a different understanding of the principle. Nor does the letter of Sir Leoline Jenkins, of the 6th of February, 1667, imply that at that time a vessel

carrying enemy's goods between ports of an enemy was held liable to condemnation. It is admitted that the preceding letter of the Swedish resident adverted only to the circumstance of the vessel's having carried enemy's goods on her outward voyage as the ground on which she was seized on her return voyage; and it will be seen, by quoting the whole of Sir Leoline Jenkins's letter, that he does not lay any stress whatever on the circumstance of the former voyage being a coasting voyage: "The question which I am, in obedience to His Majesty's most gracious *pleasure, to answer unto, being [*510 a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but further to inquire of Sir Robert Wiseman, His Majesty's Advocate-General, Sir William Turner, His Royal Highness, the Lord High Admiral's Advocate; Mr. Alexander Check, His Majesty's Proctor; Mr. Roger How, principal actuary and register in the High Court of Admiralty in England, whether they, or any of them, had observed, or could call to mind, that, in the late war against the Dutch, any one ship, otherwise free, as belonging to some of His Majesty's allies, having carried goods belonging to His Majesty's enemies, from one enemy's port to another, and being seized after it had discharged the said goods, laden with the proceeds of that freight which it had carried, and received of the enemy upon the account of the ship's owners, had been adjudged prize to His Majesty; they all unanimously resolved that they had not observed, nor could call to mind, that any such judgment or condemnation ever passed in the said court; and to this, their testimony, I must, as far as my experience reaches, concur; and if my opinion be, as it seems to be, required, I do not, with submission to better judgment, know anything, either in the statutes of this realm or in His Majesty's declarations upon occasion of the late war, nor yet in the laws and customs of the seas, that can (supposing the property of the said proceeds to be *bona fide* vested in the ship-owners of His Majesty's allies) give sufficient ground for a condemnation in this case. And the said advocates, upon the debate I had with them, did declare themselves positively of the same opinion. Written with my hand this 6th day of February, 1667." So that there does not appear to be any doubt respecting the legality of the former voyage, but only whether the vessel with a return cargo, being the proceeds of the freight received from the enemy on the former voyage, could be condemned on the return voyage; which question was answered in the negative, provided the property had *bona fide* vested in the neutral ship-owners. Before the treaty of 1674 was concluded, foreign vessels were freely admitted into the coasting trade of France; and when Louis XIV. was making efforts to *es- [*511 tablish a nursery of seamen for his navy, and Colbert, under the influence of the commercial system of political economy, was endeavoring to appropriate to his own country some portion of the benefits of the carrying trade, which had been before almost entirely conducted, even from one French port to another, by the Dutch, they did not exclude foreign vessels from the coasting trade, but only imposed a tonnage of

1.—See the opinion of Story, J., in the case of *The Liverpool Packet*. (1 Gallie. Rep. 513. 524.)

2.—6 Rob. 474. Appendix, note 1. (a).

3.—See the argument of Drs. Arnold and Laurence in the case of *The Providentia* (2 Rob. 146).

4.—6 Rob. 74 n. (a).

5.—2 Sir W. Temple's Works, 313.

6.—Sir Leoline Jenkins's Works, vol. 2, p. 741.

fifty sous upon the Dutch, and a crown upon Spanish and Flemish vessels.¹ A like discriminating duty was imposed upon foreign vessels entering French ports, in whatever commerce they might be engaged; so that there was as much reason to conclude that the whole trade of France was exclusively appropriated to her own shipping in time of peace as that the coasting trade was thus appropriated. This renders it the more improbable that the trade from one enemy's port to another should have been considered unlawful by the British prize courts, until the principle of adoption, or naturalization was applied, in the war of 1756, to the trade between the mother country and her colonies, from which neutrals were, in fact, excluded in time of peace. Neither that principle nor the more modern doctrine which confines the neutral to his accustomed peace trade could be applied to a commerce which the neutral might carry on in peace or war, upon payment of alien tonnage duties. According to Lord Liverpool, this discriminating duty of 50 sous was suspended during the war of 1756, in order to ward off the effects of the British superiority at sea;² and this might afford a pretext for applying the rule during that war to the coasting trade of France, as it would raise a presumption of enemy's interests in the foreign shipping, thus adopted into his navigation, with all the privileges of French-built ships. But such a presumption could never arise from neutral vessels entering the coasting trade, under the disadvantage of the discriminating duty; nor could the doctrine which confines the neutral to his accustomed peace trade be applied, *since it is admitted by Sir William Scott, in the case of *The Immanuel*, that the neutral has a right to push his accustomed trade to the utmost extent of which it is capable, but not to enter a new trade from which he was before wholly excluded.³

It is incredible that the freight only should have been forfeited in the wars of 1744, 1756 and 1778, as a mitigation of the primitive strictness of the rule, when we know that vessels engaged in the colonial trade, in the war of 1756, were confiscated, together with their cargoes; ^{512*} and the *Veranderen*, taken on *a voyage from Bourdeaux to Dunkirk, 1778, and the *Prosperite* from Nantz to Dunkirk, 1779, could not

have been restored by Sir James Marriott upon the ground of a relaxation, but restitution must have been decreed, upon the principle of a total abandonment of the rule, since the one was a vessel belonging to Prussia, and the other to Lubeck, with neither of which states Great Britain had, at that time, any treaty regarding this matter.

It is true that, before the war of 1756, attempts were made to prohibit, by mere proclamation, all trade with an enemy. Thus, beside the earlier attempts of this nature,⁴ by the convention concluded at London on the 22d of August, 1689, between England and Holland, wherein the contracting parties say, "that, having declared war against the Most Christian King, it behooves them to do as much damage as possible to the common enemy, in order to bring him to agree to such conditions as may restore the repose of Christendom; and that, for this end, it was necessary to interrupt all trade and commerce with the subjects of the said king," it was agreed between them, "that they would take any vessel, whatever king or state it may belong to, that shall be found sailing into, or out of, the ports of France, and condemn both vessel and merchandise as legal prize; and that this resolution should be notified to all neutral states." Lord Liverpool and Mr. Ward, among the strongest advocates for the maritime claims of Great Britain, condemn, in the most unequivocal manner, this pretension, on her part.⁵ The French regulation of the 23d July, 1704, seems to have been intended to counteract these measures of the English and Dutch, during the war which followed the English revolution in 1688, and, we may suppose, were revived during the subsequent war concerning the Spanish succession. Although Louis XIV., in the preamble to this ordinance, studiously negatives the idea of its being intended *as a measure of retaliation, yet this [⁵¹⁴] profession is powerfully contrasted with the provisions actually contained in the body of the edict, prohibiting all neutral trade in articles the growth or manufacture of the enemy's country, except in the direct voyage from the enemy's ports to a port of the neutral country to which the vessel belongs.⁶

During the long period of tranquility which followed the peace of Utrecht, interrupted only

1.—Valin sur l'ordonnance, tom. 1, p. 14.

2.—Discourse on the Conduct of the Government of Great Britain, &c., p. 9.

3.—"I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered. In the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls, in the same degree, into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed; which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war, by no other title than by the success of the one belligerent against the other, and at the expense of that very

Wheat. 1.

belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking." 2 Rob. 198. The truth is, France never had a navigation act similar to the English, and absolutely excluding foreign shipping from her coasting and carrying trade, until the revolution, when the decree of the 21st of September, 1793, entitled "Acte de Navigation," was passed, which is alluded to by Sir W. Scott in the case of *The Emanuel*, 1 Rob. 296, as if it had been a re-enactment of the ancient laws of France. This was, besides, limited to the coasting trade; as it only extended to the transportation of goods of French production or manufacture, and not to the trade from port to port, in commodities of foreign growth or fabric; which last has been confounded by the British prize courts in the same indiscriminate rule of condemnation with the coasting trade, properly so called.

4.—1 Coll. Mar. 158, note (h).

5.—Discourse on the conduct of the Government of Great Britain, &c., p. 36. Ward on the Rights and Duties of Belligerents and Neutrals, &c., p. 3, 4.

6.—Valin, sur l'Ordonnance, 2 Tom., p. 248.

by the very short war of 1719, no occasion could be afforded to administer the principles of prize law; and, as we have seen, no traces of the existence of the rule in question can be found previous to that epoch, although the colonial system of Europe had, long before, been established, and its maritime nations all participated in the commerce of the East and West India.

The judicial history of the rule, during the subsequent wars, is so admirably traced in a Memorial to Congress from the merchants of Baltimore, &c., a paper drawn up, in 1808, by Mr. Pinkney, that the subject cannot be better illustrated than by the following extract:

"In the war of 1744, in which Great Britain had the power, if she had thought fit to exert it, to exclude the neutral states from the colony trade of France and Spain, her High Court of Appeals decided that the trade was lawful, and released such vessels as had been found engaged in it.

"In the war which soon followed the peace of Aix-la-Chapelle, Great Britain is supposed to have first acted upon the pretension that such a trade was unlawful, as being shut against neutrals in peace. And it is certain that, during the whole of that war her courts of prize did condemn all neutral vessels taken in the prosecution of that trade, together with their cargoes, whether French or neutral. These condemnations, however, proceeded upon peculiar grounds. In the seven years' war, France did not throw open to neutrals the traffic of her colonies. She established no free ports in the east, or in the west, with which foreign vessels could be permitted to trade, either generally or occasionally, as such. Her first practice was simply to grant special licenses to particular neutral vessels, principally Dutch, and commonly chartered by Frenchmen, to make, under the usual restrictions, particular trading voyages to the colonies. These licenses 515*] furnished the British courts with a peculiar reason for condemning vessels sailing under them, viz., 'that they became, in virtue of them, the adopted or naturalized vessels of France.'

"As soon as it was known that this effect was imputed to these licenses, they were discontinued, or pretended to be so; but the discontinuance, whether real or supposed, produced no change in the conduct of Great Britain; for neutral vessels, employed in this trade, were captured and condemned as before. The grounds upon which they continued to be so captured and condemned may best be collected from reasons subjoined to the printed cases, in the prize causes, decided by the High Court of Admiralty, (in which Sir Thomas Salisbury, at that time, presided,) and by the lords commissioners of appeals, between 1757 and 1760.

"In the case of *The America*, (which was a Dutch ship, bound from St. Domingo to Holland, with the produce of that island, belonging to French subjects, by whom the vessel had been chartered,) the reason stated in the printed case is, 'that the ship must be looked upon as a French ship (coming from St. Domingo), for by the laws of France no foreign ship can trade in the French West Indies.'

"In the case of *The Snip*, the reason assigned by Sir George Hayes, and Mr. Pratt, afterwards

Lord Camden, is, 'for that *The Snip* (though once the property of Dutchmen), being employed in carrying provisions to, and goods from, a French colony, thereby became a French ship, and as such was justly condemned.'

"It is obvious that the reason in the case of *The America* proceeds upon a presumption that as the trade was, by the standing laws of France, even up to that moment confined to French ships, any ship found employed in it must be a French ship. The reason in the other case does not rest upon this idle presumption, but takes another ground; for it states, that by the reason of the trade in which the vessel was employed she became a French vessel.

"It is manifest that this is no other than the first idea of adoption or naturalization, accommodated to the change attempted to be introduced into the state of things, by the actual or pretended discontinuance of the special licenses. What, then, is the amount of the doctrine of the seven years' war, in the utmost extent which it is possible to ascribe to it? It is, in substance, no more than this, that as France did not, at any period of that war, abandon, or in any degree suspend, the principle of colonial monopoly, or the system arising out of it, a neutral vessel found in the prosecution of the trade, which, according to that principle and that system, still continuing in force, could only be a French trade, and open to French vessels, either became, or was legally to be presumed to be, a French vessel. It cannot *be [*516 necessary to show that this doctrine differs essentially from the principle of the present day; but, even if it were otherwise, the practice of that war, whatever it might be, was undoubtedly contrary to that of the war of 1744, and, as contrasted with it, will not be considered, by those who have at all attended to the history of these two periods, as entitled to any peculiar veneration. The effects of that practice were almost wholly confined to the Dutch, who had rendered themselves extremely obnoxious to Great Britain, by the selfish and pusillanimous policy, as it was falsely called, which enabled them, during the seven years' war, to profit of the troubles of the rest of Europe.

"In the war of 1744 the neutrality of the Dutch, while it continued, had in it nothing of complacency to France; they furnished, from the commencement of hostilities, on account of the pragmatic sanction, succors to the confederates; declared openly, after a time, in favor of the Queen of Hungary; and, finally, determined upon, and prepared for, war by sea and land. Great Britain, of course, had no inducement, in that war, to hunt after any hostile principle, by the operation of which the trade of the Dutch might be harassed, or the advantage of their neutral position, while it lasted, defeated. In the war of 1756 she had this inducement in its utmost strength. Independent of the commercial rivalry existing between the two nations, the Dutch had excited the undisguised resentment of Great Britain, by declining to furnish against France the succors stipulated by treaty; by constantly supplying France with naval and warlike stores, through the medium of a trade, systematically pursued by the people, and countenanced by the government; by granting to France, early in 1757, a free passage through Namur and Maestricht, for

Wheat. 1.

the provisions,ammunition,and artillery,belonging to the army, destined to act against the territories of Prussia, in the neighborhood of the Low Countries; and by the indifference with which they saw Nieuport and Ostend surrendered into the hands of France, by the court of Vienna, which Great Britain represented to be contrary to the Barrier treaty, and the treaty of the Utrecht. Without entering into the sufficiency of these grounds of dissatisfaction, which undoubtedly had a great influence on the conduct of Great Britain towards the Dutch, from 1757 until the peace of 1763, it is manifest that this very dissatisfaction, little short of a disposition to open war, and frequently on the eve of producing it, takes away, in a considerable degree, from the authority of any practice to which it may be supposed to have led, as tending to establish a rule of the public law of Europe. It may not be improper to observe, too, that the station occupied by Great Britain, in the seven years' war (as proud a one as any country ever did occupy), compared with 517*] that of the other European *powers, was not exactly calculated to make the measures which her resentments against Holland, or her views against France, might dictate, peculiarly respectful to the general rights of neutrals. In the north, Russia and Sweden were engaged in the confederacy against Prussia, and were, of course, entitled to no consideration in this respect. The government of Sweden was, besides, weak and impotent. Denmark, it is true, took no part in the war; but she did not suffer by the practice in question. Besides, all these powers combined would have been as nothing against the naval strength of Great Britain in 1758. As to Spain, she could have no concern in the question, and, at length, became involved in the war on the side of France. Upon the whole, in the war of 1756 Great Britain had the power to be unjust, and irresistible temptations to abuse it. In that of 1744 her power was, perhaps, equally great, but everything was favorable to equity and moderation. The example afforded on this subject, therefore, by the first war, has far better titles to respect than that furnished by the last.

"In the American war, the practice and decisions on this point followed those of the war of 1744.

"The question first came before the Lords of Appeal in January 1782, in the Danish cases of *The Tiger*, *Copenhagen*, and others, captured in October, 1780, and condemned at St. Kitts, in December following. The grounds on which the captors relied for condemnation, in *The Tiger*, as set forth at the end of the respondent's printed case, were, 'for that the ship having been trading to Cape François, where none but French ships are allowed to carry on any traffic, and having been laden, at the time of the capture, with the produce of the French part of the island of St. Domingo, put on board at Cape François, and both ship and cargo taken confessedly coming from thence, must, (pursuant to precedents in the like cases in the last war) to all intents and purposes, be deemed a ship and goods belonging to the French, or at least adopted and naturalized as such.'

"In *The Copenhagen*, the captor's reasons are thus given:

Wheat. 1.

"'1st. Because it is allowed that the ship was destined, with her cargo, to the island of Guadaloupe, and no other place.'

"'2d. Because it is contrary to the established rule of general law to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace.'

"On the 22d of January, 1782, these causes came on for hearing before the Lords of Appeal, who decreed restitution in all of them; thus, in the most solemn and explicit manner, disavowing and rejecting the pretended rules of the law of nations, upon which the captors *relied; the first of which was literally [*518 borrowed from the doctrine of the war of 1756, and the last of which is that very rule on which Great Britain now relies.

"It is true that, in these cases, the judgment of the lords was pronounced upon one shape only of the colony trade of France, as carried on by neutrals; that is to say, a trade between the colony of France and that of the country of the neutral shipper. But, as no distinction was supposed to exist, in point of principle, between the different modifications of the trade, and as the judgment went upon general grounds applicable to the entire subject, we shall not be thought to overrate its effect and extent, when we represent it as a complete rejection, both of the doctrine of the seven years' war and of that modern principle by which it has been attempted to replace it. But, at any rate, the subsequent decrees of the same high tribunal did go that length. Without enumerating the cases, of various descriptions, involving the legality of the trade in all its modes, which were favorably adjudged by the Lords of Appeal, after the American peace, it will be sufficient to mention the case of *The Vervagting*, decided by them in 1785 and 1786. This was the case of a Danish ship, laden with a cargo of dry goods and provisions, with which she was bound on a voyage from Marseilles to Martinique and Cape François, where she was to take in, for Europe, a return cargo of West India produce. The ship was not proceeded against; but the cargo, which was claimed for merchants of Ostend, was condemned as enemy's property (as in truth it was), by the vice-admiralty of Antiqua, subject to the payment of freight *pro rata itineris*, or, rather, for the whole of the outward voyage. On appeal, as to the cargo, the Lords of Appeal, on the 8th of March, 1785, reversed the condemnation, and ordered further proof of the property to be produced within three months. On the 28th March, 1786, no further proof having been exhibited, and the proctor for the claimants declaring that he should exhibit none, the lords condemned the cargo, and, on the same day, reversed the decree below, giving freight, *pro rata itineris* (from which the neutral master had appealed), and decreed freight generally, and the costs of the appeal.

"It is impossible that a judicial opinion could go more conclusively to the whole question on the colony trade than this; for it not only disavows the pretended illegality of neutral interpositions in that trade, even directly between France and her colonies (the most exceptionable form, it is said, in which that inter-

position could present itself); it not only denies that property engaged in such a trade is, on that account, liable to confiscation (inasmuch as, after having reversed the condemnation of the cargo pronounced below, it proceeds afterwards to condemn it, merely for want of further proof as to the property), but it holds that the trade is so unquestionably lawful to neutrals as not even to put in jeopardy the claim to freight for that part of the voyage which had not yet begun, and which the party had not yet put himself in a situation to begin. The force of this, and the other British decisions produced by the American war, will not be avoided by suggesting that there was anything peculiarly favorable in the time when, or the manner in which, France opened her colony trade to neutrals on that occasion. Something of that sort, however, has been said. We find the following language in a very learned opinion on this point: 'It is certainly true that in the last war (the American war) many decisions took place which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce; but under what circumstances? It was understood that France, in opening her colonies during the war, declared that this was not done with a temporary view, relative to the war, but on a general permanent purpose of altering her colonial system, and of admitting foreign vessels, universally, and at all times, to a participation of that commerce; taking that to be the fact (however suspicious its commencement might be, during the actual existence of a war), there was no ground to say that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and, therefore, in the case of *The Verragting*, and in many other succeeding cases, the lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered, on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of war; for, hardly was the ratification of the peace signed when she returned to her ancient system of colonial monopoly.'

'We answer to all this, that, to refer the decision of the lords, in *The Verragting*, and other succeeding cases, to the reason here assigned, is to accuse that high tribunal of acting upon a confidence which has no example in a singularly incredible declaration (if, indeed, such a declaration was ever made), after the utter falsehood of it had been, as this learned opinion does itself inform us, unequivocally and notoriously ascertained.

'We have seen that *The Verragting* was decided by the lords in 1785 and 1786, at least two years after France had, as we are told, 'returned to her ancient system of colonial monopoly,' and when, of course, the supposed assertion of an intended permanent abandonment of that system could not be permitted to produce any legal consequence.

'We answer, further, that if this alleged declaration was in fact made (and we must be allowed to say that we have found no trace of it out of the opinion above recited), it never was put into such a formal and authentic shape as to be the fair subject of judicial notice.

'It is not contained in the French arrests of

that day, where only it would be proper to look for it, and we are not referred to any other document proceeding from the government of France, in which it is said to appear. There does not, in a word, seem to have been anything which an enlightened tribunal could be supposed capable of considering as a pledge on the part of France, that she had resolved upon, or even meditated, the extravagant change in her colonial system which she is said, in this opinion, to have been understood to announce to the world. But even if the declaration in question was actually made, and that, too, with all possible solemnity, still it would be difficult to persuade any thinking man that the sincerity of such a declaration was, in any degree, confided in; or that any person, in any country, could regard it in any other light than as a mere artifice that could give no right which would not equally well exist without it. Upon the whole, it is manifestly impracticable to rest the decisions of the Lords of Appeal, in and after the American war, upon any dependence placed on this declaration, of which there is no evidence that it ever was made—which, it is certain, was not authentically or formally made—which, however made, was not, and could not be, believed at any time, far less in 1785 and 1786, when its falsehood had been unquestionably proved by the public and undisguised conduct of its supposed authors, in direct opposition to it. That Sir James Marriott, who sat in the High Court of Admiralty of Great Britain during the greater part of the late war, did not consider these decisions as standing upon this ground, is evident; for, notwithstanding that in the year 1756 he was the most zealous, and, perhaps, able advocate for the condemnation of the Dutch ships engaged in the colony trade of France, yet, upon the breaking out of the late war, he relied upon the decisions in the American war as authoritatively settling the legality of that trade, and decreed accordingly.

'If, as a more plausible answer to these decisions (considered in the light of authorities) than that which we have just examined, it should be said that they ought rather to be viewed as reluctant sacrifices to policy, or even to necessity, under circumstances of particular difficulty and peril, than as an expression of the deliberate opinion of the Lords of Appeal, or the government of Great Britain, on the matter of right, it might, perhaps, be sufficient to reply, that if the armed neutrality coupled with the situation of Great Britain as a party to the war, did in any degree compel these decisions, we might also expect to find, at the same era, some relaxation on the part of that country relative to the doctrine of contraband, upon which the convention of the armed neutrality contained the most direct stipulations which the northern powers were particularly interested to enforce. Yet such was not the fact. But, in addition to this, and other considerations of a similar description, it is natural to inquire why it happened, that if the Lords of Appeal were satisfied that Great Britain possessed the right in question, they recorded, and gave to the world, a series of decisions against it, founded, not upon British orders of council, gratuitously relaxing what was still asserted to be the strict right, as in the late war, but upon

Wheat. 1.

general principles of public law. However prudence might have required (although there is no reason to believe it did require) an abstinence, on the part of Great Britain, from the extreme exercise of the right she had been supposed to claim, still it could not be necessary to give, to the mere forbearance of a claim, the stamp and character of a formal admission, that the claim itself was illegal and unjust. In the late war, as often as the British government wished to concede and relax, from whatever motive, on the subject of the colony trade of her opponents, an order of council was resorted to, setting forth the nature of the concession, or relaxation, upon which the courts of prize were afterwards to found their sentences; and, undoubtedly, sentences so passed cannot, in any fair reasoning, be considered as deciding more than that the order of council is obligatory on the courts whose sentences they are. But, the decrees of the Lords of Appeal, in and after the American war, are not of this description, since there existed no order of council on the subject of them; and, of course, they are, and ought to be, of the highest weight and authority against Great Britain, on the questions involved in, and adjudged by them.

In confirmation of the preceding authorities, adduced from the decisions of the British prize courts during the wars of 1744, 1756 and 1778, the following cases may be added from the adjudications of the common law tribunals:

The first is that of *Berens v. Rucker*, ruled by Lord Mansfield at the sittings after Trinity Term, 1761.¹ This was an action on a policy of insurance on a Dutch ship, called the *Tyd*, 522*] and its cargo, at and from St. Eustatius to Amsterdam, warranted a Dutch ship, and the goods Dutch property, and not laden in any French port in the West Indies. The cargo was worth £12,000, and insured at a premium of 15 guineas per cent., which was inflated to this high rate on account of the number of captures made by the British, of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the courts of admiralty. In May, 1758, the ship was at St. Eustatius, taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, and partly from the shore of the island. On the 18th of June, 1758, she sailed on her voyage to Amsterdam; on the 27th she was taken by a British privateer, and carried into Portsmouth, in England. On the 1st of August the seamen were examined on the standing interrogatories, and the master entered his claim in the High Court of Admiralty. In October the claimants were cited to specify what part of the goods were taken from the shore of St. Eustatius, and what from the barks. Citation was continued, from court to court, till February, 1759, when an interlocutory decree was pronounced for the continuance of the claimants in not specifying, and that, therefore, the goods should be presumed French property. There was an appeal to the lords, but as many cases stood before it, as the market was very high, and as the cargo was, in part, perishable, the agent of the owners agreed

with the captors to give them £800 and costs, in order to obtain a reversal of the sentence. The reversal was had by consent, and in order to give costs to the captors, it was decreed, by consent, that there was probable cause for seizure, and, thereupon, costs were decreed to the captors, and the cargo was restored to the claimants. The ship, when restored, proceeded to Amsterdam; and, after her arrival there, the chamber of insurances, in that city, settled the average of the plaintiff towards the loss and expenses occasioned by the capture, detention, and litigation, and for this sum the action was brought.

Lord Mansfield. The first question is, whether this was a just capture. Both sentences are out of the case, being done, and undone, by consent. The capture was certainly unjust. *The pretense was, that part [*523 of this cargo was put on board off St. Eustatius, out of barks supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore, and then put on board afterwards; in which case there is no color for seizure. The rule is, that if a neutral ship trade to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so if she have only French produce on board, without taking it in at a French port, for it may be purchased of neutrals.

"The second question is, whether the owners have acted *bona fide* and uprightly, as men acting for themselves, and upon a reasonable footing, so as to make the expenses of this compromise a loss to be borne by the insurers. The order of the judge of the admiralty to specify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because, if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one; and a court of appeal cannot, or seldom does, upon a reversal, give costs or damages which have accrued subsequent to the original sentence; for these damages arise from the fault of the judge, not of the parties. Under all these circumstances, the owners did wisely to offer a compromise. The cargo was worth £12,000; the appeal was hazardous; the delay certain. The Dutch deputy in England negotiated the compromise; the chamber of commerce, at Amsterdam, ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I, therefore, think the insurers liable to answer this average loss, which was submitted to, in order to avoid a total one."

Such was the definition of the rule, as given by a judge who, according to Blackstone, attended the commission of appeals, *and [*524 conducted its decisions during the war of 1756, and "whose masterly acquaintance with the law of nations was known and revered by every state in Europe."³

2.—Park on Ins., 90 Ed. 1809.

3.—3 Comm. 70.

1.—1 W. BL 313.

Wheat. 1.

The next case is that of *Brymer v. Atkyns*, determined in the Court of Common Pleas, Hilary Term, 1789, in which Lord Loughborough uses the following words: "But during the prosecution of the war which ensued in the year 1758, great complaints were made by neutral powers of the misconduct of English privateers in the channel, in seizing their merchantmen; and a question had also arisen, between the subjects of Holland and the officers of the British navy, upon the extent of the treaties of commerce between this country and the Dutch republic; the Dutch claiming a right to carry to the French all such goods as were not specifically enumerated under the title of contraband; while, on the part of the British navy it was contended that free ships only made free goods as to such course of trade as was carried on in time of peace; that the Dutch being excluded from the French Islands in the West Indies in time of peace, and only admitted in time of war to cover their trade, their ships ought to be considered as adopted French, and were, therefore, lawful prize."¹

The next adjudication which may be advantageously cited, to illustrate the history of the rule, is the case of *The Kutharina*, determined in the House of Lords on the 2d of May, 1788.² This was a Dutch ship, which sailed from the Texel on the 31st of August, 1779, bound to Curacao, where she arrived on the 18th of November following, with a cargo of linen goods, and some articles of provisions, and thence sailed for Cape François, in the island of St. Domingo, where the cargo was sold, a return cargo of colonial produce taken on board, and the ship sailed for Amsterdam on the 17th of April, 1780. On the 22d of May she was captured by a British privateer, and carried into Scotland, where the ship and cargo were, on the 22d of September, 1780, condemned as lawful prize, by the judge admiral. An appeal was entered to the Court of Session, where the **525** sentence was affirmed, and the claimants appealed to the House of Lords, who reversed the decrees of the courts below, and ordered the value of the ship and cargo to be paid to the claimants.

It has been alleged that this case was determined by the House of Lords, as it is said the parallel case of *The Tiger* must have been by the Lords of Appeal, upon the ground of the existence of a French edict, dated the 31st of July, 1779, opening the colonial trade to neutrals.³ But, as we have seen, this could not possibly have been the foundation for the decree of restitution in the case of *The Tiger*. 1st. Because no such edict can be found in any collection of French arretes, and it is acknowledged that the search for it had been fruitless.⁴ 2d. Because the edict has been supposed to have been issued *flagrante bello*; and a trade opened in time of war to neutrals could not be considered as an accustomed trade in the view of the prize courts. 3d. Because it is admitted that France returned to her ancient colonial system after the peace of 1763, and yet the Lords of Appeal persisted in decreeing restitution of

neutral property taken during the war. 4th. Because the supposed edict of the 31st July, 1779, is not recited in the printed case of *The Tiger*; but, on the contrary, a special ordinance, of a preceding date, is relied upon by the claimants in that case as opening to foreigners the ports of St. Domingo. The objection also applies to this ordinance, that, beside its being issued immediately upon the commencement of hostilities, it was the mere local act of a colonial governor, and still less likely to be regarded by the Lords of Appeal as indicative of a permanent change in the colonial system of France than the supposed more general edict of the 31st July, 1779.

If, then, the opening of the French colonies to neutrals could not have formed the basis on which restitution was decreed by the Lords of Appeal, in the case of *The Tiger*, was it the real ground of the reversal, by the House of Lords, of the decree of condemnation in the case of *The Kutharina*?

*When the grounds of a judicial decision are stated by a court, it is not only superfluous, but manifestly tends to lead the inquirer astray who is seeking for the real grounds of such decision, to look for it in the arguments of the parties. It was, indeed, argued by the counsel for the claimants, in *The Kutharina*, that the French edict, of the 31st July, 1779, excepted that case from the general rule which had been enforced in the preceding war; whilst, on the other hand, the captor's counsel denied that any reliance could be placed on the sincerity and permanence of the supposed change in the colonial system of France. It was, also, contended by the claimants' counsel, that the ship was exempted from capture under the general immunity of the Dutch treaty of 1674; whilst, on the contrary, the counsel for the captors maintained that she was liable to condemnation for carrying provisions on her outward voyage, contrary to the same treaty. But the only points even glanced at by the learned lord who moved for the reversal in the House of Lords, were: 1st. The want of jurisdiction in the court below. 2d. The discontinuance, during the war of the American revolution, of the principle of the war of 1756.

As to the first point, there seems to be no doubt that, by the articles of union between England and Scotland, the Court of Admiralty, in Scotland, was preserved in its ancient jurisdiction, which, unquestionably, extended to prize causes, and no subsequent act of the British parliament has made any change in this respect. The appeal is to the Court of Sessions, and thence to the House of Lords.⁵

The second point, on which the decree of the House of Lords was founded is, "because the principle on which the courts below had proceeded, although adhered to in the war which ended in 1763, had been departed from in that which terminated in 1782."

Hence it is manifest that the decree of the House of Lords, in this case, can only be referred to an actual abandonment of the rule of the war of 1756. And such is the effect of this adjudication as understood by the reporter himself, who, in his marginal note to the case, says, in the very words of the claimants' coun- **527**

1.—H. Bl. 191.

2.—Browne's Parl. Cases, 328; Ed. 1808.

3.—6 Rob. Appendix, Note I, 478.

4.—*Ib.*, 478.

5.—2 Browne's Civ. & Adm. Law, 30.

sel: "It is now established, by repeated determinations, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India Islands, with cargoes purchased there, are liable to capture." There is, then, no occasion to advert to the printed reasons of the parties in order to rest this decree upon a supposed exception to the rule which is not stated by the tribunal itself.

Yet they may be quoted as a confirmation of what has been before asserted respecting the origin and nature of the rule. Thus it was stated by the claimants' counsel (of whom Sir William Scott, then at the bar, was one), "That it was now established that neither ships or cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India Islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly *The Tiger*, a Danish ship, with a cargo purchased at Cape François, proceeding to St. Thomas; *The Copenhagen*, a Danish ship, from St. Thomas to Guadaloupe; *The Jonge Jan*, a Dutch ship, with a cargo taken in at Port-au-Prince, and bound to Curacao; and, likewise, in the case of *The Snop Nancy*, and six other Danish vessels, with cargoes taken in at Guadaloupe, in the year 1780, and bound therewith to the island of St. Thomas, under convoy of a Danish frigate; all which were captured by British cruisers, and condemned in the vice-admiralty courts, in the British West Indies. The lords commissioners of appeal reversed the sentences of condemnation, and restored the ships and cargoes."¹

To which it was answered by the captor's counsel, "That the subjects of all other nations being absolutely prohibited to trade to, or from, the French West India Islands, by the fundamental laws of France, the ship in question, coming directly from St. Domingo, with a cargo taken in there (be the property whose it might), must be considered as French, and, as such, both ship and cargo were lawful prize, agreeably to many decisions in the courts of admiralty, and by the Lords of Appeal last war, 528*] *founded upon the clearest principles. But it is objected that, by an edict of the French king, dated in July, 1779, the trade to his colonies was laid open to all neutral states. To this it is answered, that during the last war, Dutch ships, engaged in this fraudulent trade, obtained special licenses from the French government; but these were constantly disregarded, when urged, as obviating the allegation of their being engaged in a trade open only to French subjects, and even were taken as conclusive evidence of their being adopted French ships. During the present war, it is said a general license has been given, which cannot vary the case when the views and consequences are precisely the same. The opening a trade to the colonies of France, *flagrante bello*, is a transaction to the prejudice of Great Britain, and a mere device and cover for fraud. A Dutchman, who trades under a privilege of this kind, is not in the ordinary situation of a neutral subject, continuing his own commerce with the warring nations as in time of peace; he is, to all intents

and purposes, carrying on the trade of France, being admitted to a participation, *ad hunc effectum*, in the exclusive rights of a French subject; and, as the government of France considers such persons as temporary subjects, to the effect of being allowed to trade with the French West Indies, the subjects of Great Britain, on the other hand, must, according to every principle of justice and sound reasoning, be entitled to consider them in the same light, and to seize, as lawful prize, both ships and cargoes employed in this extraordinary commerce. No person can possibly believe that the license will be continued by France after the peace. It has been shown, in a variety of instances, that the Dutch do not understand that it will; and, till such a license has been granted, or continued in time of profound peace, no regard can be paid to it when issued in time of war."²

But this doctrine of the captor's counsel was rejected by the House of Lords in the case of *The Katharina*, as it had before been in the cases of *The Tiger* and *The Copenhagen*, by the Lords of Appeal; and thus we have the conjoint authority of the two highest *tribunals in [*529 the British empire, to confirm the abandonment of this rule during the war of the American revolution.

We come now to the first war of the French revolution, and here we have the testimony of Sir William Scott, to show that his predecessor, in the High Court of Admiralty (Sir James Marriott), adhered, at the commencement of that war, to the practice which had been settled in the war of 1778, and, accordingly, decreed freight to neutral vessels employed in the coasting trade of the enemy. In the case of *The Emanuel*³ (April 9th, 1799), Sir William Scott says, "with respect to authorities, it has been much argued, that in three cases during this war the Court of Admiralty has decreed payment of freight to vessels so employed; and I believe that such cases did pass under an intimation of the opinion of the very learned person who preceded me, in which the parties acquiesced, without resorting to the authority of a higher tribunal. But a case before the lords seems to convey a different opinion upon this subject of the coasting trade of the enemy—the case of *The Mercurius*, in which freight was refused."

Here it is to be remembered that this case of *The Mercurius* was determined, by the lords of appeal, on the 7th of March, 1795, and, therefore, can be no authority as to the practice at an earlier period of the war, or as to the law at the same period, which was understood by Sir James Marriott and the learned counsel who acquiesced in his decisions, without an appeal, still to subsist as settled by the lords during the preceding war, and adhered to, by them, down to the year 1786. Even Sir William Scott himself, long after the case of *The Mercurius* was decided by the lords, seems to have regarded the rule, in respect to the coasting trade, as merely creating a presumption of enemy interests, and not as affording a substantive ground of condemnation. Thus, in the case of *The Welvaart*⁴ (January 8th, 1799), he says: "Besides, this vessel appears to have been engaged in the coast-

2—5 Browne's Parl. Cas. 341.

3.—1 Rob. 301.

4.—1 Rob. 124.

1.—5 Browne's Parl. Cas. 330.

Wheat. 1.

ing trade of France. The court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile 530*] character; but, in "my opinion a habit of such trading would. Such a voyage must, however, raise a strong degree of suspicion against a neutral claim, and the plunging, at once, into a trade so highly dangerous, creates a presumption that there is an enemy proprietor lurking behind the cover of a neutral name." So, also, in the case of *The Speculation*¹ (December 16th, 1799), the king's advocate (Sir John Nicholl) stated, "That the ship appeared to have been carrying on the coasting trade of France; a trade not only generally forbidden, but expressly prohibited to neutral ships, by the ordinances of France, which have issued during this war, that she would, therefore, come under the character of an adopted French ship." Whilst, on the other hand, the claimants' counsel (Dr. Laurence) answered, that "It has not been held, in the present war, that the mere circumstances of being engaged in the coasting trade of the enemy does amount to that adoption, which will subject the property to condemnation." Sir William Scott, in his judgment, says: "This is a case of a ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture; because the very circumstance of being engaged in conducting the trade of the enemy, from one port to another, will justly subject the vessel to inquiry; and, perhaps, in some future case, the court may have occasion to consider how far the regulations that have been alluded to, and the acting upon them (which it may be proper to consider at the same time), may not make such a trade liable to be considered as a case of adoption."

We may, therefore, consider it as proved, that the rule was suffered to slumber from the beginning of the war of the American revolution until it was awakened, with increased activity, by the orders in council of the 6th of November, 1793, instructing the public and private ships of war of Great Britain to "stop and detain all vessels laden with goods, the produce of any colony belonging to France, or carrying provisions, or other supplies, for the use of any such colony, and to bring the same, with their cargoes, to legal adjudication in our courts of admiralty."

531*] *Although some confusion and contradiction exists in the language of the British prize courts, whether instructions of this nature are binding on the tribunals or the nation by whom they are issued, as a positive law, or merely as declaratory of the pre-existing law of nations, Sir William Scott appearing, at one time, to regard the text of the king's instructions as binding on his judicial conscience, and at another, holding it indecorous to anticipate the possibility of their conflicting with the law of nations, whilst Sir James Mackintosh declared that, if he saw in such instructions any attempt to extend the law to the prejudice of neutrals, he should not obey them, but regulate his decisions by the known and recognized law of nations;² yet, the instructions of 1793

might properly be considered as evidence of what the British government deemed to be law, if this inference were not somewhat weakened by the circumstances that they were secretly issued, precipitately repealed, and full indemnification was made for the captures under them. On the 8th January, 1794, the following instruction was substituted: "That they shall bring in, for lawful adjudication, all vessels, with their cargoes, that are loaded with goods, the produce of the French West India Islands, and coming directly from any port of the said islands, to any port in Europe." And, on the 25th of January, 1798, this order was also revoked, and the following was issued: "That they should bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods the produce of any island, or settlement, belonging to France, Spain, or the United provinces, and coming directly from any port of the said islands, or settlements, to any port in Europe, not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong."

We have seen that, up to the time when this last order was issued, the prize courts had never, of their own authority, revived the rule which they had invented in the war of 1756, and laid aside in that of the American revolution. But when it was once more called into life, by the instructions of the executive government, they gradually enlarged the sphere of its activity *beyond the text of those [532 instructions, either upon the principle of affecting the return voyage, with the penalty of contraband, contrary to Sir William Scott's own previous opinions,³ or, upon the principle of a continuity of the voyage which had been repudiated by the Lords of Appeal in the war of 1756, even where the colonial produce was transhipped in a neutral port, from barks, in which it was brought from enemy's ports, and not from the shore. Upon one or the other of these assumptions the rule was applied to cut off the exportation of the produce of the enemy's colonies from neutral countries, where it had been imported, unless it had become incorporated into the general stock of national commodities⁴ according to the fluctuating rules prescribed to break the continuity of voyage. On the renewal of the war, after the peace of the Amiens, the following order was issued, dated on the 24th of June, 1803: "In consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war, and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of the enemy, and the neutral country to which the vessel belongs, and laden with the property of the inhabitants of such neutral country; provided, that such neutral vessel shall not be supplying, nor shall, on the outward voyage, have supplied the enemy with any articles contraband of war, and shall not be trading with any blockaded port." This instruction is substantially the same with that of 1798, except that it adopts the innovation of the prize courts, affecting the return

3.—1 Rob. 87, *The Frederick Molke*; 2 Rob. 140, *The Margareta Magdalena*.

4.—Sec 5 Rob. 349, *The William*; *Ib.* 325, *The Maria*, where all the cases on the subject of continuity of voyage are cited.

1.—2 Rob. 253.

2.—*The Minerva*, 1 Hall's American Law Journal, 217.

voyage, with the penalty of contraband carried outward. Under it, the same course of decisions took place, by which the noxious qualities of the rule were much enlarged, and its wide-spreading desolation threatened to interrupt the amicable relations between the United States and Great Britain; when the order in council, of the 16th of May, 1806, was issued, blockading the coasts from the river Elbe to Brest, inclusive, except that neutral vessels, 533*] *coming directly from the ports of their own country, were allowed to enter, and depart, from the blockaded ports, with cargoes not enemy's property, nor contraband, but were not permitted to trade from port to port. This order was supposed to have been drawn up with a view to the colonial trade; but it does not appear to have been considered by the prize courts as containing any relaxation of the principles they had established respecting that trade, and the whole question was at length merged in the orders in council of the 7th of January, and the 11th of November, 1807; by the first of which, all neutral trade, from one enemy's port, or from a port where the British flag was excluded, to another such port, and by the latter (among other provisions) the exportation of the produce of the enemy's colonies, from a neutral country to any other country than Great Britain, was prohibited. These orders were issued in retaliation of the Berlin decree of the French emperor, and on the 26th of April, 1809, they were relaxed as to the European blockade, but extended to the total prohibition of all neutral trade with the colonies of France and Holland.

It would unreasonably swell this note to enlarge upon this part of the subject. These edicts were condemned by the universal voice of the impartial world; they were condemned by the past example of the powers who issued them; they were condemned by the authority of the jurists whom Europe revered in better times as the oracles of public law.¹ It is pretended, by a superficial writer on the law of nations, that Sir William Scott decided the

case of *The Nayade* (4 Rob., 251), upon the principle of retaliating the injustice of an enemy on a neutral power, who passively submits to that injustice.² *Sir William Scott did no [*534 such thing; all that he determined, in that case, was, that Portugal and Great Britain, being allied by ancient treaties, the *casus fœderis* between them had arisen by the passive submission of Portugal to the hostile attacks of France, which involved Portugal, *volens volens*, as an ally, in the war against France, and, consequently, rendered the property of a Portuguese merchant taken in trade with the common enemy, liable to condemnation in the British prize courts. It cannot be pretended that the neutral states, whose commerce was affected by the Berlin decree, had participated in the injustice of France, by passively submitting to that measure; since the orders in council were issued before sufficient time had elapsed to ascertain what would be the conduct either of France or of those states in respect to the decree. Nor can the order of the 7th of January, 1807, be justified as an original and abstract measure;³ because the trade from the port of one enemy to the port of another was always held lawful by the British tribunals. "This sort of traffic, from one of his (the enemy's) ports to the ports of another country, has always been open, and is, in its own nature, subject to the uses of all mankind, who are not in a state of hostility with him. The Dane has a perfect right, in time of profound peace, to trade between Holland and France, to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war."⁴ It is needless, however, to enlarge upon the topics which might be urged against this train of innovations, by which first the trade from neutral countries to the colonies, and from port to port, of the enemy, and then all neutral traffic whatever, with him, was prohibited. It deserves notice, however, that Great Britain and France appropriated to themselves, by means of free ports or licenses, the very commerce they were prohibiting to neutrals, and to their allies, under the pretext of its aiding their enemy in the war.

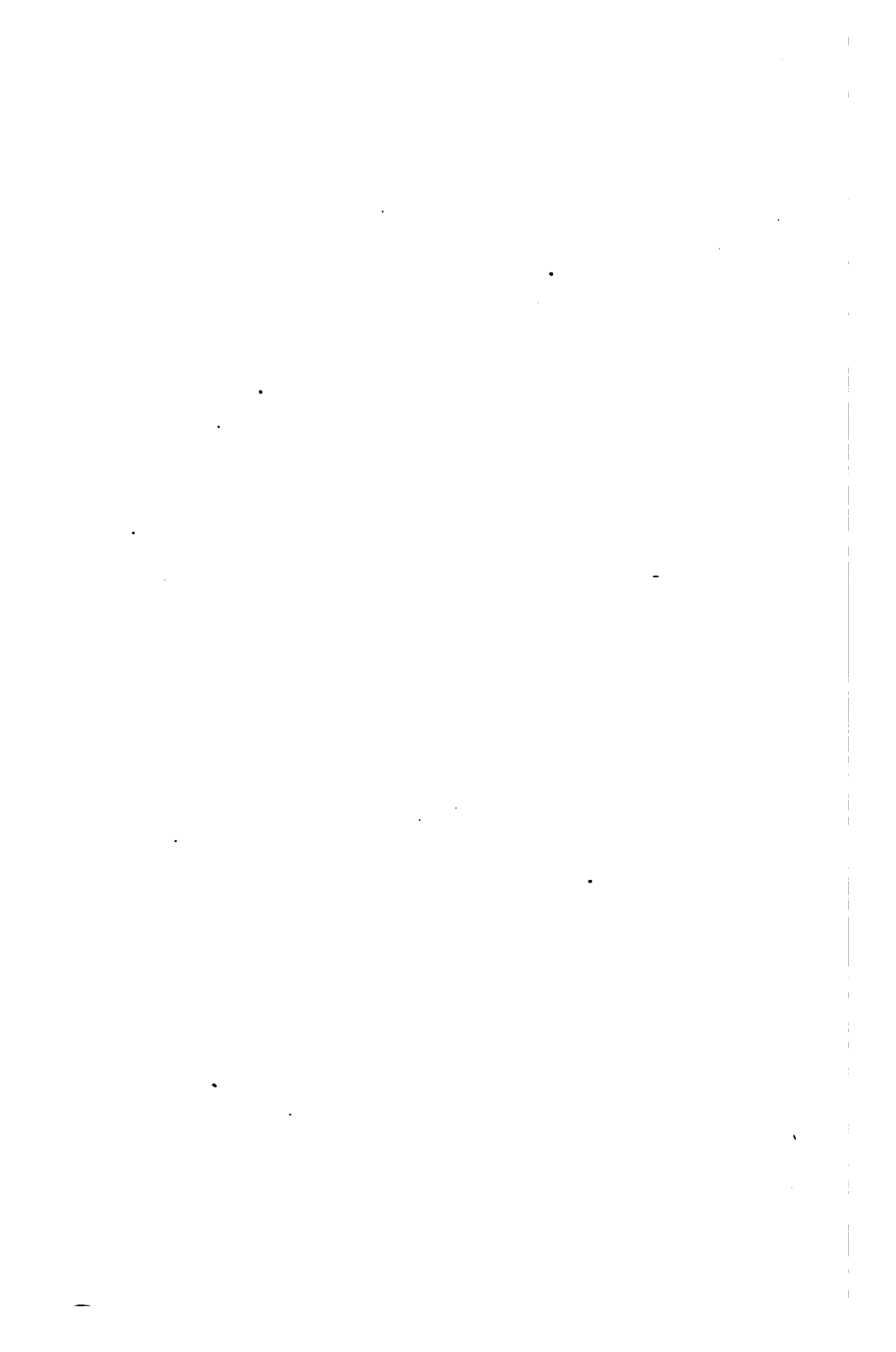
2.—Chitty's Law of Nations, 152.

3.—See Lord Erskine's Speech in Parliament on the Orders in Council, Cobbett's Parl. Debates, vol. 10, p. 945.

4.—2 Rob. 101, *The Wilhelmina*, in note to the *Rebecca*.

1.—Bynkershoek, speaking of the edicts of the States General of Holland retaliating upon neutrals, certain illegal orders of France and of England, denies that these edicts could be founded upon the law of retaliation, which is only applicable to him who has inflicted the injury. *Retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac deinde patitur, non vero adversus communem amicum.* Q. J. Pub. c. 4. See also Sir William Scott's remarks in the case of *The Flad Oyen*, 1 Rob. 142.

Wheat. 1.



REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN FEBRUARY TERM, 1817.

• BY HENRY WHEATON.

Counselor at Law. •

VOLUME II.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS, WITH THE DATES OF THEIR
COMMISSIONS.

The Hon. JOHN MARSHALL, <i>Chief Justice</i> ,	- - - - -	December 31, 1801.
The Hon. BUSHROD WASHINGTON, <i>Associate Justice</i> ,	- - - - -	December 20, 1798.
The Hon. WILLIAM JOHNSON, <i>Associate Justice</i> ,	- - - - -	March, 1804.
The Hon. BROCKHOLST LIVINGSTON, <i>Associate Justice</i> ,	- - - - -	November 20, 1806.
The Hon. THOMAS TODD, <i>Associate Justice</i> ,	- - - - -	1807.
The Hon. GABRIEL DUVAL, <i>Associate Justice</i> ,	- - - - -	November 18, 1811.
The Hon. JOSEPH STORY, <i>Associate Justice</i> ,	- - - - -	November 18, 1811.
RICHARD RUSH, Esq., <i>Attorney-General</i> ,	- - - - -	Appointed February 10, 1814.

RULES AND ORDERS

OF THE SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1817.

WHENEVER it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

IN ALL cases of admiralty and maritime jurisdiction, where new evidence shall be admissible

in this court, the evidence by testimony of witnesses, shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying *for the commis- [*viii sion, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice. Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court, in cases where by law it is admissible.

REPORTS OF THE DECISIONS
OF THE
Supreme Court of the United States.
FEBRUARY TERM, 1817.

1*] *[CONSTITUTIONAL LAW.]

SLOCUM v. MAYBERRY ET AL.

The courts of the United States have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the United States; and any intervention of a state authority which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful.

In such a case, the court of the United States, having cognizance of the seizure, may enforce a redelivery of the thing, by attachment, or other summary process.

The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious.

If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the District Court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.

And if the seizure be finally adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the Instance Court of Admiralty, for damages for the illegal act.

But the common law remedy in such a case must be sought for in the state courts, the courts of the United States having no jurisdiction to decide on the conduct of their officers, in the execution of their laws, in suits at common law, until the case shall have passed through the state courts.

Where a seizure was made, under the eleventh section of the embargo act of April, 1808, it was determined that no power is given by law to detain the cargo if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law; and in case of its detention, to bring an action of replevin therefor in the state court.

ERROR on a judgment rendered by the Supreme Court for the state of Rhode Island.

John Slocum, the plaintiff in error, was surveyor of the customs for the port of Newport, in Rhode Island, and under the directions of the collector had seized the *Venus*, lying in that port with a cargo ostensibly bound to some other port in the United States. The defend-

ants in error, who were owners of the cargo, brought their writ of replevin in the state court of Rhode Island for the restoration of the property. The defendant pleaded that the *Venus* was laden in the night, not under the inspection of the proper revenue officers; and that the collector of the port, suspecting an intention to violate the embargo laws, had directed him to seize and detain her till the opinion of the President should be known [*3 on the case; and concluded to the jurisdiction of the court. The same matter was also pleaded in bar. To both these pleas the plaintiff in the state court demurred, and the defendants joined in demurrer. Judgment having been rendered in favor of the plaintiff in the state court, the cause was removed into this court by writ of error.

The *Attorney-General*, for the plaintiff in error. 1. The seizure was well made under the eleventh section of the embargo act of the 25th of April, 1808. The nature and extent of the power vested in the revenue officers was settled in the case of *Crocoll v. M'Fadon*.¹ Even admitting that, according to the doctrine held in the case of *The Paulina*,² the landing without a permit, contrary to the second section, does not work a forfeiture (the denial of a clearance being the only penalty), still the efficacy of the eleventh section justifies and protects the officer. 2. The case being brought under the cognizance of the United States, and within the jurisdiction of their courts, by the just exercise of an authority by one of their officers, the state court had no right to interfere, and arrest the seizure by its process. In the case of *The Favorite*,³ three of the judges held that "the conduct of the salvors in taking the goods out of the possession of the revenue officers, though by legal process, was improper." This intimation⁴ is the stronger as the wrecked [*4 goods were adjudged not liable to duties; and it is fortified by the opinion of a learned judge in the Supreme Court of New York, upon an analogous question.⁴

1.—8 Cranch, 96.

2.—7 Cranch, 52.

3.—4 Cranch, 347. See also 1 Binney, 138, Soderstrom's case; 2 Hall's Law Journal, 186.

4.—9 Johns. R. 230. Per Kent, Ch. J. This was an application to the Supreme Court of the state of New York, at August term, 1812, for the allowance Wheat, 2.

of a writ of *habeas corpus*, directed to John Christie, a lieutenant-colonel in the army of the United States, to bring up the body of Jeremiah Ferguson, founded upon an affidavit of his father, stating that he was an enlisted soldier in the 13th regiment of infantry in the army of the United States, then under the command of Christie, and that the said Jeremiah Ferguson was an infant under the age of

5*] *Hunter*, contra. 1. It is conceded that the opinion or suspicion of the collector authorized him to detain any vessel, ostensibly bound with a cargo to some port of the United States, until the pleasure of the President should be known. This is not a replevin for the vessel. As to that, the owners submitted to the suspicion of the collector, and the pleasure of the President; but as to the cargo, neither of these officers had, by law, the power of detaining it. A momentary and unavoidable detention of the cargo, incidental to the seizure of the vessel, might indeed be deemed a necessary consequence of an undeniable power; but could never give the seizing officer a right to continue the detention of the cargo after the vessel was securely detained. Cargo, in the revenue laws, in the law of prize, and in questions of salvage, insurance, and freight, is contra-distinguished from vessel. The system of the embargo laws was intended to prevent exportation; and, in order to accomplish this only, they authorized the detention of the vehicle, without which no exportation could take place. Even the vessel was not forfeited, but detained; and the cargo was neither forfeited nor detained, but left in the possession of the owners, to be freely consumed at home. The laws of the United States having then exerted their energy, and performed their office, the subsequent proceedings were illegal. In the case of *Crowell v. M'Fadon*, the action was *trover*. Lucrative damages were sought, for a conversion proved not to be wrongful, but assented to by the party. Here the [*] action is *replevin*, and the *party only seeks to retain what is universally admitted to be his property. *Incommoda vitantis quam commoda petentis melior est causa*. 2. The plea to the jurisdiction of the state court is fatally defective in not stating another jurisdiction.¹ 3. But even supposing the decision of this court must be against the jurisdiction of the state court, no judgment can be pronounced upon that basis. The thing in controversy cannot be restored to the plaintiff in error, for he never owned or claimed it; and the authority of *The Paulina*² is sufficient to dissipate the mistaken notion of a forfeiture to the United States. No collision between the state and national judicatures can, therefore, arise. Even if the state court has improperly interfered, it is, at the worst, an innocent officiousness; since that court has determined the question precisely as the national tribunals would have done, and has merely anticipated the beneficence they intend-

ed. The mischief that the common law writ of prohibition seeks to remedy is the inconvenience of having the same question determined different ways, according to the court in which the suit is depending. But if it be shown to the court trying a suggestion in prohibition, that the question has been, or must be, determined exactly as the appropriate court would determine it, its merely being drawn *at aliud examen* would not be a sufficient ground for issuing the writ of prohibition.³ *No usurpation can be ultimately successful against the national jurisdiction. The very clause of the judiciary act of 1789, sec. 25 by which the cause is brought here, shows that this jurisdiction is amply armed for self-defense. But this transaction does not present anything for the judicial powers of the United States to act upon. The case of *The Favorite* was a question of salvage, depending, as such questions always do, upon personal merit and propriety of conduct. A severe assertion even of legal right may, in many instances, amount to *demerit*. In the case of *Mr. Soderstrom*,⁴ the very words of the ninth section of the judiciary act expressly excluded the state courts from jurisdiction. In that case there was a personal privilege in the consul, and an absolute disability in the court. The *dictum* of the Chief Justice of the Supreme Court of New York, in the case of *Ferguson*, was disclaimed by the rest of the court, although under the particular circumstances of the case they declined to interfere. Unless the state tribunals have a right to interfere with the aid of their preventive process, in a case where the national jurisdiction has not lawfully attached, property detained under color of authority may be dissipated by rapacious profusion, because a timely replevin could not be interposed.

The *Attorney-General*, in reply. 1. The plea of the defendant in the court below covers both the vessel and the cargo, and being demurred to, its facts *are admitted. Both must be [*] detained, where they are seized contemporaneously; and to permit a subsequent transshipment of the cargo from the vessel where it was found, *in delicto*, to another, would be to defeat the policy of the law. In the case of *Otis v. Watkins*,⁵ both vessel and cargo were removed from Provincetown to Barnstable, yet the conduct of the collector was held justified. 2. The rule, that he who pleads to the jurisdiction ought to give it to some other court, must be taken with the proper qualifications. Another jurisdiction

21 years, &c., and that he enlisted without his father's consent, and was desirous of being released and discharged. The Chief Justice, in delivering his opinion, stated, "that the present case being one of an enlistment under color of the authority of the United States, and by an officer of that government, the federal courts have complete and perfect jurisdiction in the case; and there is no need of the jurisdiction or interference of the state courts; nor does it appear to me to be fit that the state courts should be inquiring into the abuse of the exercise of the authority of the general government. Numberless cases may be supposed of the abuse of power, by the civil and military officers of the government of the United States; but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us; and we have no reason to doubt of their readiness, as well as ability, to correct and punish every abuse

of power under that government. The judicial power of the United States is commensurate with every case arising under the laws of the Union; and the act of Congress (1 Laws of the United States, 53, 55) gives to the federal courts, exclusively of the courts of the several states, cognizance of all crimes and offenses cognizable under the authority of the United States." The other judges concurred in refusing to allow the *habeas corpus*, deeming that a question of sound legal discretion; but reserved themselves as to the jurisdiction of the state courts.

1.—Doct. Pl. 23; 1 Vesey, 213, *Mostyn v. Fabrigas*; Cowp. 172, 2 Vesey, 237; 3 Atk. 662.

2.—7 Cranch, 52.

3.—3 Bl. Com. c. 7.

4.—1 Binney, 138.

5.—9 Cranch, 339.

must be shown, where it exists, or is intended to be claimed over the subject-matter of the suit. But here it was intended only to except to the officious, unlawful jurisdiction of that court where the officer was impleaded. 3. The plea of the defendant in the court below is not an avowry, which goes for a restitution of the thing in controversy; he merely makes cognizance, acknowledges the taking, but justifies under the law, and the orders of the collector. Hence the argument, that a reversal of the judgment below would imply a restitution of the cargo to the seizing officer as his property, is inapplicable. Where, from the circumstances of the case it was lawful to take, and yet, from intervening events, unlawful to detain, the defendant cannot be entitled to a return.¹ The seizure, in this case, though it looked to no direct forfeiture or even to a trial, yet, being a necessary incident to a seizure, having in view 9*] a forfeiture, *it falls within the scope of the 9th section of the judiciary act as fairly as the cases positively enumerated; and a contrary determination would efface from the statute book those preventive means by which a complexity of litigation is avoided.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

In considering this case, the first question which presents itself is this: Has the constitution, or any law of the United States, been violated or misconstrued by the court of Rhode Island in exercising its jurisdiction in this case?

The judiciary act gives to the federal courts exclusive cognizance of all seizures made on land or water. Any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act; and the federal court having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should devert such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause. If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the *federal courts, and cannot be drawn to another forum; and it depends upon the final decree of such courts whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the District Court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law, or in the admiralty for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved, other than such as

might be obtained in a court of admiralty, could be prosecuted only in the state court. The common law tribunals of the United States are closed against such applications, were the party disposed to make them. Congress has refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, until the case shall have passed through the state courts, and have received the form which may there be given it. This, however, being an action which takes the thing itself out of the possession of the officer, could certainly not be maintained in a state court, if, by the act of Congress, it was seized for the purpose of being proceeded against in the federal court.

A very brief examination of the act of Congress will be sufficient for the inquiry whether this cargo was so seized. The second section of the act, *pleaded by the defendant in [11] the original action, only withholds a clearance from a vessel which has committed the offense described in that section. This seizure was made under the 11th section, which enacts, "that the collectors of the customs be, and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon."

The authority given respects the vessel only. The cargo is in no manner the object of the act. It is arrested in its course to any other port, by the detention of the vehicle in which it was to be carried; but no right is given to seize it specifically, or to detain it if separated from that vehicle. It remains in custody of the officer, simply because it is placed in a vessel which is in his custody; but no law forbids it to be taken out of that vessel, if such be the will of the owner. The cargoes thus arrested and detained were generally of a perishable nature, and it would have been wanton oppression to expose them to loss by unlimited detention, in a case where the owner was willing to remove all danger of exportation.

This being the true construction of the act of Congress, the owner has the same right to his cargo that he has to any other property, and may exercise over it every act of ownership not prohibited by law. He may, consequently, demand it from the officer *in whose possession it is, that officer having no legal right to withhold it from him; and if it be withheld, he has a consequent right to appeal to the laws of his country for relief.

To what court can this appeal be made? The common law courts of the United States have no jurisdiction in the case. They can afford him no relief. The party might, indeed, institute a suit for redress in the District Court acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of Congress neither expressly nor by implication forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel instead of the cargo,

1.—Roll. Abr. 319; Bull. N. P. 55.

the case would have been essentially different. The detention would have been by virtue of an act of Congress, and the jurisdiction of a state court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the state court.

The same course of reasoning which sustains the jurisdiction of the court of Rhode Island sustains also its judgment on the plea in bar. The two pleas contain the same matter; the one concluding to the jurisdiction of the court, and the other in bar of the action. In examining the plea to the jurisdiction, it has been shown that the officer had no legal right to detain the [13*] property; consequently, his plea was *no sufficient defense, and the court misconstrued no act of Congress, nor committed any error in sustaining the demurrer.

Judgment affirmed with costs.

Cited—8 Wheat. 312; 6 How. 390; 24 How. 458; 6 Wall. 195; 1 Otto. 681; 1 Woods. 178; 1 Mason, 99; 1 Ware, 364; 7 Bank. Reg. 426; 13 Bank. Reg. 300; Newb. 299; 2 Curt. 469; 7 Blatchf. 33; 2 McLean, 334.

[COMMON LAW.]

GREENLEAF v. COOK.

Where a promissory note was given for the purchase of real property, held that the failure of consideration through defect of title must be total, in order to constitute a good defense to an action on the note.

Quere. Whether, after receiving a deed, the party could avail himself even of a total failure of consideration.

But where the note is given with full knowledge of the extent of the incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.

Any partial defect in the title or the deed is not inquirable into by a court of law in an action on the note; but the party must seek relief in chancery.

ERROR to the Circuit Court of the United States, for the District of Columbia.

NOTE.—Rawle on Covenants for Title, says: "In *Greenleaf v. Cook*, *supra*, the defence of a failure of title, to a note given for the purchase money of land, seems to have been excluded with entire propriety, as nothing in the report of the case shows that the deed contained any covenants whatever; and, from what was said in the decision as to the alleged defectiveness of the deed, it is possible that the absence of covenants was referred to. There was a prior mortgage on the premises, under which a decree of foreclosure had been pronounced, but the possession had never been disturbed.

"It may be observed of this case, which, upon the facts presented, was most correctly decided, that at that time the law was far from being settled as to the right of the purchaser thus to defend himself, and the true basis of the decision seems to rest not so much upon any distinction between a total and partial failure of consideration as on the ground that there being no covenants in the deed, the purchaser had already obtained what, from the absence of these covenants, a court of law must presume he bargained for, viz., the mere transfer of the vendor's title, such as it was, without any recourse to him in the event of its turning out defective; and hence the question of consideration was not touched—nor, if the deed had contained a covenant of warranty, or for quiet enjoy-

ment, could the result have been different, for, as there had been no eviction, the purchaser would not have been entitled at that time to damages." Rawle on Covenants for title, 495, 496, 497.

"Ten years after the decision in *Greenleaf v. Cook*, it was held by the same tribunal, in *Thornton v. Wynn*, 12 Wheat. 183, that a breach of warranty of a chattel was no defense to an action on a note given for its price, if the sale were absolute, and there was no subsequent agreement on the part of the vendor to take back the article; but very recently, in the cases of *Withers v. Green*, 9 How. 213, and *Van Buren v. Diggs*, 11 Id. 461, this doctrine has been much modified, if not overruled." Rawle on Cov. for title, 496, note.

In *Scudder v. Andrews*, 2 McLean, 464, the facts were very similar to those presented in *Greenleaf v. Cook*, but the decision was the other way. There the action was on a note given for the price of a tract of land, and the defense set up, was failure of consideration, in that the land sold was part of the public domain, and had never been sold or offered for sale by the United States, and it was held that the defense amounted to a total failure of consideration and was good. See Rawle on Cov. for title, 497, note 1.

In *Frisbie v. Hoffnagle*, 11 John. (N. Y.) 50, decided in 1814, where in an action on two notes given

James Greenleaf instituted a suit in that court on a promissory note executed by the defendant, who pleaded the general issue. On the trial the defendant gave in evidence a deed executed by Pratt, Francis and others, by James Greenleaf, their attorney, *convey- [*14] ing to him a lot of ground in the city of Washington, for the purchase of which the promissory note in the declaration mentioned was given. He also gave in evidence a deed from Morris, Nicholson and others, to Thomas Law, purporting to be a mortgage of a great number of squares and lots in the city of Washington, and among others, of the square comprehending the lot purchased by the defendant, together with the proceedings in a suit in chancery, instituted by the said Thomas Law against Pratt, Francis and others, in which a decree of foreclosure was pronounced. He then produced a witness who proved that at the time of the sale the lot was not, in his opinion, exclusive of improvements, worth more than the sum mentioned in the note.

Upon this testimony, the counsel for the defendant moved the court to instruct the jury, that if they believed the testimony, the law was for the defendant; which instruction the court refused to give, the judges being divided in opinion thereon. The counsel for the plaintiff then moved the court to instruct the jury that the law was for the plaintiff; which opinion the court also refused to give, being still divided.

The counsel for the plaintiff then produced testimony to prove that the lot of ground, in payment for which the promissory note mentioned in the declaration was given, had been sold to a certain John Bickly, who took possession thereof, and resided thereon during his life; that after his death, his widow continued to reside thereon until she intermarried *with [*15] the defendant, and that the defendant still resides thereon. That previous to the execution of the promissory note, on which this suit is instituted, he received full and complete information of the deed of mortgage in the foregoing bill of exceptions mentioned, and of the probable effect of that deed. That with this knowledge, after consultation and mature consideration, he received the deed for the lot, and gave

his promissory note for the purchase money. He then moved the court to instruct the jury that, if they believed the facts thus stated on testimony, the plaintiff was entitled to recover in this action. But the court, being again divided, refused to give the opinion required.

The counsel for the plaintiff took exceptions to the proceedings of the court in each point, in not giving their opinions as asked. The jury found a verdict for the defendant, upon which judgment was rendered, and the cause came before this court on a writ of error.

Jones, for the plaintiff in error, argued, that where a party purchases real property, without fraud on the part of the vendor, the vendee takes it at his own risk, unless he has a warranty against the acts of all the world. That there is no distinction between a direct action to recover back the purchase money, and a defense for want of consideration. In this case there is no eviction, but a mere contingent incumbrance only, proper for the exclusive cognizance of a court of equity, which court may [16*] decree a specific performance, or compensation, as its justice may require.¹

Law, contra, contended, that if this were a case of an express agreement to take any or no title, the doctrine cited from *Sugden* would apply; but that here the vendor promised to give the vendee a clear and unincumbered title. A court of chancery will never decree a specific performance without a perfect title at law and in equity; and the defense on account of defect of title is as available in the one forum as the other.²

MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

On the first exception it has been argued that there is a failure of consideration, which constitutes a good defense in this action.

Without deciding whether, after receiving a deed, the defendant could avail himself of even

1.—*Sugden's Law of Vendors*, 312 to 318, and the authorities there cited.

2.—2 *Comyn on Cont.* 52.

for the purchase money of land sold with a covenant of warranty, the defendant proved that the land had subsequently been sold under a judgment against the plaintiff, and a sheriff's deed made to the purchaser, and although it was also in evidence that the defendant had not been evicted or disturbed in his possession, the court ordered a nonsuit. On a motion for a new trial, the case was submitted without argument, and in refusing a new trial the court held, "The consideration of the note has entirely failed, for the defendant has no title, it having been extinguished by the sale under the judgment. Here is a total, not a partial, failure of consideration, for although the defendant has not been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the meane profits. To allow a recovery in this case would lead to a circuitry of action, for the defendant, on this failure of title, would be entitled to immediately recover back the money. The motion to set aside the nonsuit must therefore be denied."

Cases of *Frisbie v. Hoffnagle*, decided after *Latin v. Vail*, 17 Wend. 188, in New York, substantially overruled by it. The defendant, on being sued for the purchase money of real estate, which had been conveyed with a covenant against incumbrances, pleaded the existence of a prior mortgage which

a total failure of consideration, the court is of opinion that to make it a good defense, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something; this court cannot say how much; nor is the inquiry a proper *one [*17 in a court of law in an action on the note. If the defendant be entitled to any relief it is not in this action.

But if any doubt could exist on the first exception, there is none on the second. The note was given with full knowledge of the case. Acquainted with the extent of the incumbrance; and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and on receiving it, executes his note for the purchase money. To the payment of a note given under such circumstances, the existence of the incumbrance can certainly furnish no legal objection.

It has also been said that the deed is defective. If it be, the defendant may require a proper deed, and it is not impossible but there may be circumstances which would induce a court of equity to enjoin this judgment until a proper deed be made. But the objections to the deed cannot be examined in this action.

*Judgment reversed.*³

*JUDGMENT.—This cause came on to be [*18 heard on the transcript of the record of the Circuit Court of the United States for the County of Washington, and was argued by counsel. All

3.—By the French law, the price of the sale of real property cannot be recovered by the vendor, if the vendee has been disturbed (trouble) in his possession, by prior incumbrances, or has just ground for apprehension on that account, until the litigation concerning them is terminated; unless, indeed, the vendor gives sufficient security to indemnify the vendee in case of eviction. *Pothier de Vente*, n. 280. *Code Napoleon*, l. iv. 3, tit. 6, chap. 5, n. 1653. For the various distinctions in our law as to where the vendee may detain the purchase money, if incumbrances are discovered previously to the payment of it, and to what relief he is entitled if evicted after the money is actually paid, see *Sugden's Law of Vendors*, as above cited, which contains a complete digest of the cases in equity on this subject.

was a lien on the property. The court held that although the covenant was broken as soon as made, yet as the defendant had not paid off the mortgage, or averred any special damage by reason of its existence, he would be at that time entitled to no more than nominal damages, and hence the defense could not be made available to him. *Rawle on Cov.* for title, 493, 497, 498.

See also *Whitney v. Lewis*, 21 Wendell, 181.

Kent says: "In *Frisbie v. Hoffnagle*, the purchaser, in a suit at law upon his note given to the vendor for the purchase money, was allowed to show in his defense, in avoidance of the note, a total failure of title, notwithstanding he had taken a deed with full covenants, and had not been evicted. But the authority of that case and the doctrine of it, were much impaired by the Supreme Court in *Malne*, in a subsequent case, founded on like circumstances (*Lloyd v. Jewell*, 1 Greenl. R. 352); and they were afterwards in a degree restored, by the doubts thrown over the last decision by the Supreme Court of Massachusetts in *Knapp v. Lee* (3 Pick. 452), the same defense was made to a promissory note in the case of *Greenleaf v. Cook* (2 Wheat. 13), and it was overruled on the ground that the title to the land, for the consideration of which the note was given, had only partially failed; and it

RULES AND ORDERS

OF THE SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1817.

WHENEVER it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

IN ALL cases of admiralty and maritime jurisdiction, where new evidence shall be admissible

in this court, the evidence by testimony of witnesses, shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying *for the commis- [*viii sion, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice. Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court, in cases where by law it is admissible.

REPORTS OF THE DECISIONS
OF THE
Supreme Court of the United States.

FEBRUARY TERM, 1817.

1*] *[CONSTITUTIONAL LAW.]

SLOCUM v. MAYBERRY ET AL.

The courts of the United States have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the United States; and any intervention of a state authority which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful.

In such a case, the court of the United States, having cognizance of the seizure, may enforce a redelivery of the thing, by attachment, or other summary process.

The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious.

If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the District Court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.

And if the seizure be finally adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the Instance Court of Admiralty, for damages for the illegal act.

But the common law remedy in such a case must be sought for in the state courts, the courts of the United States having no jurisdiction to decide on the conduct of their officers, in the execution of their laws, in suits at common law, until the case shall have passed through the state courts.

Where a seizure was made, under the eleventh section of the embargo act of April, 1808, it was determined that no power is given by law to detain the cargo if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law; and in case of its detention, to bring an action of replevin therefor in the state court.

ERROR on a judgment rendered by the Supreme Court for the state of Rhode Island.

John Slocum, the plaintiff in error, was surveyor of the customs for the port of Newport, in Rhode Island, and under the directions of the collector had seized the *Venus*, lying in that port with a cargo ostensibly bound to some other port in the United States. The defend-

ants in error, who were owners of the cargo, brought their writ of replevin in the state court of Rhode Island for the restoration of the property. The defendant pleaded that the *Venus* was laden in the night, not under the inspection of the proper revenue officers; and that the collector of the port, suspecting an intention to violate the embargo laws, had directed him to seize and detain her till the opinion of the President *should be known [*3 on the case; and concluded to the jurisdiction of the court. The same matter was also pleaded in bar. To both these pleas the plaintiff in the state court demurred, and the defendants joined in demurrer. Judgment having been rendered in favor of the plaintiff in the state court, the cause was removed into this court by writ of error.

The *Attorney-General*, for the plaintiff in error. 1. The seizure was well made under the eleventh section of the embargo act of the 25th of April, 1808. The nature and extent of the power vested in the revenue officers was settled in the case of *Crorell v. M'Faddon*.¹ Even admitting that, according to the doctrine held in the case of *The Paulina*,² the landing without a permit, contrary to the second section, does not work a forfeiture (the denial of a clearance being the only penalty), still the efficacy of the eleventh section justifies and protects the officer. 2. The case being brought under the cognizance of the United States, and within the jurisdiction of their courts, by the just exercise of an authority by one of their officers, the state court had no right to interfere, and arrest the seizure by its process. In the case of *The Favorite*,³ three of the judges held that "the conduct of the salvors in taking the goods out of the possession of the revenue officers, though by legal process, was improper." This intimation *is the stronger as the wrecked [*4 goods were adjudged not liable to duties; and it is fortified by the opinion of a learned judge in the Supreme Court of New York, upon an analogous question.⁴

1.—8 Cranch, 96.

2.—7 Cranch, 52.

3.—4 Cranch, 347. See also 1 Binney, 138, Soderstrom's case; 2 Hall's Law Journal, 186.

4.—9 Johns. R. 239. Per Kent, Ch. J. This was an application to the Supreme Court of the state of New York, at August term, 1812, for the allowance Wheat, 2.

of a writ of *habeas corpus*, directed to John Christie, a lieutenant-colonel in the army of the United States, to bring up the body of Jeremiah Ferguson, founded upon an affidavit of his father, stating that he was an enlisted soldier in the 13th regiment of infantry in the army of the United States, then under the command of Christie, and that the said Jeremiah Ferguson was an infant under the age of

5*] *Hunter*, contra. 1. It is conceded that the opinion or suspicion of the collector authorized him to detain any vessel, ostensibly bound with a cargo to some port of the United States, until the pleasure of the President should be known. This is not a replevin for the vessel. As to that, the owners submitted to the suspicion of the collector, and the pleasure of the President; but as to the cargo, neither of these officers had, by law, the power of detaining it. A momentary and unavoidable detention of the cargo, incidental to the seizure of the vessel, might indeed be deemed a necessary consequence of an undeniable power; but could never give the seizing officer a right to continue the detention of the cargo after the vessel was securely detained. Cargo, in the revenue laws, in the law of prize, and in questions of salvage, insurance, and freight, is contra-distinguished from vessel. The system of the embargo laws was intended to prevent exportation; and, in order to accomplish this only, they authorized the detention of the vessel, without which no exportation could take place. Even the vessel was not forfeited, but detained; and the cargo was neither forfeited nor detained, but left in the possession of the owners, to be freely consumed at home. The laws of the United States having then exerted their energy, and performed their office, the subsequent proceedings were illegal. In the case of *Crowell v. M'Fadon*, the action was *trover*. Lucrative damages were sought, for a conversion proved not to be wrongful, but assented to by the party. Here the [*] action is *replevin*, and the [*] party only seeks to retain what is universally admitted to be his property. *Incommodum rilanis quam commoda petentis melior est causa*. 2. The plea to the jurisdiction of the state court is fatally defective in not stating another jurisdiction.¹ 8. But even supposing the decision of this court must be against the jurisdiction of the state court, no judgment can be pronounced upon that basis. The thing in controversy cannot be restored to the plaintiff in error, for he never owned or claimed it; and the authority of *The Paulina*² is sufficient to dissipate the mistaken notion of a forfeiture to the United States. No collision between the state and national judicatures can, therefore, arise. Even if the state court has improperly interfered, it is, at the worst, an innocent officiousness; since that court has determined the question precisely as the national tribunals would have done, and has merely anticipated the beneficence they intend-

ed. The mischief that the common law writ of prohibition seeks to remedy is the inconvenience of having the same question determined different ways, according to the court in which the suit is depending. But if it be shown to the court trying a suggestion in prohibition, that the question has been, or must be, determined exactly as the appropriate court would determine it, its merely being drawn *at aliud examen* would not be a sufficient ground for issuing the writ of prohibition.³ *No usur- [*] pation can be ultimately successful against the national jurisdiction. The very clause of the judiciary act of 1789, sec. 25 by which the cause is brought here, shows that this jurisdiction is amply armed for self-defense. But this transaction does not present anything for the judicial powers of the United States to act upon. The case of *The Favorite* was a question of salvage, depending, as such questions always do, upon personal merit and propriety of conduct. A severe assertion even of legal right may, in many instances, amount to *demerit*. In the case of *Mr. Soderstrom*,⁴ the very words of the ninth section of the judiciary act expressly excluded the state courts from jurisdiction. In that case there was a personal privilege in the consul, and an absolute disability in the court. The *dictum* of the Chief Justice of the Supreme Court of New York, in the case of *Ferguson*, was disclaimed by the rest of the court, although under the particular circumstances of the case they declined to interfere. Unless the state tribunals have a right to interfere with the aid of their preventive process, in a case where the national jurisdiction has not lawfully attached, property detained under color of authority may be dissipated by rapacious profusion, because a timely replevin could not be interposed.

The *Attorney-General*, in reply. 1. The plea of the defendant in the court below covers both the vessel and the cargo, and being demurred to, its facts [*] are admitted. Both must be [*] detained, where they are seized coterminaneously; and to permit a subsequent transshipment of the cargo from the vessel where it was found, *in delicto*, to another, would be to defeat the policy of the law. In the case of *Otis v. Watkins*,⁵ both vessel and cargo were removed from Provincetown to Barnstable, yet the conduct of the collector was held justified. 2. The rule, that he who pleads to the jurisdiction ought to give it to some other court, must be taken with the proper qualifications. Another jurisdiction

21 years, &c., and that he enlisted without his father's consent, and was desirous of being released and discharged. The Chief Justice, in delivering his opinion, stated, "that the present case being one of an enlistment under color of the authority of the United States, and by an officer of that government, the federal courts have complete and perfect jurisdiction in the case; and there is no need of the jurisdiction or interference of the state courts; nor does it appear to me to be fit that the state courts should be inquiring into the abuse of the exercise of the authority of the general government. Numberless cases may be supposed of the abuse of power, by the civil and military officers of the government of the United States; but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us; and we have no reason to doubt of their readiness, as well as ability, to correct and punish every abuse

of power under that government. The judicial power of the United States is commensurate with every case arising under the laws of the Union; and the act of Congress (1 Laws of the United States, 53, 55) gives to the federal courts, exclusively of the courts of the several states, cognizance of all crimes and offenses cognizable under the authority of the United States." The other judges concurred in refusing to allow the *habeas corpus*, deeming that a question of sound legal discretion; but reserved themselves as to the jurisdiction of the state courts.

1.—Doct. Pl. 23; 1 Vesey, 213, *Mostyn v. Fabrigas*; Cowp. 172, 2 Vesey, 237; 3 Atk. 662.

2.—7 Cranch, 52.

3.—3 Bl. Com. c. 7.

4.—1 Binney, 138.

5.—9 Cranch, 399.

must be shown, where it exists, or is intended to be claimed over the subject-matter of the suit. But here it was intended only to except to the officious, unlawful jurisdiction of that court where the officer was impleaded. 8. The plea of the defendant in the court below is not an avowry, which goes for a restitution of the thing in controversy; he merely makes cognizance, acknowledges the taking, but justifies under the law, and the orders of the collector. Hence the argument, that a reversal of the judgment below would imply a restitution of the cargo to the seizing officer as his property, is inapplicable. Where, from the circumstances of the case it was lawful to take, and yet, from intervening events, unlawful to detain, the defendant cannot be entitled to a return.¹ The seizure, in this case, though it looked to no direct forfeiture or even to a trial, yet, being a necessary incident to a seizure, having in view 9*] a forfeiture, *it falls within the scope of the 9th section of the judiciary act as fairly as the cases positively enumerated; and a contrary determination would efface from the statute book those preventive means by which a complexity of litigation is avoided.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and, after stating the facts, proceeded as follows:

In considering this case, the first question which presents itself is this: Has the constitution, or any law of the United States, been violated or misconstrued by the court of Rhode Island in exercising its jurisdiction in this cause?

The judiciary act gives to the federal courts exclusive cognizance of all seizures made on land or water. Any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act; and the federal court having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause. If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the *federal courts, and cannot be drawn to another forum; and it depends upon the final decree of such courts whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the District Court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law, or in the admiralty for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved, other than such as

might be obtained in a court of admiralty, could be prosecuted only in the state court. The common law tribunals of the United States are closed against such applications, were the party disposed to make them. Congress has refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, until the case shall have passed through the state courts, and have received the form which may there be given it. This, however, being an action which takes the thing itself out of the possession of the officer, could certainly not be maintained in a state court, if, by the act of Congress, it was seized for the purpose of being proceeded against in the federal court.

A very brief examination of the act of Congress will be sufficient for the inquiry whether this cargo was so seized. The second section of the act, *pleaded by the defendant in [*11 the original action, only withholds a clearance from a vessel which has committed the offense described in that section. This seizure was made under the 11th section, which enacts, "that the collectors of the customs be, and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon."

The authority given respects the vessel only. The cargo is in no manner the object of the act. It is arrested in its course to any other port, by the detention of the vehicle in which it was to be carried; but no right is given to seize it specifically, or to detain it if separated from that vehicle. It remains in custody of the officer, simply because it is placed in a vessel which is in his custody; but no law forbids it to be taken out of that vessel, if such be the will of the owner. The cargoes thus arrested and detained were generally of a perishable nature, and it would have been wanton oppression to expose them to loss by unlimited detention, in a case where the owner was willing to remove all danger of exportation.

This being the true construction of the act of Congress, the owner has the same right to his cargo that he has to any other property, and may exercise over it every act of ownership not prohibited by law. He may, consequently, demand it from the officer *in whose possession it is, that officer having no legal right to withhold it from him; and if it be withheld, he has a consequent right to appeal to the laws of his country for relief.

To what court can this appeal be made? The common law courts of the United States have no jurisdiction in the case. They can afford him no relief. The party might, indeed, institute a suit for redress in the District Court acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of Congress neither expressly nor by implication forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel instead of the cargo,

1.—Roll. Abr. 319; Bull. N. P. 55.

the case would have been essentially different. The detention would have been by virtue of an act of Congress, and the jurisdiction of a state court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the state court.

The same course of reasoning which sustains the jurisdiction of the court of Rhode Island sustains also its judgment on the plea in bar. The two pleas contain the same matter; the one concluding to the jurisdiction of the court, and the other in bar of the action. In examining the plea to the jurisdiction, it has been shown that the officer had no legal right to detain the [13*] property; consequently, his plea was *no sufficient defense, and the court misconstrued no act of Congress, nor committed any error in sustaining the demurrer.

Judgment affirmed with costs.

Cited—3 Wheat. 312; 6 How. 390; 24 How. 458; 6 Wall. 195; 1 Otto, 661; 1 Woods, 178; 1 Mason, 99; 1 Ware, 384; 7 Bank. Reg. 426; 13 Bank. Reg. 300; Newb. 299; 2 Curt. 469; 7 Blatchf. 38; 2 McLean, 334.

[COMMON LAW.]

GREENLEAF v. COOK.

Where a promissory note was given for the purchase of real property, held that the failure of consideration through defect of title must be total, in order to constitute a good defense to an action on the note.

Quære, Whether, after receiving a deed, the party could avail himself even of a total failure of consideration.

But where the note is given with full knowledge of the extent of the incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.

Any partial defect in the title or the deed is not inquirable into by a court of law in an action on the note; but the party must seek relief in chancery.

ERROR to the Circuit Court of the United States, for the District of Columbia.

NOTE.—Rawle on Covenants for Title, says: "In *Greenleaf v. Cook*, *supra*, the defence of a failure of title, to a note given for the purchase money of land, seems to have been excluded with entire propriety, as nothing in the report of the case shows that the deed contained any covenants whatever; and, from what was said in the decision as to the alleged defectiveness of the deed, it is possible that the absence of covenants was referred to. There was a prior mortgage on the premises, under which a decree of foreclosure had been pronounced, but the possession had never been disturbed.

"It may be observed of this case, which, upon the facts presented, was most correctly decided, that at that time the law was far from being settled as to the right of the purchaser thus to defend himself, and the true basis of the decision seems to rest not so much upon any distinction between a total and partial failure of consideration as on the ground that there being no covenants in the deed, the purchaser had already obtained what, from the absence of these covenants, a court of law must presume he bargained for, viz., the mere transfer of the vendor's title, such as it was, without any recourse to him in the event of its turning out defective; and hence the question of consideration was not touched—nor, if the deed had contained a covenant of warranty, or for quiet enjoy-

ment, could the result have been different, for, as there had been no eviction, the purchaser would not have been entitled at that time to damages." Rawle on Covenants for title, 496, 498, 497.

"Ten years after the decision in *Greenleaf v. Cook*, it was held by the same tribunal, in *Thorn-ton v. Wynn*, 12 Wheat. 183, that a breach of warranty of a chattel was no defense to an action on a note given for its price, if the sale were absolute, and there was no subsequent agreement on the part of the vendor to take back the article; but very recently, in the cases of *Withers v. Green*, 9 How. 213, and *Van Buren v. Diggs*, 11 Id. 461, this doctrine has been much modified, if not overruled." Rawle on Cov. for title, 498, note.

Upon this testimony, the counsel for the defendant moved the court to instruct the jury, that if they believed the testimony, the law was for the defendant; which instruction the court refused to give, the judges being divided in opinion thereon. The counsel for the plaintiff then moved the court to instruct the jury that the law was for the plaintiff; which opinion the court also refused to give, being still divided.

The counsel for the plaintiff then produced testimony to prove that the lot of ground, in payment for which the promissory note mentioned in the declaration was given, had been sold to a certain John Bickly, who took possession thereof, and resided thereon during his life; that after his death, his widow continued to reside thereon until she intermarried *with [15 the defendant, and that the defendant still resides thereon. That previous to the execution of the promissory note, on which this suit is instituted, he received full and complete information of the deed of mortgage in the foregoing bill of exceptions mentioned, and of the probable effect of that deed. That with this knowledge, after consultation and mature consideration, he received the deed for the lot, and gave

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In *Scudder v. Andrews*, 2 McLean, 464, the facts were very similar to those presented in *Greenleaf v. Cook*, but the decision was the other way. There the action was on a note given for the price of a tract of land, and the defense set up, was failure of consideration, in that the land sold was part of the public domain, and had never been sold or offered for sale by the United States, and it was held that the defense amounted to a total failure of consideration and was good. See Rawle on Cov. for title, 497, note 1.

In *Frisbie v. Hoffnagle*, 11 John. (N. Y.) 50, decided in 1814, where in an action on two notes given Wheat 2.

his promissory note for the purchase money. He then moved the court to instruct the jury that, if they believed the facts thus stated on testimony, the plaintiff was entitled to recover in this action. But the court, being again divided, refused to give the opinion required.

The counsel for the plaintiff took exceptions to the proceedings of the court in each point, in not giving their opinions as asked. The jury found a verdict for the defendant, upon which judgment was rendered, and the cause came before this court on a writ of error.

Jones, for the plaintiff in error, argued, that where a party purchases real property, without fraud on the part of the vendor, the vendee takes it at his own risk, unless he has a warranty against the acts of all the world. That there is no distinction between a direct action to recover back the purchase money, and a defense for want of consideration. In this case there is no eviction, but a mere contingent incumbrance only, proper for the exclusive cognizance of a court of equity, which court may [16*] decree a specific performance, or compensation, as its justice may require.¹

Law, contra, contended, that if this were a case of an express agreement to take any or no title, the doctrine cited from *Sugden* would apply; but that here the vendor promised to give the vendee a clear and unincumbered title. A court of chancery will never decree a specific performance without a perfect title at law and in equity; and the defense on account of defect of title is as available in the one forum as the other.²

MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

On the first exception it has been argued that there is a failure of consideration, which constitutes a good defense in this action.

Without deciding whether, after receiving a deed, the defendant could avail himself of even

1—*Sugden's Law of Vendors*, 312 to 318, and the authorities there cited.

2—2 *Comyn on Cont.* 52.

for the purchase money of land sold with a covenant of warranty, the defendant proved that the land had subsequently been sold under a judgment against the plaintiff, and a sheriff's deed made to the purchaser, and although it was also in evidence that the defendant had not been evicted or disturbed in his possession, the court ordered a nonsuit. On a motion for a new trial, the case was submitted without argument, and in refusing a new trial the court held, "The consideration of the note has entirely failed, for the defendant has no title, it having been extinguished by the sale under the judgment. Here is a total, not a partial, failure of consideration, for although the defendant has not been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the mesne profits. To allow a recovery in this case would lead to a circuitry of action, for the defendant, on this failure of title, would be entitled to immediately recover back the money. The motion to set aside the nonsuit must therefore be denied."

Cases of Frisbie v. Hoffnagle, decided after *Latin v. Vail*, 17 *Wend.* 188, in New York, substantially overruled by it. The defendant, on being sued for the purchase money of real estate, which had been conveyed with a covenant against incumbrances, pleaded the existence of a prior mortgage which

a total failure of consideration, the court is of opinion that to make it a good defense, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something; this court cannot say how much; nor is the inquiry a proper *one [*17 in a court of law in an action on the note. If the defendant be entitled to any relief it is not in this action.

But if any doubt could exist on the first exception, there is none on the second. The note was given with full knowledge of the case. Acquainted with the extent of the incumbrance; and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and on receiving it, executes his note for the purchase money. To the payment of a note given under such circumstances, the existence of the incumbrance can certainly furnish no legal objection.

It has also been said that the deed is defective. If it be, the defendant may require a proper deed, and it is not impossible but there may be circumstances which would induce a court of equity to enjoin this judgment until a proper deed be made. But the objections to the deed cannot be examined in this action.

*Judgment reversed.*³

*JUDGMENT.—This cause came on to be [*18 heard on the transcript of the record of the Circuit Court of the United States for the County of Washington, and was argued by counsel. All

3—By the French law, the price of the sale of real property cannot be recovered by the vendor, if the vendee has been disturbed (troubé) in his possession, by prior incumbrances, or has just ground for apprehension on that account, until the litigation concerning them is terminated; unless, indeed, the vendor gives sufficient security to indemnify the vendee in case of eviction. *Pothier de Vente*, n. 280. *Code Napoleon*, liv. 3, tit. 6, chap. 5, n. 1653. For the various distinctions in our law as to where the vendee may detain the purchase money, if incumbrances are discovered previously to the payment of it, and to what relief he is entitled if evicted after the money is actually paid, see *Sugden's Law of Vendors*, as above cited, which contains a complete digest of the cases in equity on this subject.

was a lien on the property. The court held that although the covenant was broken as soon as made, yet as the defendant had not paid off the mortgage, or averred any special damage by reason of its existence, he would be at that time entitled to no more than nominal damages, and hence the defense could not be made available to him. *Rawle on Cov.* for title, 493, 497, 498.

See also *Whitney v. Lewis*, 21 *Wendell*, 131.

Kent says: "In *Frisbie v. Hoffnagle*, the purchaser, in a suit at law upon his note given to the vendor for the purchase money, was allowed to show in his defense, in avoidance of the note, a total failure of title, notwithstanding he had taken a deed with full covenants, and had not been evicted. But the authority of that case and the doctrine of it, were much impaired by the Supreme Court in *Maine*, in a subsequent case, founded on like circumstances (*Lloyd v. Jewell*, 1 *Greenl. R.* 352); and they were afterwards in a degree restored, by the doubts thrown over the last decision by the Supreme Court of Massachusetts in *Knapp v. Lee* (3 *Pick.* 452), the same defense was made to a promissory note in the case of *Greenleaf v. Cook* (2 *Wheat.* 13), and it was overruled on the ground that the title to the land, for the consideration of which the note was given, had only partially failed; and it

which being seen and considered, it is the opinion of this court that there is error in the proceedings of the said Circuit Court, in this, that the said court refused to instruct the jury on the application of the counsel for the plaintiff, that on the facts given in evidence to them, if believed, the plaintiff was entitled to recover in that action; wherefore it is considered by this court that the said judgment of the said Circuit Court be reversed and annulled, and that the cause be remanded to the said court to be proceeded in according to law.

Cited—17 How. 585; 2 McLean, 468; 4 McLean, 302.

[COMMON LAW.]

OTIS v. WALTER.

In seizures under the embargo laws, the law itself is a sufficient justification for the seizing officer where the discharge of duty is the real motive, and not the pretext for detention, and it is not necessary to show probable cause.

But the embargo act of the 25th of April, 1808, related only to vessels ostensibly bound to some port in the United States, and a seizure after the termination of the voyage is unjustifiable; and no further detention of the cargo is lawful than what is necessarily dependent on the detention of the vessel.

It is not indispensable to the termination of a voyage that the vessel should arrive at the terminus of her original destination; but it may be produced by stranding, stress of weather, or any other cause [19*] inducing her to enter another port with a view to terminate her voyage *bona fide*.

But if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention.

ERROR to the Supreme Judicial Court of the State of Massachusetts.

This was an action of trover brought in the state court, in which Walter, the plaintiff in that court, recovered of Otis, the defendant in that court, damages for the conversion of sundry articles constituting the cargo of a vessel called the Ten Sisters. The defendant in the

court below, collector of the port of Barnstable, in Massachusetts, had detained the vessel under suspicion of an intention to violate the embargo laws, particularly the act of the 25th of April, 1808, sec. 6 and 11. The vessel sailed from Ipswich with a cargo of flour, tar, and rice, in order to carry the same to Barnstable, or to a place called Bass River, in Yarmouth; and proceeded to Hyannis, in the collection district of Barnstable. On her arrival there, the master applied to the collector for a permit to land the cargo, which was refused by the latter, who shortly afterwards seized and detained the vessel under the above-mentioned acts. This detention was given in evidence as a defense to the action under the general issue, and the Chief Justice of the Supreme Court of Massachusetts instructed the jury "that the said several matters and things, so allowed and proved, *were not sufficient to bar the plaintiff of [*20 his said action, nor did they constitute or amount to any defense whatever in the action," &c. Whereupon the jury found a verdict, and the court rendered a judgment for the plaintiff.

The *Attorney-General*, for the plaintiff in error, argued, that this case fell under the principal of that of *Cronell v. M'Faddon*,¹ and it would appear that the vessel was *in itinere*; but that even if this were not the state of the case, the jury ought to have been left to make their own inference from the facts, and not to have been charged by the judge that no defense whatever was made out.

Read, for the defendant in error, contended, that the case of *Otis v. Bacon*² was perfectly in point, and showed that the vessel, having arrived at her port of discharge, was no longer within the operation of the embargo laws; and that if the collector's defense was not completely made out—if it was, in any respect, materially defective, it was not made out at all.

JOHNSON, *J.*, delivered the opinion of the court:

This was an action of trover, brought in the State Court of Massachusetts, in which

1.—3 Cranch, 94.

2.—8 Cranch, 589.

was said, that to make it a good defense in any case, the failure of title must be total.

"This case at Washington is contrary to the defense set up and allowed, and to the principle established in the case of *Gray v. Handkinson* (1 Bay's Rep. 278), but it seems to be supported by the case of *Day v. Nix* (9 Moore's R. 159), where it was decided, by the English court of C. B., that a partial failure of the consideration of a note was no defense, provided the quantum of damages arising upon the failure was not susceptible of definite computation.

"The cases are in opposition to each other, and they leave the question how far and to what extent a failure of title will be a good defense, as between the original parties to an action for the consideration money on a contract of sale, in a state of painful uncertainty. I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money even on a failure of title. This is the strict English rule, both in law and in equity; and applies equally to chattels, when the vendor sells without any avowment of title and without possession. *Roswell v. Vaughn*, Cro. Jac. 196; *Medina v. Stoughton*, 1 Salk. Rep. 211; *Bree v. Holbeck*, Doug. R. 654; *Johnson*

v. Johnson, 3 Bos. & Pul. 170; *Sugden on Vendors*, 346, 347; 4 Cruise's Dig. 90; Coop. Eq. R. 311. In sales of chattels the purchaser cannot redress payment in cases free from fraud, while the contract continues open, and he has possession. But in this country the rule has received very considerable relaxation. In respect to lands, the same rule has been considered to be the law in New York (*Frost v. Raymond*, 2 Caines R. 188); while on the other hand, in South Carolina, their courts of equity will allow a party suffering by the failure of title, in a case without warranty, to recover back the purchase money, in the sale of real as well as of personal estates. *Tucker v. Gordon*, 4 Eq. Rep. So. Car. 53, 58; 2 Kent's Com. 472, 473.

It is now settled in the New York decisions, that on a partial failure of a consideration on a sale of goods the defendant may recoupe his damages, on a breach of the plaintiff's contract of warranty. *Reab v. McAllister*, 8 Wendell, 109; *Still v. Hall*, 2 Wendell, 51; *Batterman v. Pierce*, 3 Hill, 171.

The case of *Frisbie v. Hoffnagle* has been virtually overruled in *Vilbard v. Johnson*, 19 Johnson, 77, and it is now not regarded as authority. See *Whitney v. Lewis*, 21 Wendell, 128, 134.

By the Code of N. Y., sec. 501, any cause of action arising out of the contract or transaction alleged, which tends to diminish or defeat a recovery, may be set up as a counterclaim.

Walter, the plaintiff in that court, recovered of Otis damages for the conversion of sundry articles constituting the cargo of a vessel called the Ten Sisters.

21*) *Otis, the collector of Barnstable, had detained the vessel under suspicion of an intention to violate the embargo laws. (Act of the 25th of April, 1808, sec. 6 and 11.)

It has already been decided, in such cases, that it is not necessary to show probable cause; that the law confides in the discretion of the collector, and is, in itself, a sufficient justification, when the discharge of duty is the real motive, and not the pretext for detention. But it has also been decided that the law relates only to vessels ostensibly bound to some port in the United States; that a seizure is unjustifiable after the termination of a voyage; and that no further detention of the cargo is lawful than what is necessarily dependent upon the detention of the vessel.

In this case there was no ground for charging the collector with oppression or malversation; and the only point insisted on in the argument was, that she had actually terminated her voyage. As the clearance is not in evidence in the cause, we are obliged to take the *termini* of the voyage from the testimony of the captain, who swears that he sailed from Ipswich "with a cargo of tar, flour, and rice, to carry the same to Barnstable, in the county of Barnstable, or to a place called Bass River, in Yarmouth, in said county;" that he "proceeded to Hyannis, in the district of Barnstable; that on his arrival there he applied for a permit to land, which was refused by the collector, who, in a day or two afterwards, seized the vessel, and detained her under the embargo acts." Ipswich lies to the 22*) north of the peninsula *which terminates in Cape Cod; the port or bay of Barnstable on the north side of that peninsula; Bass River and Hyannis Bay on the south; all of them known as distinct places, but all lying within the county and collection district of Barnstable. And although Hyannis Bay lies within the district of Barnstable, yet to reach it in sailing from Ipswich you must pass both the town of Barnstable and the mouth of Bass River.

The defense of the collector in the state court was founded on the authority to detain vested in him by the act of Congress. The instruction of the Chief Justice of that state was in these words: "that the said several matters and things, so allowed and proved, were not sufficient to bar the plaintiff of his said action, nor did they constitute or amount to any defense whatever in the action."

Instructions couched in such general terms may serve to embarrass a court exercising appellate jurisdiction; but it is a mistake to suppose that it precludes such a court from a view of the errors which may have been committed on the trial. It has before been decided that it only obliges this court to look through the whole cause, and examine if there be nothing in it which ought to have called forth a different instruction or judgment. In this case we are of opinion that, conformably to our former decisions, the instruction given could only have been sanctioned on the supposition that the vessel had actually terminated her voyage. But here it is contended that this court stand com- 23*) mitted by an admission *in the case of

Wheat. 2.

Otis v. Bacon,¹ that a destination to Barnstable is satisfied by an arrival in Hyannis Bay.

We have looked into the record in that case, and find that it will support no such inference. It is true that Mud-hole, the place at which the vessel had arrived in that case, is in Hyannis Bay. But the question of fact did not arise, for the collector had acquiesced in the termination of the voyage there, by actually granting a permit to land. And the grant of the permit was expressly made a ground, in the state court, of the instruction to the jury. Now, it is not indispensable to the termination of the voyage that the vessel should arrive at the *terminus ad quem* she was destined. It may as well be produced by stranding, by stress of weather, or by any other cause inducing her to enter another port, honestly, with a view to terminate her voyage. But if a vessel, not actually arriving at her port of destination, excites an honest suspicion in the mind of the collector that her demand of a permit was merely colorable, we are of opinion that this can neither be held to be an actual or admitted termination of the voyage, so as to preclude the right of detention. Had the destination in this case been generally to Barnstable, or the town of Barnstable, there may have been some color of ground for arguing that her arrival at Hyannis was the termination of her voyage; but as the destination was expressly to Barnstable or Bass River, within the county of *Barnstable, her [*24 arrival at one or the other of those places was indispensable to the termination of her voyage, supposing her really, in fact, to have had no ulterior destination.

But a destination may be colorable, and intended only to mask an ulterior and illegal destination; and hence, we are of opinion that, unless the fact be conceded by some such unequivocal act as was done by the collector in the case of *Otis v. Bacon*, it is a question which ought to be left in the instruction of the court open to the jury. And that if any positive instruction on the subject had been given to the jury in this cause, it ought to have been in favor of the defendant, as the arrival in Hyannis Bay would not have been deemed a legal termination of the voyage, either on a policy of insurance, a charter-party, bottomry bond, or any other maritime contract.

A majority of the court are therefore of opinion that the court of Massachusetts erred in this case, and that the judgment ought to be reversed.

STORY, J., did not sit in this cause.

Judgment reversed.

*[LOCAL LAW.]

*[25]

M'IVER ET AL., LESSEES, v. RAGAN ET AL.

Where the plaintiffs in ejectment claimed under a grant from the state of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which, by the statutes of that state and Tennessee, constitutes a bar to the action, if the possession be under color of title. To repel this defense, the plaintiffs proved

that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning and nearly the whole land, and all the corners, except one, were within the Cherokee Indian boundary, not having been ceded to the United States, until the year 1806, within seven years from which time the suit was brought; but the land in the defendant's possession, and for which the suit was brought, did not lie within the Indian boundary. It was held that, notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not, therefore, survey the land granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years under color of title.

ERROR to the Circuit Court for the District of West Tennessee.

The plaintiffs in error brought an ejectment in that court for 5,000 acres of land, in possession of the defendant, Ragan, and on the trial gave in evidence a grant from the state of North Carolina, of 40,000 acres, comprehending the lands for which the suit was instituted.

The defendants claimed, under a junior patent to Mabane, and a possession of seven years held by Ragan, which, by the statutes of North **26*** Carolina and ***Tennessee**, constitutes a bar to the action, if the possession be under color of title.

To repel this defense, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked, except the beginning corner. That the beginning, and nearly the whole land, and all the corners, except one, were within the Indian boundary, being part of the lands reserved by treaty for the Cherokee Indians. These lands were not ceded to the United States until the year 1806, within seven years from which time this suit was instituted. But the land, in possession of the defendant, Ragan, and for which this ejectment was brought, did not lie within the Indian boundary.

The laws of the United States prohibited all persons from surveying or marking any lands within the country reserved by treaty for the Indians.

Upon this testimony the counsel for the plaintiffs requested the court to instruct the jury that "the act of limitations would not run against the plaintiffs for any part of the said tract, although such part should be out of the Indian boundary, until the Indian title was extinguished to that part of the tract which includes the beginning corner, and the lines running from it, so as to enable them to survey their land, and prove the defendant to be within their grant." But the judge instructed the jury that, "although the Indian boundary included the beginning corner, and part of the lines of the said tract, yet, if the defendants had actual possession of part of the said tract, not so included within the said Indian boundary, and retained possession thereof **27***" "for seven years, without any suit being commenced, the plaintiff would thereby be barred from a recovery."

To this opinion the plaintiffs, by their counsel, excepted.

The jury found a verdict for the defendants, on which a judgment was rendered, and the cause was brought before this court by writ of error.

Swann and Campbell, for the plaintiffs in error.

and in ejectment. 1. Statutes of limitations, all over the world, except certain cases of a peculiar nature from their operation; and the impediment in this case is analagous to the exceptions expressly provided. The case of civil war interrupting all the proceedings in courts of justice is not stronger than the present; the omission in the statute ought, therefore, to be supplied by judicial equity. 2. The act of the 30th of March, 1802, ch. 13, sec. 5, prohibits the surveying, or attempting to survey, or designating any of the boundaries, &c., of lands within the Indian territory, under severe penalties; and the party could not have obtained a passport from the officers authorized to grant it by the third section of the act, in order to survey lands, but merely to go into the Indian country for any lawful purpose. 3. The record does not regularly deduce the defendant's title. There is no presumption raised that Ragan continued his possession under Mabane, and without it, that possession would not be under color of title, according to the statutes of limitation of North Carolina and Tennessee, and the decision of this court in the case **[*28 of Patton's Lessee v. Easton.]**

Jones and Thomas, contra. The exceptions in the statute of limitations (which statute gives the right of property as well as of possession) are expressed by the legislature, and cannot be multiplied by implication. But supposing the statute not to apply to lands within the Indian boundary; the lands held by the defendant was not within the Indian boundary, and therefore the limitation applies to it. If the plaintiffs had instituted a suit, they might have entered the Indian country, under an order of court, and surveyed the lands. The character of the defendants' possession, and not that of the plaintiffs, is to determine the right of property.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:—

It is contended, by the plaintiffs in error, that the judge misconstrued the law in his instructions to the jury.

The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended that, as the plaintiffs were disabled, by statute, from surveying their land, and, consequently, from prosecuting this suit with effect, they must be excused from bringing **[*29]** it; and are within the equity, though not within the letter of the exceptions.

The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of a title believed to be good. The possession of the defendants being of lands not within the Indian territory, and being in itself legal, no reason exists, as connected with that possession, why it should not avail them and perfect their title as intended by the act.

The claim of the plaintiffs to be excepted from the operation of the act is founded, so far as respects this point, not on the character of

the defendants' possession, but on the impediments to the assertion of their own title.

Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a country are closed so that no suits can be instituted.

This proposition cannot be admitted. The difficulties under which the plaintiffs labored respected the trial, not the institution of their suit. There was no obstruction to the bringing of this ejectment at an earlier day. If, at [30*] the trial, a survey had been *found indispensable to the justice of the cause, the sound discretion of the court would have been exercised on a motion for a continuance. Had such a motion been overruled, the plaintiffs would have been in the condition of all those who, from causes which they cannot control, are unable to obtain that testimony which will establish their rights. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain. It has never been determined that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations unless the legislature shall so declare its will.

It has also been contended that in this case the possession is not under color of title.

The ejectment was served on Ragan, who was the tenant in possession, and, on his motion, David Mabane and John Thomson, executors of the last will and testament of James Mabane, deceased, and landlords to the said Henry Ragan, were admitted as defendants with him in the cause. At the trial they produced a grant for the land in controversy to James Mabane, and proved "that Ragan took possession of the same, under James Mabane, the grantee, in 1804, and continued to occupy the same ever since."

It is argued that, though Ragan is stated to have taken possession under Mabane, he is not [31*] stated to *have continued that possession under Mabane, and this court will not presume that he did so. Without such presumption, his possession, it is said, would not be under color of title, and, consequently, would be no bar to the action according to the statute of Tennessee.

The court cannot yield its assent to this hypercriticism on the language of the exceptions. The representatives of Mabane came in as defendants, and plead the general issue. They are stated on the record to be the landlords of Ragan. When Ragan is said to have taken possession under Mabane, and to have continued to occupy the land, the fair inference is that the possession was continued under the same right by which it was originally taken. Neither the statement of the counsel nor the opinion of the court turns, in any degree, on the nature and character of Ragan's possession, but on the

disability of the plaintiffs to survey their land. For all these reasons this court is decidedly of opinion that the possession of Ragan was the possession of Mabane, and was under color of title.

Judgment affirmed.

Approved - 9 How. 529.
Cited—11 Wheat. 192; 12 Pet. 748; 21 How. 238; 8 Wall. 542; 14 Wall. 148; 3 Cranch. C. C. 248; 11 Bank. Reg. 363; 13 Bank. Reg. 306; 1 Woods. 164; 2 Curt. 486; 4 Ben. 466; Hemp. 634.

*[CHANCERY.]

[*32]

HUNTER ET AL. v. BRYANT.

H., in contemplation of marriage with B., gave a bond for \$5,000, and interest to trustees, to secure to B. a support, during the marriage, and after the death of H., in case she should survive him, and to their child or children, in case he should survive her; with condition that if H. should, within the time of his life, or within one year after the marriage (whichever of the said terms should first expire), convey to the trustee some good estate, real or personal, sufficient to secure the annual payment of \$300 for the separate use of his wife during the marriage, and also sufficient to secure the payment of the said \$5,000 to her use in case she should survive her husband, to be paid within six months after his death; and in case of her death before her husband, to be paid to their child or children; or, if it should die before B. and by his will should, within a year from its date, make such devise and bequests as should be adequate to these provisions, then the bond to be void. H. died, leaving his widow B. and a son, having by his last will devised a tract of 1,000 acres of land in the Mississippi territory to his son in fee; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her in fee of the son's moiety, if he died before he attained "the lawful age, to will it away." And the residue of his estate, real and personal, to be divided equally between his wife and son with the same contingent devise over to her as with regard to the tract of 10,000 acres of land. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at \$5,000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband or otherwise," to be divided between her son and the plaintiff below (Bryant), with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought this bill to charge the lands of H. with the payment of the bond for \$5,000, and interest, to which the plaintiff derived his right under the nuncupative will of B.

By the laws of Kentucky this will did not pass the real estate of the testator, but was sufficient to pass her personal estate, including the bond.

*Held, that the provision made in the will of [*33] H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect between the provision under the will and the bond, and that this privilege was extended to her devisee, the plaintiff.

Actual maintenance is equivalent to the payment of a sum secured for separate maintenance, and, therefore, interest upon the bond during the husband's life-time was not allowed.

Under all the circumstances of the case, it was determined that the bond was chargeable on the residue of the estate, and of this the personality first in order.

A PPEAL from the Circuit Court for the District of Pennsylvania. This cause was argued by *Key* and *Hopkinson* for the appellants and defendants, and by *Jones* for the plaintiffs and respondents.

JOHNSON, J., delivered the opinion of the court:

This is an appeal from a decree in equity, in the District of Pennsylvania, on a bill filed by Thomas Y. Bryant, against the legal representatives of John Hare.

The object of the bill is to charge the lands of Andrew Hare, now deceased, through John Hare, to the appellants, defendants in the court below, with the payment of a bond for \$5,000, and interest, given by Andrew Hare, in contemplation of marriage with Margaret Bryant, the mother of John Hare.

The land lies partly in the state of Kentucky, and partly in the Mississippi territory, and five of the defendants live in the state of Pennsylvania, the sixth in the state of Virginia. The **34*** bill was originally *filed against all six of the legal representatives of John Hare; but the name of Mary Dickinson, the resident in Virginia, being stricken out by leave of court, five only were made defendants below.

The bond is executed to George Hunter and William Hunter, two of these appellants. The penalty is in the usual form, and bears date the 10th of November, 1789. The condition is in these words: "Whereas, by the permission of God, a marriage is intended to be had and solemnized between the above bound Andrew Hare, and Margaret Bryant, of the city of Philadelphia, spinster, and the said Andrew Hare, in consideration of the said marriage, and to secure a decent and competent support to and for his said intended wife, as well during the marriage as after his death, in case she should survive him, and to all and every the child or children which may be born of the said marriage, in case he should survive her, hath agreed that the sum of 5,000 Mexican dollars, part of the estate whereof, by the blessing of God, he is now possessed, and the interest and income thereof accruing annually should be vested in trustees, for the sole and separate use of the said Margaret Bryant, his intended wife, or the children born of her body, in the manner hereinafter mentioned. Now, the conditions of the above obligation is such, that if the said Andrew Hare do, and shall, within the time of his life, or within the term of one year after the marriage shall take effect (whichsoever of the said terms shall first expire), convey and assure to the above named George and William Hunter, **35*** the next *friends of the said Margaret Bryant, and trustees by her for this special purpose chosen, or the survivor of them, or his heirs, executors, administrators or assigns, some good estate, real or personal, sufficient to secure the payment of 800 Mexican dollars, as aforesaid, to the trustees, or the survivor of them, on every the 10th day of November, in every year after the date hereof, for the sole and separate use of the said Margaret, his intended wife, during the intended marriage; which annual payment shall be at her own disposal, and shall be paid upon her own orders or receipts, independent and free from the intermeddling charge or control of her said intended husband, and shall not be liable to any of his contracts, debts, or engagements whatsoever, and also sufficient to secure the payment of the sum of \$5,000, as aforesaid, to and for the sole use of the said Margaret, in case she shall survive her said intended husband, to be paid to the said trustees,

or the survivor of them, for her use within six months next after the death of her said intended husband, and in case of her death before her said intended husband, to be paid to the said trustees, or the survivor of them, for the use of all and every of the child or children of the said Margaret, to be born in pursuance of the intended marriage, to be equally divided amongst them, if more than one, but if but one, then the whole to the use of the said one. Or, if the said Andrew Hare shall die before the said Margaret, and by his testament and last will shall, within the said year from the date hereof, give and bequeath to her such estates, legacies, bequests *and provisions, as shall be **36** fully adequate to the provisions here intended to be made for her, and her child or children; then, and in either of the said cases, the above written obligation shall be void, otherwise the same shall remain in full force and virtue at law, in this state of Pennsylvania, and in all other states or kingdoms whatever."

The marriage accordingly took effect, and except when the husband was necessarily absent, in prosecution of his business as a merchant, the parties lived constantly together in great harmony, and in a style fully consonant with the husband's resources. In 1793 he established himself in Lexington, Kentucky, and was engaged in mercantile transactions until his death, which happened in 1799.

By his will Andrew Hare devised a tract of 1,000 acres of land lying in the Mississippi territory to his son John, in fee. A tract of 10,000 acres in the state of Kentucky equally between his wife and son, with a devise over to her in fee of the son's moiety if he died before he attained "the lawful age to will it away." And the rest and residue of his estate, real and personal, he gives to be equally divided between his wife and son, with the same contingent devise over to her as is given with regard to the Kentucky tract of 10,000 acres. The value of the property thus devised to her, independent of the contingent interest which has since fallen, might reasonably have been estimated at the time of the testator's death at about five thousand dollars.

In 1801, about eighteen months after the husband, the wife died; after having made a nuncupative *will, by which she devised all **37** her estate, "whether vested in her by the will of Andrew Hare, her deceased husband, or otherwise," to be divided between her son John and the complainant below, Thomas Y. Bryant, with a contingent devise of the whole to the survivor.

John Hare died, aged about 11 years; and under this nuncupative will it is that Thomas Y. Bryant derives his right to this bond. According to the laws of Kentucky this will was not sufficient to pass the landed estate of Margaret Hare, but it is good as to the personal estate, including the bond, which was the subject of this suit.

The defense set up in the answer below is, that the provision made in the will of the husband for his wife must be taken in satisfaction of this bond, inasmuch as he would otherwise have left his child, who ought to have been, and evidently was, the primary object of his care, probably destitute of support. And this court unanimously acquiesce in the correctness

of this reasoning. For, every bequest is but a bounty, and a bounty must be taken as it is given. Positive words are not indispensably necessary to attach a condition. It may arise from implication, and grow out of a combination of circumstances which go to show that without attaching such condition to a bequest the primary views and prominent duties of the testator will be pretermitted. In this case, in addition to the striking improbability of the testator's intending to leave his child destitute, or even dependent, there are two circumstances which 38* tend to show that the testator had no *expectation that, in addition to the provision for his widow, his estate was to be made liable for this heavy debt. First. The condition of the bond holds out the alternative of making provision by will, in satisfaction of it. And, although we do not accede to the construction contended for, that this necessarily extended to his whole life, but think it was, in legal strictness, limited by the latter words of the condition to his death within one year, yet the words in the prior part of the condition "within the term of his life," were well calculated to excite in the mind of a man whose habits of thinking had not been corrected by technical exercise, an idea that he was legally, as well as conscientiously, complying with his obligation when executing this will. Second. The principal part of his bounty to his wife consists of the one-half of the rest and residue of his estate, with a contingent devise over to her of the other half on the decease of his son; thus disposing of the whole, and giving to her the one-half of the natural and ordinary fund for the payment of this bond; a disposition of his effects that would have been idle under the supposition that this bond was to be exacted of his estate.

But, in the actual state of the rights and interests of these parties, at least in the view which this court takes of them, this question becomes a very immaterial one. For, the complainant, Bryant, acquires nothing of the estate of Andrew Hare, under the will of Mrs. Hare, but that part of the personality which she acquired under the residuary bequest of her husband. 39* And this being unquestionably the *fund first to be applied to the payment of debts, it must, in his hands, be first subjected to the payment of this debt. It is only as connected with Mrs. Hare's acquiescence or election to take under the will that the question of satisfaction becomes material. In which case we should be bound to dismiss the bill altogether, on the ground of satisfaction. But here we are of opinion that the evidence of election is not sufficient to bind Mrs. Hare. That she was perfectly at liberty to reject the provision under the will of her husband, and rest alone on her bond, is unquestionable. And if this election was never deliberately made in her life-time, there can be no reason for denying the extension of it to her representative, Bryant. He now makes that election in demanding the payment of this bond, and we conceive that nothing unequivocally expressive of that election has before occurred, at least nothing that ought to preclude it. If the will had expressly given the property devised to her in satisfaction of this bond, she would have been put on her guard, and more cautious conduct might have been required of her; but, although a court may raise the impli-

Wheat. 2.

cation, she was not bound to do it, and her mind was not necessarily led to an election. It is true that in her will she notices the property acquired under her husband's will; but this is perfectly consistent with the idea that she took, under her husband's will, something in addition to her interests under the bond independent of that will. We are therefore of opinion that the complainant is entitled to satisfaction of this bond; and as in the course of events, the interests of *the obligees, who stood in [40 the relation of trustees to Margaret Bryant, have become hostile to those of the *cestui que trust*, he must have the aid of this court to enforce it. The only questions, then, are, how the bond shall be stated, and how the money shall be raised. And here the question occurs, on the allowance of interest during the husband's life-time.

On this subject the majority of the court is satisfied that actual maintenance is equivalent to the payment of a sum secured for separate maintenance. It is true the husband cannot claim his election; but, if the wife and her trustees never demand it, it is considered as an acquiescence, or waiver, on their part, and this court will not afterwards enforce payment. (2 P. Wms., 84; 3 P. Wms., 355; 2 Atkin, 84; 4 Bro. Ch. Cas., 326.) In the present case, there is nothing in the bond that holds out the idea of making this interest an accumulating fund; no demand of a settlement was ever made; the parties lived together in perfect harmony, and the wife was maintained in a style fully adequate to the provision stipulated for. This bond was intended as a provision against the husband's inability or unwillingness to maintain his wife; but whilst steadily pursuing his avocation as a merchant, and faithfully discharging his duties as a husband, the reasonable conjecture is, that it was thought really best for his family not to withdraw so large a sum from his small capital. If the trustees or the wife had desired that the settlement should be made *in pursuance of the condition, [41 they might have demanded it, and enforced a compliance at law or in equity. We, therefore, think that interest on the bond is not to be computed during the husband's life.

The only remaining question is, how the money is to be raised, or on what funds the bond is to be charged. And here there can be no doubt that the first fund to be exhausted is the residue of the estate; and of this, the personal residue first in order. This, of course, sweeps all that part of Andrew Hare's estate that Bryant acquired under the will of Mrs. Hare; and included in this we find Hustin's bond for \$3,272.86. The one-half of this bond was decreed in the court below to be an equitable offset against Hare's bond. All we know on the subject of this offset is extracted from the confessions of the complainant himself. From these it appears that the testator, Hare, held a bond of Hustin's for the delivery of a quantity of pork. This bond it was purposed to exchange for one for the delivery of a quantity of tobacco, and the testator, in his life-time, dispatched the complainant as his agent with instructions to effectuate the exchange. To enable him to do so, he assigned the bond for the pork to the complainant, instead of executing a common power of attorney. Whilst ab-

sent for this purpose, and before he had completed the arrangement with Hustin, Hare died; and Bryant proceeded no farther, until he had consulted Mrs. Hare and Mr. Todd, as executrix and executor of the will of Hare, on the propriety of proceeding. "On conferring with Mrs. Hare, and advising with Mr. Todd," to use Bryant's **42*** own equivocal language, he effected a negotiation, and having received the tobacco, took it down to New Orleans, where, not meeting with a ready sale, he deposited it with one Moore, the factor and correspondent of Hare, in his life-time. He took Moore's receipt for the tobacco so deposited, and all that we are told of the transaction subsequently is, that at the instance of Mr. Todd he assigned that receipt to some house under the firm of John Jordan & Co., but who they were, or what finally became of the tobacco, the case does not show; and, for aught that appears to us, the proceeds of that adventure may at this day lie in the hands of the factor, subject to the order of the executor of Andrew Hare.

The court below thought these facts sufficient to charge Mrs. Hare with one-half the amount of Hustin's bond. But this court are of opinion that the evidence is not sufficient for them to decide finally on the subject. Although it be generally true that the executor, who, by taking an inferior security or unreasonably extending time of payment, brings a loss upon his testator's estate, shall himself be liable, yet there are many objections to applying that principle to this case. The executor, who takes charge of the affairs of a man in trade, must necessarily, on the winding up of his affairs, be allowed a reasonable latitude of discretion, and in general, where there is manifest fidelity, diligence, and ordinary judgment displayed, this court will always with some reluctance enforce the rigid rules which courts have been obliged, for the protection of estates, to impose upon the conduct of executors. In the principal case the language of Thomas Bryant **43*** is by no means positive as to the consent of either the executor or executrix to this transaction. He says that he did it "after conferring with Mrs. Hare, and advising with Mr. Todd." But it does not follow that either of them assented because they were consulted, or that they did anything more than express an opinion on the expediency of the measure. Neither of them had then qualified, nor was it at all certain that they would qualify, and the only person then empowered to act on this subject was Bryant himself; who, by virtue of the assignment which he held, possessed a power which legally survived his principal. Under this assignment it was that the negotiation was effected, and not by virtue of any power derived to him from the supposed assent of the executrix. Moreover, admitting the consent of the executrix, it is still doubtful whether any change of security did in fact take place. For, Hustin still remained the debtor—the articles of agreement substituted for the original bond bear the aspect of the purchase of a bond rather than the relinquishment of an advantage; the greater part, if not the whole balance, of the original debt was also payable in tobacco; and if the loss finally sustained proceeded, as is probable, from the insolvency of the factor, and not the reduced value of the commodity,

this was by no means a necessary consequence of the change. Upon the whole, we are of opinion that the estate of Margaret Hare ought not in this mode, and upon the evidence now before us, to be charged with any part of Hustin's debt. For aught we know, Bryant may himself be liable for the whole, *by **44** means of his mismanagement in the agency, or it may be in the power of the defendants to prove such acts of the executrix as may amount to a *devastavit*. On these points we do not mean to express an opinion or prejudice the rights of the appellants; we only mean to decide that the evidence in this case is not sufficient to sustain this discount.

After having settled these principles, the decree below must be reversed, and the case remanded for such further proceedings as are necessary to carry into effect the views of this court. But as only five-sixths of the land are represented in this court, we can decree for only five-sixths of the balance of the bond. After applying to it the residuary personal estate, for the balance the complainant will have to pursue his remedy against Mary Dickinson, unless the representatives shall have the prudence voluntarily to join in any sales of land that may be made under this decree.

DECREE.—Whereupon it is ordered, adjudged, and decreed, that the decree of the Circuit Court of Pennsylvania District be reversed and annulled. And this court decrees: 1st. That the complainant, Thomas Y. Bryant, is entitled to recover of the estate of Andrew Hare the sum of five thousand dollars, with interest thereon, at six per centum per annum from the day of the death of the said Andrew. 2d. That the defendant, George Hunter, do pay to the complainant in the court below the balance in his hands of money of the estate of the said Andrew, with interest at the same rate from the day it was **45** demanded by the said complainant. 3d. That the complainant, after giving credit for the sum that shall be thus paid him by the said defendant, and all other sums received by the said Margaret in her life, or the complainant since her death, from, or on account of, the estate of the said Andrew, as well as the value of any part of the personal residue of the said Andrew's estate, which may have come to their, or either of their hands according to the date of such receipts, shall have the aid of the said Circuit Court to compel these defendants to raise by sale (if sufficient for that purpose) of their respective shares of the real estate of the said Andrew, descended to them, five-sixths of the balance that shall be computed to be due on the said bond, calculated as above directed. And, lastly, that the cause be remanded to the Circuit Court for further proceedings.

Decree accordingly.

Cited—8 *Cliff.* 162.

[COMMON LAW.]

DUVALL v. CRAIG ET. AL.

Variances between the writ and declaration are matters pleadable in abatement only, and cannot be taken advantage of upon general demurrer to the declaration.

A trustee is, in general, suable only in equity; but if he chooses to bind himself by a personal covenant he is liable at law for a breach thereof, although he describe himself as covenanting as trustee.

46*) *Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other persons, with an indemnity in lands of an equivalent value in case of eviction; it was held that these covenants were independent, and that it was unnecessary to allege in the declaration any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior incumbrance by the acts of the grantors, &c., and that the action might be maintained on the first covenant in order to recover pecuniary damages.

Where the grantors covenant generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances. No proof of a deed is necessary where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

An averment of an eviction under an elder title is not always necessary to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an elder title, it is equivalent to an eviction, and a breach of the covenant.

ERROR to the Circuit for the District Court of Kentucky.

The *capias ad respondendum* issued in this case was as follows: "The United States of America to the marshal of the Kentucky District, Greeting. You are hereby commanded to take John Craig, Robert Johnson, and Elijah Craig, if they be found within your bailiwick, and them safely keep so that you have their bodies before the judge of our District Court, at the capitol in Frankfort, on the first Monday in March next, to answer William Duvall, a citizen of the state of Virginia, of an action of covenant; damages fifty thousand dollars; and have then and there this writ. In testimony whereof, Harry Innes, Esq., judge of our said 47*) court, hath caused the *seal thereof to be hereunto affixed this 22d day of January, 1804, and of our independence the 28th. Thomas Turnstall, C. D. C."

Whereupon the plaintiff declared against John Craig, Robert Johnson, and Elijah Craig, in covenant, for that whereas, on the 28th day of February, 1795, &c., the said John, and the said Robert and Elijah, as trustees to the said John, by their certain indenture of bargain and sale, &c., did grant, bargain, sell, alien, and confirm unto the said plaintiff, by the name of William Duvall, of the city of Richmond and state of Virginia, his heirs and assigns forever, a certain tract of land lying and being in the state of Kentucky, &c., together with the improvements, water-courses, profits, and appurtenances whatsoever, belonging, or in any wise appertaining; and the reversion and remainder, and remainders and profits, thereof; and all the estate, right, title, property, and demand of them, the said John Craig, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, of, in, and to the same, to have and to hold the lands thereby conveyed with all and singular the premises, and every part and parcel thereof to the said William Duvall, his heirs and assigns forever, to the only proper use and behoof of him, the said William, his heirs and assigns forever; and the said John Craig, and Robert Johnson, and Elijah Craig, trustees to the said John Craig, for themselves,

Wheat, 2.

their heirs, executors, and administrators, did covenant, promise, and agree, to and with the said William Duvall, his heirs and assigns, that the premises before mentioned, *then [48 were, and forever after should be, free of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, titles, troubles, charges, and incumbrances whatsoever done, or suffered to be done by them, the said John Craig, and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, as by the said indenture will more at large appear. And the said William, in fact saith that the premises before mentioned were not, then and there, free of and from all former gifts, grants, bargains, sales, titles, troubles, charges, and incumbrances whatsoever done and suffered to be done by the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig. But, on the contrary, the said John Craig and Robert Johnson, therefore, to wit, on the 11th day of May, 1785, assigned the place and certificate of survey of said land to a certain John Hawkins Craig, by virtue of which said assignment, Patrick Henry, Governor of the Commonwealth of Virginia, granted the said land to said John Hawkins Craig, and his heirs forever, by letters patent, dated the 16th day of September, 1785, and now here shown to the court, the date whereof is the day and year aforesaid, which said patent to the said John Hawkins Craig, on the day and year first aforesaid, at the district aforesaid, was in full force and virtue, contrary to the covenant aforesaid, by reason of which said assignment, patent and incumbrance, the said William hath been prevented from having and enjoying all or any part of the premises above mentioned. *And there- [49 upon the said William further saith, that the defendants aforesaid, although often requested, have not kept and performed their covenant aforesaid, &c. To which declaration there was a general demurrer, and joinder in demurrer, and a judgment thereupon in the Circuit Court for the defendants.

The indenture referred to in the plaintiff's declaration is in the following words: "This indenture, made this 28th day of February, 1795, between John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, all of the state of Kentucky, of the one part, and William Duvall, of the city of Richmond, and state of Virginia, of the other part, witnesseth, that the said John Craig, for and in consideration of the sum of two thousand pounds, current money of Kentucky, to him, the said John Craig, in hand paid, the receipt whereof they do hereby acknowledge and forever acquit and discharge the said William Duvall, his heirs, executors, and administrators, have granted, bargained and sold, aliened and confirmed, and by these presents do grant, bargain and sell, alien and confirm, unto the said William Duvall, his heirs and assigns forever, a certain tract of land lying and being in the state of Kentucky, and now county of Scott, formerly Fayette, on the waters of the Ohio River, below the Big Bone Lick Creek, it being the same lands that the said John Craig covenanted by a writing obligatory, sealed with his seal, and dated the second day

of December, 1788, to convey to Samuel **50*** M'Craw, of the city of Richmond, *and which said writing the said Samuel M'Craw, on the back thereof, indorsed and transferred the same on the 27th day of February, 1789, to William Reynolds, and which is bounded as follows: Beginning at a poplar and small ash corner, to William Bledsoe, about thirty miles nearly a south course from the mouth of Licking; thence S. 15, E. 520 poles with the said Bledsoe's line, crossing four branches to an ash and beech; thence S. 75, W. 150 poles, to a hickory and beech; thence S. 15, E. 400 poles, crossing a branch to a sugar tree and beech, near a branch; thence S. 75, W. 87 poles, to three beeches, corner to Robert Sanders; thence with his line S. 15, E. 600 poles, crossing two branches to a poplar and sugar tree; thence S. 60 poles to a sugar tree and beech; thence W. 2,174 poles, crossing five branches to a large black walnut; thence N. 1, 580 poles, crossing a large creek and four branches to a sugar tree and ash; thence E. 2,008 poles, crossing five branches to the beginning; containing twenty thousand four hundred and forty acres, together with the improvements, water-courses, profits and appurtenances whatsoever to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, property, and demand, of them, the said John Craig and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, of, in, and to the same, to have and to hold the land hereby conveyed, with all and singular the premises and every part and parcel thereof, to the said William Duvall, his **51*** heirs and *assigns forever, to the only proper use and behoof of him, the said William Duvall, his heirs and assigns forever. And the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors, and administrators, do covenant, promise, and agree, to and with the said William Duvall, his heirs and assigns, by these presents, that the premises before mentioned now are, and forever after shall be, free of and from all former and other gifts, grants, bargains, sales, dower, right, and titles of dower, judgments, executions, title, troubles, charges, and incumbrances whatsoever done, or suffered to be done, by the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig. And the said John Craig and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, and their heirs, all and singular the premises hereby bargained and sold, with the appurtenances, unto the said William Duvall, his heirs and assigns, against him the said John Craig and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, and their heirs, and all and every person whatsoever, do and will warrant and forever defend with this warranty, and no other, to wit, that if the said land, or any part thereof, shall at any time be taken by a prior legal claim, or claims, that then and in such case they, the said John Craig and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, and their heirs, shall make good to the said William Duvall

*and his heirs, such part or parts so lost, **[*52]** by supplying to his the said William Duvall's use, other lands in fee of equal quantity and quality, to be adjudged of by two or more honest, judicious, impartial men, mutually chosen by the parties for ascertaining the same. In witness whereof the said John Craig and Sarah, his wife, and Robert Johnson, and Elijah Craig, trustees for the said John Craig, have hereunto set their hands and seals, the date first in this indenture written.

JOHN CRAIG. (L. s.)
 SARAH CRAIG. (L. s.)
 ROBERT JOHNSON,
 Trustee for John Craig. (L. s.)
 ELIJAH CRAIG.
 Trustee for John Craig. (L. s.)

Signed, sealed, and deliver- }
 ed in presence of }
 Charles W. Byrd.
 T. S. Threshly.
 Thomas Corneal.
 Christopher Greenup.
 Robert Saunders.
 James Taylor.
 Jos. Wiggleworth.
 George Christy."

B. Hardin, for the plaintiff, made the following points: 1. That the variance between the writ and declaration, as to the description of the parties, *was immaterial. Naming two of **[*53]** the defendants as trustees, is only *descriptio personae*, and could not alter the nature of the covenant. 2. Judgment was rightly rendered against the defendants in their individual capacity. 3. It was unnecessary to aver a demand and refusal of other lands of equivalent value as an indemnity, this covenant not being sued upon; and the action might be maintained upon the first covenant against incumbrances by the parties to the deed. 4. That the breach alleged in the declaration was sufficient. 5. That it was unnecessary to make profert of the assignment described in the breach.

Talbot, contra. 1. The variance between the writ and declaration is a substantial variance, and is therefore available on general demurrer. The parties, Robert Johnson and Elijah Craig, are not sued in their fiduciary character; but they are declared against as trustees to the said John, who is the *cestui que trust*, and could not be joined in an action at law with the trustees. They covenanted as trustees, and a court of equity is the proper forum in which they ought to be sued. 2. Having covenanted as trustees, no individual judgment could be rendered against them. 3. Supposing the trustees to be liable in their individual capacity, the two covenants in the deed are to be construed in connection; the clause as to an indemnity with other lands of an equivalent value, ought to be applied to both; and the declaration is fatally defective in not alleging a demand and refusal to indemnify with other lands. 4. The covenant, *on which the breach is assigned, **[*54]** is against the joint and not the several incumbrances of the parties to the deed. The incumbrance alleged is the act of two of the parties only. 5. There is no profert of the assignment to John Hawkins Craig, by which the incumbrance was created; nor is it shown to have

been made for a valuable consideration. 6. There is no averment of an eviction of the plaintiff under the assignment, which was absolutely necessary to sustain the action on the covenant against incumbrances.

M. B. Hardin, in reply. 1. The variance between the writ and declaration could only be taken advantage of by a plea in abatement. 2. As between a trustee and the *cestui que trust* a court of chancery is the only jurisdiction; but trustees may bind themselves individually so as to be amenable at law. The present case is not that of a covenant binding the trustees, only as to the trust fund in their hands, but they covenant for themselves, their heirs, executors, &c. The mere description as trustees, therefore, becomes immaterial. 3. The covenants are independent, and the action may be maintained to recover pecuniary damages, without alleging an eviction and demand of other lands of equivalent value. 4. Where there is any doubt, a covenant is to be construed most strongly against the covenanters; and in a case of this nature, the law considers an act done by one or more of the covenanters as a breach of the covenant. 5. No profit of the assignment was necessary, because the action [*55] was not founded upon it, nor was the plaintiff a party or privy to it; and the omission of profit was ground of special demurrer only.

Story, J., delivered the opinion of the court:

Several points have been argued in this case, upon which the opinion of the court will be now pronounced. In the first place, it is stated that a material variance exists between the writ and declaration, of which (being shown upon oyer) the court, upon a general demurrer to the declaration, are bound to take notice; and if so, it is fatal to the action. The supposed variance consists in this, that in the writ all the defendants are sued by their christian and surnames only; whereas, in the declaration, the deed on which the action is founded is averred to be made by the defendant, John Craig, and by the other defendants, Robert Johnson and Elijah Craig, "as trustees to the said John," and the covenant on which the breach is assigned, is averred to be made by the said John Craig, and Robert Johnson and Elijah Craig,

"trustees to the said John." The argument is, that the writ is founded upon a personal covenant, and the declaration upon a covenant in *auter droit*, upon which no action lies at law; or if any lies, the writ must conform in its language to the truth of the case. It is perfectly clear, however, that the exception, even if a good one, cannot be taken advantage of upon general demurrer to the declaration, for such a demurrer is in bar to the action; whereas, variances between the writ and declaration are matters pleadable in abatement only. [*56] But there is nothing in the exception itself. A trustee, merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law for a breach thereof in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words "as trustee" is but matter of description to show the character in which he acts for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal.¹

*The reasoning upon this point disposes, [*57] also, of the second made at the argument, viz., that the covenant being made by Robert Johnson and Elijah Craig, as trustees, no individual judgment can be rendered against them. It is plain that the judgment is right, and, indeed, there could have been no other judgment rendered, for at law a judgment against a trustee in such special capacity is utterly unknown.

Having answered these minor objections, we may now advance to the real controversies between the parties. It is contended that [*58] the two covenants in the deed are so knit together that they are to be construed in connection, so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants; and if so, then the action can

1.—Where a person acts as agent for another, if he executes a deed for his principal, and does not mean to bind himself personally, he should take care to execute the deed in the name of his principal, and state the name of his principal only, in the body of the deed. *White v. Cuyler*, 6 Term Rep. 176; *Wilkes v. Back*, 2 East, 142. The usual and appropriate manner is to sign the deed "A. B. by C. D., his attorney." If, instead of pursuing this course, the agent names himself in the deed, and covenants in his own name, he will be personally liable on the covenants, notwithstanding he describes himself as agent. There are numerous cases to be found in the books illustrative of this doctrine decided in the text. Thus in *Appleton v. Birks* (5 East, 140), where the defendant entered into an agreement, under seal, with the plaintiff, by the name of T. B. of, &c., "for, and on the part and behalf of the Right Honorable Lord Viscount Rokeby," and covenanted for himself, his heirs, executors, &c., "on the part and behalf of the said Lord Rokeby," and executed the agreement in his own name, it was held that he was personally liable on the covenant. So where a committee for a turnpike corporation contracted under their own hands and seals, describing themselves as a committee, they were held personally responsible. *Tibbets v. Walker*, 4 Mass. Rep. 556. So where a person signed a promissory note in his own name, describing him-

self as guardian, he was held bound to the payment of the note in his personal capacity. *Thatcher v. Dinsmore*, 5 Mass. Rep. 299; *Foster v. Fuller*, 6 Mass. Rep. 53; *Chitty on bills* (Story's Ed.) 40, note *Ibid.* So where administrators of an estate, by proper authority from a court, sold the lands of their intestate, and covenanted, in the deed "in their capacity as administrators," that they were seized of the premises, and had good title to convey the same; that the same were free of all incumbrances, and that they would warrant and defend the same against the lawful claims of all persons; it was held that they were personally responsible. *Sumner v. Williams*, 8 Mass. Rep. 162; *Thayer v. Wendall*, 1 Gallis, 37. In respect to public agents a distinction has been long asserted, and is now generally established; and, therefore, if an agent of the government contract for their benefit, and on their behalf, and describe himself as such in the contract, he is held not to be personally responsible, although the terms of the contract might, in cases of a mere private nature, involve him in a personal responsibility. *Macbeath v. Haldimand*, 1 Term Rep. 172; *Unwin v. Wolseley*, 1 Term Rep. 674; *Myrtle v. Beaver*, 1 East, 135; *Rice v. Shute*, 1 East, 579; *Hodgdon v. Dexter*, 1 Cranch, 363; *Jones v. Le Tombe*, 3 Dall. 384; *Brown v. Austin*, 1 Mass. Rep. 208; *Freeman v. Otis*, 9 Mass. Rep. 272; *Sheffield v. Watson*, 3 Calnes, 69.

not be sustained, for the declaration does not allege any eviction, or any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose that then the parties had provided a specific indemnity for a prior claim, they might mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist to authorize a court to adopt such a construction. The covenants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against the acts and incumbrances under the parties to the deed, which they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warranty against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one **59**] in which no judicial doubt could exist of the real intention of the parties to create such a restriction. It cannot be pronounced that such is the present case; and this objection to the declaration cannot, therefore, be sustained.

The remaining objections turn upon the sufficiency of the breach alleged in the declaration. It is contended that the covenant on which the breach is assigned is against the joint, and not the several acts and incumbrances of the parties to the deed, and that, therefore, the breach, which states an assignment by John Craig and Robert Johnson only, is wholly insufficient. It is certainly true that, in terms, the covenant is against the acts and incumbrances of all the parties, and the words "every of them" are not found in the deed. Some of the incumbrances, however, within the contemplation of the parties are not of a nature to be jointly created; as, for instance, the incumbrance of dower and title of dower. This very

strongly shows that it was the intention of the parties to embrace in the covenant several, as well as joint acts and incumbrances. There is also a reference in the premises of the deed to a covenant for a conveyance previously made by John Craig to Samuel M'Craw, against which it must have intended to secure the grantees; and if so, it fortifies the construction already stated. If, therefore, the point were of a new impression, it would be difficult to sustain the reasoning which would limit the covenant to the joint acts of all the grantors; and there is no authority to support it. On the contrary, *Meriton's* case, though stated with some difference by the several reporters, seems to us completely to sustain the position [**60**] that a covenant of this nature ought to be construed as including several, as well as joint incumbrances, and has certainly been so understood by very learned abridgers. (*Meriton's* case, Noy, 86; S. C. Popham, 200; S. C. Latch, 161; Bac. Abr. Covenant, 77; Com. Dig. Condition, [E].) This objection, therefore, is overruled.¹

*Another exception is, that there is no [**61**] profer of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception; and without deciding on others, it is a sufficient answer that the plaintiff is neither a party nor privy to the assignment, nor consensual of the consideration upon which it was made, and therefore is not bound to make a profer of it or show the consideration upon which it was made.

The last exception is, that the breach does not set forth any entry or eviction of the plaintiff under the assignment and patent to John Hawkins Craig: Assuming that an averment of an entry and eviction under an elder title be in general, necessary to sustain an action on a covenant against incumbrances (on which we give no opinion), it is clear that it cannot be always necessary. If the grantee be unable to obtain possession in consequence of an existing possession or seizin by a person claiming and holding under an elder title, this would certainly be equivalent to an eviction and a [**62**

1.—It may not, perhaps, be useless to the learned reader to state the substance of *Meriton's* case as given in the various reporters. In Noy's Reports, 86, the case is thus succinctly given: "A and B lease to M for years, and covenant that he may claim without disturbance, interruption, or incumbrance by them, and an obligation was made for performance, &c. A makes another lease to C, who enters, and M brought debt, &c., (on the obligation), and by the court, it is well, for the covenant is broken, and 'them' shall not be taken jointly only, but severally also. In Latch, 161, the case stands as follows: 'Debt upon an obligation. Two make a lease for years by indenture, and covenant that the lessee should not be disturbed, nor any incumbrance made by them; one of the lessors made a lease to a stranger, who disturbed, &c. The condition was to perform covenants. And it was agreed by Dodderidge, Jones, and Whitle, to be a breach of the condition, for 'them' shall not be taken jointly; but if either of them disturb the lessee, it is a breach of the condition.'" The case, therefore, as stated in both of these reports, is substantially the same. But in Popham's Reports, 200, it is reported somewhat differently. It is there stated to be an action of covenant, upon a covenant in an indenture between the plaintiffs and their lessors, whereby the lessors covenant to discharge them of all incumbrances done by them or any other person, and the

plaintiffs assign for breach that one of the lessors had made a lease. It was moved in arrest of judgment, that the breach was not well laid, "because it is only laid to be done by one of them, and the covenant is to discharge them of incumbrances done by them, which shall be intended joint incumbrances."

DODDERIDGE, J. The covenant goes as well to incumbrances done severally as jointly, for it is of all incumbrances done by them or any other person; and so was the opinion of all the other justices; and, therefore, the exception was overruled." From this last report, it would seem that the covenant was against incumbrances, not only of the lessors, but of other persons, and it might, at first view, be thought that some stress was laid by the court upon the last words. But upon a careful consideration, even supposing (what may well be doubted) that Popham's is the more correct report, it would not seem that the latter words, "any other person," could be properly held to embrace the lessees, or either of them; for "other" is used as exclusive "of them"; and, therefore, the cause must have turned substantially upon the import of the preceding words, "of them," i. e., whether embracing several as well as joint incumbrances. In this view all the reports are consistent, and put the case upon the real point in controversy.

breach of the covenant. In the case at bar the breach is assigned in a very inartificial and lax manner; but it is expressly averred that the assignment and patent to John Hawkins Craig was a prior conveyance, which was still in full force and virtue, "by reason of which said assignment, patent, and incumbrance, the said William (the plaintiff) hath been prevented from having and enjoying all or any part of the premises above mentioned." We are all of opinion that upon general demurrer this must be taken as an averment, that the possession of the premises was legally withheld from the plaintiff by the parties in possession, under the prior title thus set up.¹

Judgment reversed.

Cited—6 Wheat. 118, (n); 1 How. 247; 8 Otto. 59; 2 Blatchf. 33; 10 Blatchf. 529; Deady, 372; 1 Bald. 422; 1 McLean. 320; Hemp. 234.

66*]

*[COMMON LAW.]

COOLIDGE ET AL. v. PAYSON ET AL.

A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.

THIS cause was argued by *Swann* for the plaintiff in error, and by *Winder* for the defendant.

1.—The usual covenants in conveyances of real property by the grantor are, that he is lawfully seized in fee of the premises; that he has good right and title to convey the same; that they are free of all incumbrances; that the grantor, his heirs, &c., will warrant and defend the same to the grantee, his heirs, &c., against the lawful claims of all persons. The manner of assigning breaches upon these covenants deserves the attention of all persons who aspire to a reasonable knowledge of the duties of special pleaders. In case of the covenants of seizin and of good right and title to convey, it is sufficient to allege the breach by negating the words of the covenant. *Bradshaw's case*, 9 Co. 60 b. 8; *C. Cro. Jac.* 304; *Lancashire v. Glover*, 2 Shower, 460; 2 *Saund.* 181, note (a), by Mr. Sergeant Williams; *Greenby v. Wilcocks*, 2 Johns. R. 1. *Sedgwick v. Hollenback*, 7 Johns. R. 376; *Marston*

MARSHALL, Ch. J., delivered the opinion of the court:

This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants *in [*67 the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the *Hiram*, claimed by Cornthwaite & Cary, which had been captured and libeled as lawful prize. The cargo had been acquitted in the district and circuit courts, but from the sentence of acquittal, the captors had appealed to this court. Pending the appeal Cornthwaite & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore with scrolls in the place of seals, and drew on them for two thousand seven hundred dollars. This bill was

v. Hobbs, 2 Mass. R. 433; *Bender v. Fromberger*, 4 Dall. 436; *Pollard v. Dwight*, 4 Cranch. 421. The covenant for quiet enjoyment is not broken, unless some particular act is shown by which the plaintiff is interrupted; and, therefore, it is necessary to set forth in the breach, assigned in the declaration, an actual eviction or disturbance of the possession of the grantee. *Francis's case*, 8 Rep. 91, a; 6 Anon. Com. R. 223; 2 *Saund.* 181, note; *Waldron v. McCarty*, 3 Johns. R. 471; *Kortz v. Carpenter*, 5 Johns. R. 120. *And where the eviction or disturbance is by a stranger, it is further necessary to allege that the eviction was by a lawful title. *Holden v. Taylor*, Hob. 12; *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. The E. I. Company*, 8 T. R. 281; *Greenby v. Wilcocks*, 2 Johns. R. 1; *Follard v. Wallace*, 2 Johns. R. 305; *Kent v. Welsh*, 7 Johns. R. 258; *Vanderkaar v. Vanderkaar*, 11 Johns. R. 122;

NOTE.—A letter or written promise to the drawer to accept a non-existing bill, which is communicated to a third party, and induces him to take the bill, is the same as an actual acceptance. *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 111; *Mason v. Hunt*, 1 Doug. 29; *Wilder v. Savage*, 1 Story, C. C. 22; *Russell v. Wiggin*, 2 Story, C. C. 214; *Vance v. Ward*, 2 Dana. 86; *Kennedy v. Geddes*, 8 Porter, (Ala.) 238; *Kendick v. Campbell*, 1 Bailey, 552; *Goodrich v. Gordon*, 15 John. 11; *Greele v. Parker*, 5 Wend. 514; *Storer v. Logan*, 9 Mass. 58; *Wilson v. Clements*, 3 Mass. 10; *Gates v. Parker*, 43 Me. 544; *Steman v. Harrison*, 42 Penn. St. 55; *Ogden v. Gillingham*, 1 Baldw. 45; *Bayard v. Lathy*, 2 McLean, 462; *Miltinberger v. Cook*, 18 Wall. 421.

A telegram has the same effect as a letter. *Central Sav. Bk. v. Richards*, 109 Mass. 414.

A verbal promise to accept a non-existing bill, which is communicated to the holder and induces him to take it, does not amount to an acceptance of it. *Bank of Ireland v. Archer*, 11 Mees. & W. 383; *Kennedy v. Geddes*, 8 Porter, (Ala.) 238.

A verbal promise to accept, not communicated to

the holder, is no acceptance. *Johnson v. Collings*, 1 East. 98; *Bk. of Mich. v. Ely*, 17 Wend. 508; *Wilson v. Clements*, 3 Mass. 10.

In order that the promise to accept a non-existing bill shall amount to an acceptance, it must be drawn within a reasonable time before the bill was drawn, and it must so describe the bill that there can be no doubt of its application to it. *Cassel v. Dons*, 1 Blatchf. C. C. 335; *Boyce v. Edwards*, 4 Pet. 111; *Schimmelpennich v. Bayard*, 1 Pet. 264; *Carrollton Bk. v. Tayleur*, 18 La. O. S. 400.

In New York the written promise to accept need not contain a particular description or identification of the bill to be drawn. It is enough that it be drawn in pursuance of the authority. *Clater County Bk. v. McFarland*, 5 Hill. 434; 3 Denio. 553; *Parker v. Greele*, 2 Wend. 545; *Greele v. Parker*, 5 Wend. 414; *Bk. of Mich. v. Ely*, 17 Wend. 508; *Nelson v. First Nat. Bk.*, 48 Ill. 39.

The rule that the promise to accept amounts to an acceptance, is not applicable to bills payable at or after sight. *Story on Bills*, sec. 248; *Edwards on Bills*, 414; *Wildes v. Savage*, 1 Story, C. C. 28; *Mich. St. Bk. v. Leavenworth*, 25 Vt. 208.

Wheat. 2.

185

also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co. and protested for non-acceptance. After its protest Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say: "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which

he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for two thousand dollars will be honored."

On the same day Coolidge & Co. addressed a letter *to Mr. Williams, in which, after [*68 referring to him the question respecting the legal obligation of the scroll, they say: "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which, we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

Marston v. Hobbs, 2 Mass. R. 423. But it is not necessary to allege the eviction to be by legal process. 2 Saund. 181, note; Foster v. Pierson, 4 T. R. 617, 620. And where the covenant is that the grantee shall enjoy, without the interruption of the grantor himself, his heirs, or executors, it is held to be a sufficient breach to allege that he or his heirs or executors entered, without showing it to be a lawful entry or setting forth his title to enter. Lloyd v. Tomkies, 1 T. R. 671, and cases cited 2 Saund. 181, note; Sedgwick v. Hollenback, 7 Johns. R. 376. The covenant of general warranty is governed by the same rules; for the grantee must assign as a breach an ouster or eviction by a paramount legal title. Greenby v. Wilcocks, 2 Johns. R. 1; Folliard v. Wallace, 2 Johns. R. 365; Kent v. Welsh, 7 Johns. R. 258; Sedgwick v. Hollenback, 7 Johns. R. 376; Vanderkaar v. Vanderkaar, 11 Johns. R. 122; Marston v. Hobbs, 2 Mass. R. 423; Emerson v. Proprietors of Minot, 2 Mass. R. 484; Bearce v. Jackson, 4 Mass. R. 408. In respect to the covenant against incumbrances, it seemed admitted by Chief Justice Parsons, in Marston v. Hobbs, 2 Mass. R. 423, that there was no authority directly in point; but he held, that in principle it was analogous to a covenant for quiet enjoyment; and said, that in the entries, the incumbrance is specially alleged in the count. See also Bickford v. Page, 2 Mass. R. 455. It does not, however, seem necessary to allege an ouster or eviction, on the breach of a covenant against incumbrances; but only to allege the special incumbrance as a good and subsisting one. Prescott v. Trueman, 4 Mass. R. 629. And a paramount title subsisting in a third person, is an incumbrance within the meaning of the covenant. Prescott v. Trueman, 4 Mass. R. 627. So a public town way is, in legal contemplation, an incumbrance on the land over which it is laid. Kellogg v. Ingersoll, 2 Mass. R. 87; see Ellis v. Welsh, 8 Mass. R. 246.

There is some diversity of opinion as to the damages recoverable upon a breach of these several covenants. Upon the covenants of seizin, and of good right and title to convey, it is held by the courts of New York and Pennsylvania that the grantee is entitled to the purchase money and interest [*64] terest from *the time of the purchase. Staats v. Ten Eyck's executors, 3 Caines, 111; Pitcher v. Livingston, 4 Johns. R. 1; Bender v. Fromberger, 4 Dall. 441. The same rule has been adopted in Massachusetts. Bickford v. Page, 2 Mass. R. 455; Marston v. Hobbs, 2 Mass. R. 423; Caswell v. Wendell, 4 Mass. R. 108. But if the grantee has actually enjoyed the lands for a long time, the purchase money and interest for a term not exceeding six years prior to the time of eviction is given; for the grantee, upon a recovery against him, is liable to account for the mesne profits for that period only. Staats v. Ten Eyck's executors, 3 Caines, R. 111; Caulkins v. Hams, 9 Johns. R. 224; Bennet v. Jenkins, 13 Johns. R. 50. As to the covenant against incumbrances, it seems generally held that the grantee is entitled to nominal damages only, unless he extinguish the incumbrance; and if he extinguish it for a reasonable and fair price, he is entitled to recover that sum with interest from the time of payment. Delavergne v. Norris, 7 Johns. Rep. 358; Hull v. Dean, 13 Johns. Rep. 106; Prescott v. Freeman, 4 Mass. Rep. 627. And the costs, if any, to which he has been put by an action against him on account of the incumbrance. Waldo v. Long, 7 Johns. Rep. 173. In respect to the covenant for quiet enjoyment and of general warranty, the rule of damages adopted in New York and Pennsylvania is to give the purchase money with interest

and the costs of the prior suit; but no allowance is made for the value of any improvements. Staats v. Ten Eyck's executors, 3 Caines, 111; Pitcher v. Livingston, 4 Johns. Rep. 1. Spencer, J. dissenting. Bennet v. Jenkins, 13 Johns. Rep. 50; Bender v. Fromberger, 4 Dall. 441. The same rule has been adopted in Tennessee. 5 Hall's American Law Journ. 330. But, in relation to covenants of warranty, the courts of Massachusetts have adopted a different rule, and allow the damages, or, in other words, the value of the property at the time of eviction. Gore v. Brazier, 3 Mass. Rep. 523. And the same rule appears to be adopted in South Carolina. Liber et ux. v. Parsons, 1 Bay, 19; Guerard's executors v. Rivers, 1 Bay, 265. And in Virginia. Mills v. Bell, 3 Call, 326; Humphrey's administrators v. McClenachan's administrators, 1 Munt. 493. And in Connecticut. Horsford v. Wright, Kirby, 3. Where there is a failure of title, as to part only of the land granted, it has been held that the grantee cannot recover back the whole consideration money. If the title has failed as to an undivided part of an entire tract, the grantee is entitled to a like proportion of the consideration; but if it be of a *specific proportion of the tract, the damages [*65 are to be apportioned according to the measure of value between the land lost and the land preserved; that is, the portion of the consideration money to be recovered is to be in the same ratio to the entire consideration that the value of the part, as to which the title has failed, is to the value of the whole tract. Morris v. Phelps, 5 Johns. Rep. 40.

In respect to these covenants running with the land, it has been held in New York and Massachusetts, that if the grantor be not seized, at the time of conveyance, the covenant of seizin is immediately broken, and no action can be brought by the assignee of the grantee against the grantor; for after the covenant is broken, it is a chose in action, and incapable of assignment. Greenby v. Wilcocks, 2 Johns. Rep. 1; Bickford v. Page, 2 Mass. Rep. 455. But in a recent case in England, a different doctrine was held; and it was adjudged that such a covenant runs with the land, and though broken in the time of a testator, is a continuing breach in the time of his devise, and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. Kingdon v. Noble, 4 Maule & Selw. 53; and see Kingdon v. Noble, 1 Maule & Selw. 355; Chamberlain v. Williamson, 2 Maule & Selw. 408; King v. Jones, 5 Taunt. 418; S. C. 1 Marshall's Rep. 107.

By the Roman law, and the codes which have been derived from it, in case the vendee is evicted he has a right to demand of the vendor. 1st. The restitution of the price. 2d. That of the fruits, or mesne profits, in case the vendee has been obliged to account for them to the owner. 3d. The costs and expenses incurred both in the suit on the warranty and the prior suit of the owner, by whom the vendee has been evicted. 4th. Damages and interest with the expenses legally incurred. Pothier, De Vente, Nos. 118, 123, 128, 130; Code Napoleon, Liv. 3, tit. 6, art. 1630, De La Vente. The vendee has likewise a right to recover from the vendor, not only the value of all improvements made by the former, but also the increased value, if any, which the property may have acquired independently of the acts of the purchaser. 1 Domat, 77, sec. 15, 16; Pothier, De la Vente, Nos. 132, 133; Code Napoleon, Liv. 3, tit. 6, art. 1653, 1654, De la Vente. Digest of the Civil Laws of Louisiana, 355.

In his answer to this letter, Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co. in part of the protested bill of \$2,700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution as to the sufficiency of the obligors to pay the same, and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him.

To this charge, the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Cary contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for his instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from

Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose v. Van Mierop & Hopkins* (8 Burr, 1663), the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under the consideration of the court, no essential distinction is perceived. But it is contended that the authority of the case of *Pillans & Rose v. Van Mierop & Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.* (Cowp., 571), the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion contradict those laid down in *Pillans & Rose v. Van Mierop & Hopkins*. His lordship observes: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of *Pillans & Rose v. Van Mierop & Hopkins* had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of *Pierson v. Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn was bound by his promise, either because he had funds of the drawer in his hands or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued that those circumstances to which Lord Mansfield alludes must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," &c. The answer must be "accompanied with circumstances;" but it is not said that the answer must contain those circumstances. In the case

of *Pierson v. Dunlop*, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt* (Doug., 296), Lord Mansfield said: "There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other person, may 73*] show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another v. Collins* (1 East, 98), Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. 74*] In the case of *Johnson v. Collins* the

promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield, in the case of *Pierson v. Dunlop*; and Lord Kenyon said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clark and others v. Cock* (4 East, 57), the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of *Clark v. Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in *Pillans & Rose* [*75 v. *Van Mierop & Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

*Judgment affirmed.*¹

Cited—1 Pet. 264; 4 Pet. 121, 122; 16 Pet. 20; Story, 27, 414; 2 Story, 237, 240; 1 Woods, 534; 1 Bald. 44, 45; 2 McLean, 503; 1 Blatchf. 340; 2 Wood. & M. 288.

1.—By the French law, the acceptance of a bill of exchange must be in writing, and signed by the party accepting it. Ordonnance de 1673, tit. 5, art. 2. Code de Commerce, liv. 1, tit. 8, art. 122. It appears by the discussions in the council of state in drawing up the new Commercial Code, that no provision requiring the acceptance to be written on the bill itself was inserted, in order to avoid a mistaken inference which might be drawn from it that the law meant to prohibit the acceptance of a bill by a letter promising to accept (par lettre missive.) "L'acceptation est ordinairement donnée

sur la lettre de change même; mais beaucoup d'auteurs étrangers, et surtout les docteurs Hollandais, Allemands, et Espagnols, pensent qu'elle peut aussi être donnée par lettre missive. Cette opinion a été adoptée par le conseil d'état, et se trouve consacrée par l'article qui nous occupe. En l'art. 76, effet, d'un côté, il a évité de dire dans cet article que l'acceptation serait donnée sur la lettre de change, de peur de paraître établir une règle absolue de laquelle on se serait fait une fin non-recevoir contre l'acceptation par lettres missives. D'un autre côté, le conseil a pensé que, puisque la loi

[PRIZE.]

THE DOS HERMANOS—GREEN, Claimant.

In prize causes, the evidence to acquit or condemn must come, in the first instance, from the papers and crew of the captured ship.

It is the duty of the captors to bring the ship's papers into the registry of the District Court, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories.

77* "It is exclusively upon these papers and examinations that the cause is to be heard in the first instance: If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows. If the property appears to be doubtful, or the case suspicious, further proof may be granted according to the rules which govern the legal discretion of the court.

If the parties have been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed, and condemnation follows.

Although some apology may be found in the state of peace which had so long existed previous to the late war, for the irregularities which had crept into the prize practice, that apology no longer exists; and if such irregularities should hereafter occur, it may be proper to withhold condemnation even in the clearest cases, unless the irregularities are avoided or explained.

If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.

It seems that where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicile, and afterwards returned to the United States during the war and re-acquired his native domicile, he became a reintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicile by again emigrating to his adopted country.

The claimants have no right to litigate the question whether the captors were duly commissioned; the claimants have no *persona standi in judicio* to assert the rights of the United States. But if the capture be made by a non-commissioned captor, the prize will be condemned to the United States.

APPEAL from the District Court for the Louisiana District.

This was the case of a Spanish schooner captured on the 18th of October, 1814, by Mr. Shields, a purser in the navy, commanding an armed barge, in the service of the United States, ostensibly bound with a cargo of crates and dry goods, on a voyage from Jamaica to 78* Pensacola, but in fact in pursuance of an asserted change of destination then in prosecution of a voyage to New Orleans. The schooner was delivered up, and prize proceedings were instituted against the cargo in the District Court for Louisiana District. Upon the return of the monition various claims were interposed for small adventures or parts of the cargo; but the only questions before the court arose upon the claim of Mr. Basil Green, calling himself a citizen of the Republic of Car-

thagena, who, by his agents, Mr. John F. Miller and Messrs. Lewis & Lee, asserted an ownership to nearly the whole of the cargo. Mr. Miller, in his affidavit annexed to the claim, states, "that he purchased the goods so claimed, with moneys in his hands belonging to the claimant; that at the time of the purchase, he expected to have had an interest therein, but that on his arrival at New Orleans, the attorney in fact of the said claimant (meaning Mr. Lewis) refused to allow any such interest, and the deponent is therefore obliged to give up the same; and this deponent further saith, that the facts contained in the said claim are true to the best of his knowledge, information, and belief." At the hearing in the District Court, the claim was rejected, and the goods were condemned as the property of enemies, or of citizens trading with the enemies of the United States.

Harper, for the appellant and claimant, argued, upon the facts, that the proprietary interest in the cargo was in the claimant, and that he (though a native citizen) had a right to change his domicile, and did change it *bona fide* to Carthagena, in South America, where he was a resident merchant, and in his [*79 neutral character had a right to trade with the enemy of his native country.¹ He further suggested that the captor was not duly authorized to capture, there being no evidence that the armed barge, which made the capture, was duly incorporated into the navy.²

Key, contra, argued that the residence of the claimant at Carthagena was temporary only, and that the whole transaction was infected with fraud and falsehood.

STORY, J., delivered the opinion of the court:

Before we consider the merits of this claim it may not be unfit to advert to some of the principles applicable to proceedings in prize causes, which seem to have been wholly neglected in the progress of this cause.

It is the established rule in courts of prize that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship. On this account it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the District Court, and to have the examinations of the principal officers and [*80 men of the captured ship taken before the district judge, or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examin-

1.—1 Wheat. 65, note (9).

2.—5 Rob. 41, *The Mellommasne*; *Id.* 252, *The Charlotte*; *Id.* note (a), *The Island of Curacao*, &c.

n'exclut pas l'acceptation par lettre missive, on en concluroit naturellement qu'elle la permet." *Esprit du Code de Commerce*, par J. G. Locré, tom. 2, p. 29.

Such is the law of France on this subject. That of England is fully analyzed in the above opinion. In the tribunals of our own country, the first case which occurs on the subject, is that of *M'Kim v. Smith et al.* 1 Hall's Law Journal, 486, in which the doctrine of the above opinion is fully recognized. The next is that of *M'Evers v. Mason*, 10 Johns. Rep. 257, in which a more limited application of the principle may seem to be indicated. But upon an inspection of that case, it will be found that the

Wheat. 2.

Supreme Court of New York declined expressing any opinion upon the question whether a promise to accept a bill not in *case* would amount to an acceptance, and whether an indorsee could avail himself of such promise and maintain an action on the bill against the drawee. The Supreme Court of Massachusetts also, in the case of *Wilson v. Clements*, 3 Mass. Rep. 1, avoided a determination of the question whether a promise to accept before the bill was drawn amounted to an acceptance, because the bill was not drawn in due season after the promise was made. But the above decision in the text may be considered as settling the law of the country on this subject.

ations, taken *in preparatorio*, that the cause is to be heard before the District Court. If, from the whole evidence, the property clearly appears to be hostile, or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject. Further proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character. It is essential, therefore, to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness; and it is a great mistake to allow common law notions in respect to evidence or practice, to prevail in proceedings which have very little analogy to those at common law.

These remarks have been drawn forth by an examination of the present record. The court could not but observe with regret that great irregularities had attended the cause in the court below. Neither were the ship's papers produced by the captors, nor the captured crew examined upon the standing interrogatories. Witnesses were produced by the libelants and the claimant indiscriminately at the trial, and their testimony was taken in open court upon any and all points to which the parties chose to interrogate them, and upon this testimony and the documentary proofs offered by the witnesses, the cause was heard and finally adjudged. In fact there was nothing to distinguish the cause from an ordinary proceeding in a mere revenue cause *in rem*.

This court cannot but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings, and the rights and duties of the parties. Some apology for them may be found in the fact that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists; and if such irregularities should hereafter occur it may be proper to adopt a more rigorous course, and to withhold condemnation in the clearest cases, unless such irregularities are avoided or explained. In the present case the first fault was that of the captors; and if the claimant had suffered any prejudice from it, this court would certainly restore to him every practicable benefit. But in fact no such prejudice has arisen. The claimant has had, in the court below, the indulgence and benefit of further proof and of collateral aids to verify the truth of his claim; and he stands at least upon as favorable a ground to sustain it as if the cause had been conducted with the most scrupulous form.

Two questions have been argued at the bar: 82*] First, *whether Mr. Basil Green, the asserted owner, has established his proprietary interest in the goods in question; and, second, supposing this point decided in his favor, whether he has proved himself a neutral mer-

chant, entitled, by his domicile and national character, to a restitution of the property.

It appears by the evidence in the case that Mr. Green was born in Maryland, and resided in that state, and principally at Baltimore, until the year 1809, when he went abroad. In 1811 he resided in Carthagena; and in the spring of 1813, he came to New Orleans from Carthagena, in a schooner under Carthaginian colors, and being unable to sell her, he determined, in connection with Messrs. John F. Miller, Lewis & Lee, and others, inhabitants of New Orleans, who became jointly interested with him, to fit her out as an American privateer. Accordingly, on or about the 13th of March, 1813, Mr. Green applied to the collector of the customs at New Orleans for a commission; and in his petition he described her as the private armed schooner *Hornet*, of New Orleans, owned by Basil Green. The commission was granted, and soon afterwards Mr. Green sailed in the privateer on her destined cruise. In June, 1813, he was, as he alleges, compelled by a mutiny of the crew to go to Carthagena, where they deserted, and the cruise was broken up, and the privateer was finally sold; of all which he gave information to the other owners at New Orleans, and promised to remit their proportions of the proceeds. While at New Orleans in April, 1813, Mr. Green executed a letter of attorney, appointing Messrs. Lewis & [83] Lee, of that city, his general attorneys and agents, and in this power he described himself as "Basil Green, of Baltimore, merchant." He does not appear, since that period, to have returned to the United States. In July, 1814, he was a resident at Carthagena, and is described by one other witness as having a house and store there. Such are the most material facts respecting Mr. Green's domicile apparent on the record.

In respect to the proprietary interest in the goods claimed by him, the evidence is more complicated. The whole adventure was conducted by Mr. John F. Miller, of New Orleans (one of the proprietors of the *Hornet*), from whose testimony it appears that the owners of the *Hornet*, resident at New Orleans, having received information of her sale, and being desirous of receiving their funds, he, Miller, on his own account, and as their agent, determined to make a voyage to Carthagena for this purpose. He accordingly in June, 1814, went from New Orleans to St. Jago de Cuba, and from thence to Jamaica (as the only practicable route), and from thence to Carthagena. When he left New Orleans, he took a draft from Messrs. Lewis & Lee on Mr. Green for \$2,500, and a letter from the same gentlemen to Messrs. O'Hara & Offley, merchants at Jamaica, authorizing them to pay him the balance of their accounts, whatever it might be. At Carthagena, in August, 1814, he received from Mr. Green the sum of \$1,500.50, in part of the draft of Messrs. Lewis & Lee. He also received from Mr. Green the whole of the net proceeds of the sale of the [84] *Hornet*, amounting to the sum of \$11,636. of which his own share amounted to \$1,500, and that of Mr. Green to \$4,139.02; and he gave a receipt to Mr. Green for this amount, promising, on his arrival at New Orleans (sea risks and captures excepted), to pay over to the stock-

holders their respective proportions, deducting all necessary charges. Mr. Green directed his share to be remitted to his nephew at Baltimore, by written instructions contained in a letter directed to Mr. Miller, as follows: "Carthagena, August 12, 1814, Mr. John F. Miller. My dear sir—On your safe arrival in New Orleans, sea risks and captures excepted, you are authorized and appointed, at my wish, in which you will please to remit on to my nephew, Mr. George A. Stamp, of Baltimore, the sum of \$4,129.02, after deducting the charges thereon, and you will much oblige your friend—Respectfully—B. Green." On the 29th of August Mr. Green addressed a letter to his nephew, in the following paragraph: "Mr. John F. Miller, a particular friend of mine, will remit on to you, in good bills, after his safe arrival in New Orleans, the sum of \$4,129.25, agreeable to his receipt on the same, now in my possession. Perhaps he may remit you a \$1,000 or \$1,500 more, if fortune favors his prospects." At what period Mr. Miller left Carthagena, does not precisely appear, but he says that he thinks it was before the 20th of August and that the letter of the 29th of August was sent [85*] to him at Jamaica. Previous *to his departure, he further asserts that Mr. Green gave him verbal instructions to lay out his share of the money in goods, at Jamaica, instead of remitting it to his nephew, and also by a written authority, under date of the 12th of August, authorized him, if he thought proper, to draw on him for the further sum of \$2,500, at five days sight. From Carthagena, Mr. Miller went to Jamaica, where he endeavored to purchase a small vessel; but failing in his object, he, on the 9th of September, 1814, chartered the Spanish schooner *Dos Hermanos*, Captain Delgado master and owner, then lying at Kingston. By the charter-party, which was made by Messrs. O'Hara & Offley, on behalf of the owner of the one part, and Mr. Miller of the other part, it was agreed that the sum of \$1,500 should be given for the charter of the vessel for a voyage from Kingston to Pensacola, in West Florida, and back again to Kingston. That after her arrival at Pensacola, Mr. Miller should put on board, within 18 days, a return cargo of the produce of the country, to be consigned to Messrs. O'Hara & Offley for sale; and should further invest the amount of the freight in cotton or tobacco, on account of Mr. Delgado, and ship it on the return voyage, freight free, unless it occupied more than a stipulated portion of the room of the vessel. Mr. Miller was further to pay all port charges, and in case of detention beyond 18 days, demurrage, also, at the rate of \$16 per day. And it was further agreed that if the situation of that part of the world should be such as to preclude any communication between New Orleans and Pensacola, *and prevent Mr. Miller from procuring a full return cargo or as much cotton and tobacco as should be required for the amount of the charter, then the said amount of \$1,500 was to be paid over on account of the said O'Hara & Offley, to Mr. John K. West, of New Orleans; and in that event, and payment of all port charges, Miller was to be at liberty to decline loading the vessel on the return voyage. Immediately after the execution of this charter-party, Mr. Miller loaded on board Wheat. 2.

of the schooner the goods in question, through the agency of Messrs. O'Hara & Offley; and drew a bill for \$2,500 in their favor, on Mr. Green, and received from them, for the account of Messrs. Lewis & Lee, the sum of \$900. The whole cargo, with an inconsiderable exception, was documented as the property of a Don Juan Lesado, of Pensacola, and purported to be the proceeds of the sale of a former cargo consigned by him to Messrs. O'Hara & Offley. Among these documents, which are asserted by the claimant to be merely colorable, there is an invoice account current of the sales of a supposed former cargo; and a letter of advice, stating that the schooner was chartered for the voyage on account of Don Juan Lesado, and that the cargo, consisting of dry goods, was a return cargo purchased by his orders. There is, also, a bill of lading consigning the cargo to the same person. Mr. Miller alleges this artifice to have been resorted to to preserve the shipment from British and Spanish capture. The schooner sailed on the voyage about the 13th of September, with Mr. Miller on board, and *having been driven by currents consider- [*87] ably to the westward of Pensacola, and being in the Bay of St. Bernard, Mr. Miller left the schooner about the first of October, in a boat, which he had purchased at Jamaica, for the purpose, and proceeded for New Orleans, leaving the property under the control and directions of a Mr. Bassett, who was a passenger on board. On the 18th of October, Mr. Miller arrived at New Orleans. In the meantime the schooner proceeded to Dauphin Island, and there Mr. Bassett undertook (as he alleges) to change the destination, and determined to proceed to New Orleans; and, for this purpose, on the 14th of October, 1814, he entered into a new charter-party in behalf of Mr. Miller, by which it was agreed between Mr. Bassett, as agent of Mr. Miller, and Captain Delgado for himself and Messrs. O'Hara & Offley, that for the additional sum of \$1,100, the vessel should immediately proceed from Dauphin Island for the Bayou St. John, near the city of New Orleans, and there deliver the said cargo to Mr. Miller, his agents or assigns. The schooner was soon afterwards captured by the libelants, detained in the Bay of St. Lewis, and subsequently brought to Petit Coquille. After his arrival at New Orleans, and before knowledge of the capture, Mr. Miller wrote the following letter to Mr. Bassett: "New Orleans, 15th of October, 1814. Dear sir:—I arrived here on the 15th in the morning, after 12 days' suffering, and found all my family as well as could be expected from the situation of this place and Pensacola. I have thought proper to remain *without doing anything until I hear of [*88] your arrival, and news from you. I would advise, by all means, to fetch the vessel and cargo to Mobile point, if no farther, if possible. I believe it can be done without much or no danger. I believe, also, it is practicable to procure a permission from the English commander to come to New Orleans with the schooner, provided you promise to return with provisions that they stand in need of. Try every means in your power to effect the arrival here of yourself and schooner. Should you get the schooner here, I shall meet a ready sale for the crockeryware, and the schooner a

ready dispatch. Blankets sell readily at nine dollars per pair. Try and make arrangements with Delgado to fetch the schooner here, as it is certainly greatly to his advantage as well as ours. I depend upon your known activity, and remain your friend. In haste, the vessel is about to sail.

(Signed)

JOHN F. MILLER.

P. S. All those pirates are destroyed at Barataria. Tobacco, best quality, six cents, dull.

(Signed)

MILLER.

I have not time to write to Delgado, but will next opportunity. Should you not have consigned the schooner and cargo to any person, you may place any confidence in Mr. Joseph Moreiga, as I know him well."

Mr. Miller asserts that he brought a considerable sum of money in dollars and doubloons from Jamaica, of which he took \$4,500, when he left the schooner, in the boat, for New Orleans, and the residue, amounting to about \$1,800 or \$1,900, which was stored away in several ~~89~~* crates of goods, he afterwards contrived to obtain from the schooner in the night time while she lay at Petit Coquilles. All the letters brought in the schooner from Jamaica were taken by Mr. Miller, and all the documents respecting the cargo came from his hands during his several examinations in court.

Such is the general outline of the case, as to the question of proprietary interest in the goods claimed in behalf of Mr. Green. An examination of some other minute, though important particulars, will properly arise in the subsequent discussion of this question.

The first thing that strikes us on the slightest survey of this cause, is the total absence of all documentary proof to establish the claim of Mr. Green. The shipment was made in the enemy's country in the name of an enemy, and ultimately destined for sale at Mobile or New Orleans, if the parties should be able to accomplish the voyage. The property was clothed with a Spanish character, as Mr. Miller asserts, to protect it from British and Spanish capture. It is certainly the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property, and if their conduct be fair and honest, there can rarely occur an occasion to use disguise, or false documents. At all events, when false or colorable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it. To say the least of it, the excuse is not, in this case, satisfactory; for the disguise is as strongly pointed to elude ~~90~~* American as British or Spanish capture. It is not pretended that any genuine papers were put on board, or are now in existence, which would explain the circumstances; for Mr. Miller, himself, in an answer to an interrogatory on this point, says he had from Mr. Green no written instructions, nor did he enter into a written contract with Mr. Green respecting the goods to be purchased at Jamaica; that Mr. Green would have given written instructions, but he, Mr. Miller, objected to it, as in case of capture it would have been insecure. He adds that there are no letters or papers at Carthagena that can throw any light on this

subject, and that not having received any, he was unwilling to leave any.

In the next place, there is not, with the exception of Mr. Miller's, the slightest testimony from the ship's crew that the property belonged to Mr. Green. The master and mate of the schooner, and Mr. Bassett also, the agent of Mr. Miller, expressly state that they always believed Mr. Miller to be the real owner, and that he never named any other person to them as the owner, though he sometimes alluded darkly to a possible ownership in others. It is a general rule of the prize law not to admit claims which stand in entire opposition to the ship's papers, and to the preparatory examinations, where the voyages have originated after the war. The rule is founded upon this simple reason, that it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The rule, however, is not inflexible; it yields to cases of necessity, or where, *by the [~~91~~* course of the trade, simulated papers become indispensable, as in a trade licensed by the state with the public enemy. It may be said that the rule cannot be applied to the present case, because Mr. Miller is to be deemed one of the ship's crew, although he had, some time before the capture, left the vessel, and was, at the time of capture, at New Orleans; and that his examinations (for he was examined several times) established the interest of Mr. Green, and so the claim is consistent with what ought to have been the evidence in *preparatorio*. Assuming this argument to be correct, on which we give no opinion, the circumstances of this case call for the most plenary explanations to dissipate the doubts which cannot fail to be awakened.

These explanations come altogether from Mr. Miller, and are unsupported by any corroborative documents, or facts asserted upon independent testimony. All that the other principal witnesses have testified to, which bears directly on the cause, consists of declarations or confessions, or acts of Mr. Miller, after his return to New Orleans. Mr. Miller himself certainly stands in a predicament which does not lend additional credit to his assertions. He was the projector of the voyage, and the conductor of all its operations. He chartered the vessel in his own name; and if he was acting for Mr. Green, and not for himself, what motive could there be for him to conceal his agency from Messrs. O'Hara & Offley, or from Captain Delgado? The voyage itself was illegal in an American citizen. The charter-party stipulated *for a return cargo to Jamaica, [~~92~~* which was to be furnished by Mr. Miller, and he does not pretend that this cargo was to have been shipped on Mr. Green's account. It must have been a traffic on his own account, or a joint concern with Messrs. O'Hara & Offley; and in either view was a surrender of all the obligations which he owed to his country. These considerations cannot certainly increase our confidence in the integrity of the conduct of Mr. Miller.

On examining his testimony there are many circumstances which cannot fail to create unfavorable doubts. The test affidavit itself is couched in very equivocal language. Mr. Miller there asserts that at the time of the purchase he expected to have an interest in the

Wheat. 1.

goods, but that on his arrival at New Orleans, the attorney in fact of the claimants refused to allow any such interest, and the deponent was obliged to give up the same. What authority could Mr. Lewis, the attorney here alluded to, have to intermeddle with Mr. Miller's interest in the shipment? He was not the consignee of the property, nor was he confidentially acquainted with any agreement or instructions of Mr. Green relative to the voyage. It is scarcely credible that the real consignee of the goods, having an interest in them, should, under such circumstances, yield it up to a mere intruder. In his examination in chief, Mr. Miller states that it was his original intention to have invested his own funds, as well as Mr. Green's, at Jamaica; but he was induced to abandon it by reports that the British intended to occupy Pen-93*] sacola *and Mobile Point; and he explains his interest in the shipment to have been only a right to one-third of the profits in lieu of commissions.

This representation is not consistent with the language held by Mr. Miller on other occasions. After the capture Mr. Miller stated to Captain Delgado that "he had got himself into a difficulty in consequence of his (Delgado's) coming here; that the greater part of the funds invested in the goods belonged to Mr. Green; that he (Miller) was acting for others, and that he feared he should get himself into difficulty." Upon an inquiry from the same person during the voyage from Kingston, whether he was the owner, Mr. Miller answered "that he did not know—that he had funds from Carthagena." On another occasion, Mr. Miller gave another witness (Mr. M'Ilvaine) to understand "that the cargo was purchased on his (Miller's) and Green's account." And in a conversation with a Mr. West, who was the confidential agent of Messrs. O'Hara & Offley, and received a letter by the schooner advising him of the voyage, he left the impression on Mr. West's mind that the cargo was his own. The language, too, that Miller held with Mr. Heins (the mate of the schooner) after the capture, is very significant. He said, "It was a hard case that he should lose his property in that way; that it was the earnings of many years."

There are some other discrepancies in the declarations of Mr. Miller, which are not easily to be accounted for. Mr. Miller, in his examination, states that Mr. Green authorized him 94*] to invest in goods *the money belonging to him; and that after he chartered the schooner it was his intention to lay out Mr. Green's funds, as well as his own, in the purchase of goods; but that subsequent events induced him not to lay out his own funds, and that he laid out for Mr. Green about \$6,000 only. In his conversation with Mr. Lewis he stated that there was an arrangement between Mr. Green and himself; that if he thought proper upon his arrival at Jamaica, he might invest in goods the whole of the \$11,886, and more (for which he was authorized to draw on Mr. Green, if necessary), on the joint account of himself and Mr. Green; that after his arrival at Jamaica he thought he would enter into this speculation; and, thereupon, he drew upon Mr. Green for \$2,500; and that after the draft was made he discovered that he had not any right to make this disposition of the funds of the stockhold-

ers in the Hornet, and, accordingly, he laid out \$6,000 of Mr. Green's money, supposing he ought to have an interest in it himself, as a compensation for his trouble.

In determining the real character of this whole transaction it becomes material to ascertain the true value of the cargo shipped by Mr. Miller. He asserts it to be about \$6,000; but no original invoice, or other genuine paper, is produced to prove its cost at Jamaica. According to Mr. Bassett, it was worth about \$7,000 or \$8,000; and Capt. Delgado says, that while lading it, Mr. Miller told him it would amount to about \$8,000 or \$10,000. If their cargo cost but \$6,000, it may be asked, what became of the residue of the money in the *hands of Mr. Miller? According to his [*95 own account, he received for the sales of the Hornet \$11,636; from O'Hara & Offley \$900; and he drew a bill on Mr. Green, in part payment of the goods, for \$2,500, making in the whole, the aggregate sum of \$14,000. There remained, therefore, after the purchase of the goods, in the hands of Mr. Miller, about \$8,000. What has become of this fund, belonging to himself and the stockholders in the Hornet? Here, as, indeed, in every other material part of the cause, the explanation comes exclusively from Mr. Miller. He says that when he left the schooner in St. Bernard's Bay, he took away with him in the boat the sum of \$4,500; and that while the schooner lay at Petit Coquilles, he took away from some crates on board of the schooner, in which it was concealed, the further sum of \$1,800 or \$1,900. It is true that Capt. Delgado says that when Miller left the schooner he took away with him a bag, which, he supposes, contained dollars, but he does not pretend even to guess at the amount; and it is remarkable that none of the passengers are interrogated on this subject. But the statement in relation to the \$1,800 or \$1,900 is wholly incredible. The mate flatly denies that it could have been taken out of the crates in the manner which Miller asserts; and Mr. Bassett manifestly considers it almost impossible. What adds to the incredibility of the statement is, that when Mr. Miller left the schooner, he never informed Mr. Bassett that there was any money concealed in any of the crates, although he expressly constituted him his agent to dispose of the cargo, without any reserve.

*If the funds were brought to New [*96 Orleans in money, as Mr. Miller pretends, nothing could have been more easy of proof than the fact, considering that a large proportion of it belonged to the other stockholders in the Hornet. By the very terms of his receipt he was bound to pay over to them their respective proportions on his arrival at New Orleans. Has he done so? There is not the slightest proof to this effect in the case. On the contrary, several of the stockholders, or their agents, have been examined, and not one of them admits his proportion to have been paid. Indeed, Mr. Miller himself admits that he has never paid any; and gives this extraordinary excuse, that he had orders from Mr. Green not to pay over the money until three months after his arrival at New Orleans. This excuse is entirely at variance with the receipt given by Mr. Miller, and is as little reconcilable with the letter of Mr. Green to his nephew, respecting his own

remittance. It may be added that the statement itself has very little intrinsic probability to support it.

It is, therefore, no harshness to declare that the declarations of Mr. Miller, that he brought home so very considerable a sum, are not of themselves entitled to much credit, and, under the circumstances, cannot be received as satisfactory evidence of the fact by this court; and if so, then every suspicion that the whole funds were invested in the cargo is greatly inflamed, and every doubt of the good faith of the present claim materially strengthened.

There are many other circumstances in the case which tend to a discredit of the claim; but [*97] it would *occupy too much time to discuss them minutely. One circumstance, however deserves particular notice. It is the letter of Mr. Miller written to Mr. Bassett, after his arrival at New Orleans, which may almost be said to carry, in every line of it, the language and feelings of an owner of the goods. And it adds no inconsiderable force to these observations, that the only documents on board pointing to Mr. Green are inconsistent with the supposition that the goods were purchased on his account; and the only doubtful expression in them may well be satisfied as referring to money to be obtained by Mr. Miller, from a Mr. Hardy, of Jamaica, who was indebted to Mr. Green.

Considering, then, that the present claim rests altogether upon the testimony of Mr. Miller, given by him after he well knew the form and pressure of the cause, and liable, as it must be, to the strongest doubts both from the predicament in which he stands, and the circumstances which have been already stated, the court cannot admit that it is supported by any reasonable evidence. It is not material, in our view, whether the property belonged wholly to Mr. Miller, or to him jointly with Green, or was purchased with the funds of the stockholders of the Hornet, on his own account, as an unauthorized speculation, or on joint account with their authority; for in either case it is liable to the same judgment. It is a settled rule of this court, that if a party will attempt to impose upon the court by knowingly or fraudulently claiming as his own property belonging in part to others, he shall not be entitled to a restitution of that portion which he may ultimately establish [*98] as his own. This rule is founded in the purest principles of morality and justice, and would bear upon the claim of Mr. Green, supposing his domicile, as a neutral, were ever so clearly established.

In respect to the domicile of Mr. Green, there is certainly much reason to doubt if it would be sufficient to protect him, even if he could show himself, at the time of the capture, a citizen of Carthage. For, if upon his return to New Orleans after the war, he acquired a domicile there (of which the circumstance of his becoming the owner of a privateer in that port affords a strong presumption), he became a reintegrated American citizen, and he could not, by an emigration afterwards, *flagrante bello*, acquire a neutral character so as to separate himself from that of his native country.

The counsel for the claimant, aware of the pressure of his case upon the present evidence, has prayed to be admitted to make further proof, which he states to be now in his possession.

If this cause turned upon the question of domicile, the court would feel little hesitation in admitting it. But considering the manner in which the cause was conducted in the court below, and that the claimant there had the benefit of further proof, and that it appears to us that upon the question of proprietary interest, the cause now admits of no fair and reasonable explanation, consistent with an exclusive interest in Mr. Green, we do not feel at liberty to make an order for further proof. We are not satisfied that it would be a safe or convenient rule, unless, under very special circumstances, to allow parties who have had the benefit of plenary proof in the court below, to have an order for further proof in this court upon the same points. Much less should we incline to allow it in a case of pregnant suspicion, where the evidence must come from sources tainted with so many unwholesome personal interests, and so many infusions of doubtful credit.

The claim of Mr. Green must, therefore, be rejected, and the goods be condemned as good and lawful prize.

It has been urged that there is no evidence upon the record that the capture were duly commissioned, and that further proof ought to be required on this point. This, however, is a question which the claimant has no right to litigate. He has no legal standing before the court to assert the rights of the United States. If the capture was without a commission, the condemnation must be to the United States generally; if with a commission, as a national vessel, it must still be to the United States, but the proceeds are to be distributed by the court among the captors according to law. It will be time enough to require the commission to be produced when the proceeds are to be distributed by the court, if the United States shall then insist upon any exclusive claim.

*Decree affirmed with costs.*¹

S. C. 10 Wheat. 306.
Cited—2 Cliff. 187; 2 Sprague, 118, 175, 184; Blatchf. Pr. 323.

*[COMMON LAW.]

[*100

BEVERLY v. BROOKE.

Where the owner of certain slaves, and also part owner of a vessel, hired the slaves to the master of the vessel to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring; held, that the master, having acted with good faith, was not responsible for the escape of the slaves in a foreign port, which was one of the contingent *termini* of the voyage, and consequently within the hazards to which the owner knew his property might be exposed; although it was doubtful whether the master had strictly pursued his orders in going to such port.

ERROR to the Circuit Court for the District of Columbia.

This suit was instituted by the plaintiff in the Circuit Court for the county of Alexandria, to recover the value of three slaves hired by the plaintiff to the defendant for a voyage to some

1.—Vide Appendix, Note I.

Wheat. 2.

part of Europe in the brig *Sophila*, of which the defendant was master, which slaves escaped from the vessel, and were lost to the owner. The claim was founded on the allegation that the master pursued a different voyage from that for which the slaves were hired, and that to this cause was to be ascribed the loss that has been sustained.

The cause was argued by *Swann* for the plaintiff, and by *Taylor* for the defendant. The latter cited *Pothier on Obligations*, part 1, c. 101*] 2, art. 3,* to show that the party was only responsible for the ordinary results of his fault, unaccompanied with fraud,¹ and contended that the loss of the slaves was not a necessary consequence of the shipmaster's supposed misconduct, but was remote and unforeseen.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

The declaration in this cause states that the defendant "was master of the brig *Sophila*, then in the county of Alexandria, and bound on a voyage from thence to Savannah, in the state of Georgia, and from Savannah to New York, in the state of New York, and from thence to such other place or places as he, the said defendant, might be directed to go to by the owners of the said brig," of whom the plaintiff was one. That believing and expecting the defendant would pursue the orders he should receive, as was his duty, he hired to him, for the voyage the slaves in the declaration mentioned.

It appeared in evidence that these slaves were received on board the vessel as mariners on the usual wages, and without any special contract.

102*] *On the 23d of May, 1809, after the *Sophila* had sailed from Alexandria to Savannah, a letter of instructions was addressed to the master, which contains the following directions: "I hope this will find you arrived at Savannah, and ready to proceed on your voyage to Amsterdam, where you are to proceed with all dispatch; and when you arrive off the Texel, should you not have received information either from Messrs. Willinks, or from some source that you can depend upon, that you can enter Holland with safety, you are to proceed to Tonningen, and from thence communicate with Messrs. Willinks, and follow their instructions. If they say they cannot get you admitted to the continent, or can do nothing for you, you are then at liberty to take upon yourself the disposal of the cargo in any way that may be practicable, and the investment of the proceeds in any German goods that may answer our market. Should no opportunity offer for a sale at Tonningen, or on the coast of Holland, or Denmark, or in

the Baltic, you must then, as a last resort, proceed to Liverpool," &c.

On the 6th of July, 1809, a letter containing additional instructions, was written, of which the following is an extract: "Nothing decisive has yet occurred whereby to judge of the ultimate result of the pending negotiations between this country and the powers of the continent. But hoping, by the time you arrive in the British channel, all difficulties will be settled between us and the continent, your owners are still desirous, and direct, that you may prosecute your voyage, as before directed, for *Amsterdam. They are, however, desirous, [103 that before you attempt to enter the Texel, you inform yourself whether the port be blockaded, and whether there be any danger of confiscation after entering. And should you not be able to get satisfactory information on these heads at sea, or going up the British channel, you will proceed, as before directed, for Tonningen, and from thence communicate with Messrs. Willinks, of Amsterdam, and Messrs. Parish & Co., of Hamburg, and abide by their instructions. Should it so turn out that you cannot, with safety, proceed to Amsterdam, and that you can get admittance at Tonningen or Hamburg, you will deliver your cargo at either place to Messrs. Parish & Co., as they may instruct you," &c. "If no admittance can be had either at Amsterdam, Hamburg, or Tonningen, you are then at liberty to do the best you can with the cargo, as before directed."

Under these instructions the *Sophila* proceeded on her voyage, till visited by one of the squadron which blockaded Amsterdam. Information was there received showing the danger, from the local government, of entering the Texel, and also that Hamburg and Bremen were shut, and that Tonningen had been shut and opened to American vessels several times. The *Sophila* continued to ply off and on the mouth of the Texel for four or five days, with her signals displayed, when the master concluded to run into the Texel, the blockade of which, it would seem, was not then intended to exclude neutral commerce. In executing this design he was met by the schooner *Enterprise*, an American man-of-war, *beating out [104 abreast the first buoy of the Hacks. The commander of the schooner sent his boat to the *Sophila* with a request that her master would come on board the *Enterprise*. The defendant went on board, and continued there near two hours. On his return, the commander of the *Enterprise* sent on board the *Sophila* a Captain Swaine, master of an American vessel which had been captured by a Danish cruiser on a voyage to St. Petersburg, and condemned. Captain Swaine gave to Captain Brooke, the defendant, a written statement, containing all the information he possessed respecting the dangers of those seas. He stated that his vessel was captured on the 4th, and condemned on the 19th of June. That on the 20th himself and his men were turned on shore without assigning to them any cause of capture or condemnation, and without making any provision for them. His men were compelled to go on board Danish privateers to avoid starving. He remained himself at Albourg, until the 17th of July, when he traveled by land to Amsterdam, and passed within four miles of Tonning-

¹—So, also, the Napoleon Code, liv. 3, tit. 3, Des Contrats et Obligations Conventiionnelles. "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée." Art. 1150. "Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention." Art. 1151.

Wheat. 2.

gen. The information of Captain Swaine showed that the seas about the mouths of the Eider, the Elbe, and the Weser, swarmed with Danish privateers, who respected no flag, and brought in every American vessel they could capture. On the 28th of July he passed through Hamburg, and waited on the American consul for a passport, where he was informed by the chancellor that there were several American vessels at Tonningen petitioning for liberty to land their cargoes, which **105*** they could not obtain, nor was any attention paid to their petitions. He received the same information afterwards at Amsterdam. By the consulate at Hamburg he was also informed that there had been, a few days before, some American vessels at Cruhaven, which had been ordered by the consul to leave that place immediately. After receiving this information the *Sophila* proceeded to Liverpool, where the slaves of the plaintiff escaped, and have been totally lost.

Upon this testimony the counsel for the plaintiff prayed the court to instruct the jury, that if they believed the evidence, the plaintiff was entitled to recover of the defendant the value of the slaves in the declaration mentioned. The court refused to give this instruction, to which refusal the plaintiff excepted. A verdict was found for the defendant, and a judgment rendered thereon by the court, which judgment is now before this court on writ of error.

The plaintiff in error contends that the Circuit Court ought to have given the instruction prayed for, because, 1st. The defendant has violated the instructions by which he was bound. 2d. Any violation of those instructions subjects him to every loss sustained in consequence thereof.

Captain Brooke is supposed to have violated his orders in not proceeding to Tonningen, and waiting there for the directions of Messrs. Willinks.

In considering the instructions given by the owners of the *Sophila*, there are extrinsic circumstances which ought not to be entirely overlooked. The state of the whole commercial **106*** world was without example. The then Emperor of France exercised the most absolute despotism over nearly the whole continent of Europe, and at his capricious will destroyed the commerce and seized the property of neutrals in the ports of those who were compelled to submit to his influence. Under such circumstances it is reasonable to suppose that, in commercial expeditions planned from so distant a place as the United States, some confidence is placed in the master of the voyage, and that much must be left to his discretion. Although this consideration will not excuse a disobedience of orders, it is entitled to weight in expounding orders not entirely decisive. The primary object of the owners was obviously that the *Sophila* should go to Amsterdam. Yet this primary object was to be relinquished, if not to be attained with safety; and of this the master was the judge.

But the orders are said to direct the master absolutely to proceed to Tonningen, should he decline entering the Texel.

In the first letter, of the 23d of May, this direction does appear to be positive, but it also appears to have been given in the expectation

that the voyage from the mouth of the Texel to Tonningen might be prosecuted without imminent danger, and with the probability of entering some port on the continent. Of this probability the Messrs. Willinks were to judge, should it be in the power of Captain Brooke to consult them.

The first paragraph of the letter of the 6th of July repeats the order to proceed to Tonningen, *should it be unsafe to enter [***107** the Texel, and there "to communicate with Messrs. Willinks, of Amsterdam, and Messrs. Parish & Co., of Hamburg, and to follow their instruction." The letter then directs the conduct of the master, should he be enabled to get admittance into Tonningen or Hamburg, and proceeds to say: "If no admittance can be had, either at Amsterdam, Tonningen, or Hamburg, you are then at liberty to do the best you can with the cargo, as before directed."

It is on this last clause in the letter that the difficulty arises.

The plaintiff contends that the master had no right to determine at the mouth of the Texel the practicability of getting into Tonningen or Hamburg, but was bound to proceed for the former place, and when there, to govern himself by the directions of Messrs. Willinks, or of Messrs. Parish & Co. If this be not the true construction of the letter, he then contends that the intelligence received off the mouth of the Texel did not excuse the master for sailing from that place for Liverpool.

As the first paragraph of that letter contains an unconditional order to proceed to Tonningen, should it be unsafe to go to Amsterdam, it is probable that the owners might found their subsequent orders on the state of things which might be found to exist when the vessel should arrive at Tonningen, and on the expectation that the voyage would be prosecuted to that place. But this expectation is not so clearly expressed as to be free from doubt. The writer does not say "if on arriving at Tonningen *no admittance can be had," [***108** &c.; but, "If no admittance can be had," &c. These expressions might well be understood to apply to the fact, although it should be communicated before arriving at the place, and to dispense with the necessity of a useless voyage to Tonningen. There is the more reason for coming to this conclusion from the consideration that the vessel could not arrive at a place, admittance into which was forbidden. Whether this be the true construction of the letter or not, the phraseology is deemed too ambiguous to subject the master to remote damages, not certainly produced by his omitting to proceed to Tonningen, if, in omitting so to do he acted with good faith and a sincere desire to obey his orders.

This brings us to the information under which he acted. That information was that Hamburg was shut. That Tonningen had been occasionally shut and occasionally opened to American vessels. That, at the time, the cargoes of those which had been admitted were not allowed to be sold; and that the voyage to Tonningen would be attended with very serious hazards, which were probably not contemplated by his owners when they gave their instructions. If, in such a state of things, the master should be thought to have miscon-

strued his instructions, and should be deemed responsible for exercising his own discretion, the action, founded on such misconstruction, would certainly be a harsh one. The court will not decide this question, because its decision is rendered unnecessary by the view taken of the second point.

109*] *2d. Admitting that the true construction of his orders required the master to proceed to Tonningen, on finding it unsafe to go to Amsterdam, is he liable in this action?

The court thinks he is not. No special contract is proved, and the slaves of the plaintiffs were put on board the vessel generally as seamen. The court is not satisfied that the danger of their escaping might not be as great on the continent as in England. But, at any rate, Liverpool was one of the contingent *termini* of the voyage, and was consequently within the hazards to which the plaintiff knew his property might be exposed. The danger of losing them, should the Sophila proceed to Liverpool, did not deter him from placing the slaves on board the vessel, nor from directing the master to go to Liverpool, or from giving full discretion respecting his port, in an event which was far from being improbable.

There is no error, and the judgment is to be affirmed with costs.

Judgment affirmed.¹

[COMMON LAW.]

M'COUL

v.

LEKAMP'S ADMINISTRATRIX.

A. L. brought an action of *assumpsit* in the Circuit Court, and after issue joined, the plaintiff died,



1. It will be perceived that the above case was determined upon the ground that, whether the master misconstrued his orders or not, no special contract of hiring being proved, and the slaves being put on board generally as mariners, having escaped at a port which was one of the contingent *termini* of the voyage, and was, consequently, within the hazards to which the owner knew his property might be exposed, was not liable for the loss. In general, as to his obligations to the ship-owner, the master being a letter to hire of his care and attention, *conductor operis facienti*, and the contract being reciprocally beneficial to both parties, nothing more is required of him than ordinary diligence; and he is only responsible *for ordinary neglect. But this must be understood, with the exception of his responsibility as a common carrier, and also that he is responsible like any other *conductor operis*, or even a mandatory, for a degree of skill in his profession adequate to the performance of what he undertakes. *Imperitia culpe adnumeratur*; Straccha, de Nautis, Part 3, No. 32; Casaregis, Disc. 23, No. 65; Disc. 122, Nos. 1 and 12; Emerigon, tom. 1, p. 373. These principles have been recognized by the tribunals of our own country. In the case of Purviance et al. v. Angus, the High Court of Errors and Appeals of Pennsylvania said: "It is a wrong position that a master of a ship is not answerable for an error in judgment, but only for the fault of the heart, in civil matters. Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action." Per Chief Justice McKean, 1 Dall. 184. But it is difficult, if not impossible, to lay down many general rules to enforce the performance of all the duties of the master. Targa sarcastically remarks that it is as difficult to detect the misfeasance of ship-masters as that of physi-

Wheat. 2.

and the suit was revived by *scire facias* in the name of his administratrix. While the suit was still depending, the administratrix intermarried with F. A., which marriage was pleaded *puis darrein continuance*. Held that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment under the judiciary act of 1789, ch. 20, sect. 31.

Where a witness, a clerk to the plaintiff, swore that the several articles of merchandise contained in the account annexed to his deposition, were sold to the defendant by the plaintiff, and were charged in the plaintiff's day-book by the deponent and another person who is dead, and that the deponent delivered, and further swore, that he had referred to the original entries in the day-book; held, that this was sufficient evidence to prove the sale and delivery of the goods.

ERROR to the Circuit Court for the District of Virginia.

This cause was argued by Lee, for the plaintiff in error, and by Seann, for the defendant in error.

*MARSHALL, Ch. J., delivered the [*112 opinion of the court.

Albert Lekamp brought this suit in the Circuit Court, for the District of Virginia, for the recovery of money claimed to be due to him from Neil M'Coul, the defendant below. After issue joined the plaintiff died, and the suit was revived in the name of his administratrix. While the suit was still depending, the administratrix intermarried with Frederick L. E. Amelung, which marriage was pleaded *puis darrein continuance*. The *scire facias* was thereupon abated and a new *scire facias* issued to revive the original action in the names of Amelung and wife, as the personal representatives of Albert Lekamp.

At a subsequent term the cause was tried on

ciens. *Son questt' errori, come quell che commettono bene spesso i medici, nel curare li poveri infermi*. Ch. 70. By the French Code de Commerce, it is provided that the responsibility of the master shall not be discharged but by proof of the intervention of the *vis major* or irresistible force. *La responsabilité du capitaine ne cesse pas que par la preuve d'obstacles de force majeure*, Liv. 2, tit. 4, Du Capitaine, art. 230. This provision may, at first sight, appear to extend unduly the responsibility of ship-masters, which (except in their capacity of common carriers) ought not to be enlarged beyond that of other persons who undertake, for a reward, to perform any work. Its insertion in the code was objected to upon this ground by the tribunal of commerce of Palmpol, who remarked that no ship-master would be found willing to incur a responsibility so tremendous as that which a rigorous application of the literal expressions of the law might incur. That many accidents happen in navigation which no human skill can avert, but which are not to be considered as the effects of the *vis major*, and many misfortunes which are not to be attributed to the want of knowledge, the negligence, or the fault of the master. The tribunal, therefore, proposed, as an amendment to the article, the addition of the following words: *Ou par l'effet des accidens qui tiennent au hazard et à l'imprévoyance insurmontable de la navigation et du chômage dans les ports*. But this amendment was rejected upon the [*111 ground that it would be dangerous to insert in the code a general provision of this nature, which, though it might be required in some cases, would, in others, be perverted to the protection of fraud and negligence, and the principle of which ought, therefore, to be applied by judicial discretion in every particular case, according to its own peculiar circumstances. *Espit du Code de Commerce*, par J. G. Locré, tom. 3, p. 101.

the original issue, and a verdict found for the plaintiff, on which the defendant prayed that the judgment might be arrested for the following reasons: "Because he saith, that after the plea pleaded the original plaintiff, Albert Lekamp, departed this life, and Sophia Lekamp, his administratrix, sued forth a *scire facias* to revive the suit on the 4th of July, 1811; that while the suit stood revived in her name as administratrix, the said Sophia Lekamp intermarried with Frederick L. E. Amelung, and on the 4th of December, 1812, this defendant having pleaded the intermarriage aforesaid, it was ordered that the *scire facias* be abated, whereupon the said Frederick L. E. Amelung and Sophia, his wife, as administratrix aforesaid, sued out a new *scire facias* to revive the suit, and there being no new plea pleaded or any consent that the cause should be revived in any **113*** other manner than the law would direct, the jury was empaneled, and a verdict found as aforesaid; and the said defendant saith, that the act of Congress, in that case made and provided, doth not warrant the revival of the suit in the name of the said Amelung and wife, under the circumstances aforesaid."

These errors were overruled, and a judgment rendered conforming to the verdict of the jury.

At the trial of this cause the plaintiff offered in evidence the deposition of Zachariah Roberts, with the accounts thereunto annexed. The deponent states that he was clerk of Albert Lekamp from the 10th day of January, 1804, to the 9th day of June, 1809. That the account B, annexed to his deposition, is a just and true account current taken from the books. That on the 8th day of November, 1805, Neil M'Coul paid up the balance for goods purchased previous to the 26th of April, 1805, with the interest due thereon as stated. He then recapitulates in his deposition the several items on the debit side of the account current, which is composed of the sums total of goods delivered on particular days, and "states most positively that the said items are taken from the account current of the said Neil M'Coul on the said Lekamp's books, which books he kept, and has had reference thereto. That viewing and referring to the other paper writing annexed, marked, also, with the letter B, beginning with the words, 'a statement of merchandise sold and delivered to Neil M'Coul,' he saith that the several articles of merchandise therein enumerated, specified, described, and at large **114*** set forth and *charged, and contained also in the before-mentioned account current, marked B, were sold by said Albert Lekamp, in his life-time, and at the respective times at which they are charged to the defendant, Neil M'Coul, and were charged in the day-book of the said Albert Lekamp, by the deponent and Mr. Vithake, who is now deceased, and the deponent delivered them," &c. The deposition then proceeds to state that the prices are correctly stated; that all due credits, so far as he knows, are given; and that the balance is truly struck. And adds, that the deponent, before giving in his deposition, had reference to the original entries on the day-books of Lekamp, which entries were made by Mr. Vithake himself.

The first account, marked B, is, as is stated

in the deposition, the account current. The second account, also marked B, is a particular and detailed enumeration of the articles sold and delivered, with their prices, and agrees in amount with the account current.

The counsel for the defendant moved the court not to allow the said accounts to go in evidence to the jury, as not being copies of the original entries in the day-books or original books of the plaintiff's intestate; but the court was of opinion that the account B, beginning with the words "statement," &c., was substantially stated by the witness to be a copy from the day-books, or original books of entries, and that the same was sufficiently proved to go in evidence to the jury, together with the said deposition. The defendants excepted to this opinion.

*Two errors are assigned in the pro- [***115** ceedings of the court below:

1st. In reviving this suit after the abatement of the first *scire facias*, which error ought to have arrested the judgment.

2d. In permitting the account marked B to go in evidence to the jury.

The first error assigned is of some consequence, as the decision upon it furnishes a rule of practice for all the circuit courts of the United States.

The argument for the plaintiff in error is briefly this: At common law all suits abate by the death or marriage of the plaintiff, if a *feme sole*; and such suit could not be prosecuted in the name of the representative, or of the husband and wife, unless enabled so to do by statute. The act of Congress provides for the case of death, but not for the case of marriage. Consequently, the suit of a *feme sole* who marries abates as at common law.

This argument, if applied to an original suit instituted by a *feme sole*, would certainly be conclusive; but this suit was not instituted by a *feme sole*. It was instituted by Albert Lekamp, who died while it was depending. The law says, "That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth, by law, survive, shall have full power to prosecute or defend any such suit or action until final judgment."

When, therefore, Albert Lekamp died, his administratrix, *since the cause of action [***116** survived, had full power given her by the statute to prosecute this suit until final judgment. The suit did not abate, but continued on the docket as the suit of Albert Lekamp. It did not become the suit of the administratrix, but remained the suit of the intestate, to be prosecuted by his representative. The marriage of this representative would abate her own suit, but could not abate the suit of her intestate. That still remained on the docket, to be prosecuted by her, according to the letter of the law, as well as its spirit, "until final judgment." If her marriage abated her *scire facias*, and the original suit still remained on the docket, was still depending, then its state was the same as if a *scire facias* had never issued; in which case all will admit a *scire facias* ought to issue in the name of husband and wife.

This court is unanimously of opinion, that as the original suit did not abate, the *scire facias* in the name of the administratrix, while a *feme sole*, constituted no bar to a *scire facias* in the name of the husband and wife after her marriage, to enable her still "to prosecute that suit until a final judgment."

The question which grows out of the bill of exceptions is entirely a question of construction. All admit that in this action the delivery of the goods sold must be proved, and that the entries to which the witness may refer must be the original entries made in the day-book. The doubt is, whether, upon right construction, the deposition of Zachariah Roberts amounts to this. He says that the several articles of merchandise contained in the account 117*) *annexed to his deposition were sold to the defendant by Albert Lekamp, and were charged in the day-book by the deponent and another person, who is dead, and that the deponent delivered them. He further swears that he had referred to the original entries in the day-book. He could not swear more positively to the delivery of the goods than he does; but as it is clear that he could not, even for a week, recollect each article which is enumerated, he accounts for his recollection by saying that they were entered in the day-book partly by himself and partly by another clerk, who is dead, and that he has referred to this day-book. This is an account taken from the original entries made at the time of delivery, and is, therefore, admissible. The account current, though agreeing with the account taken from the day-book, appears not to have gone to the jury.

*Judgment affirmed.*¹

119*) *THE UNITED STATES v. SHELDON.

Under the act of the 8th July, 1812, "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for

1. - Whatever might have been the doctrine of the civil, or Roman law, on this subject, it is certain that by the codes of the nations of the European continent, which are founded on that law, the books of merchants and traders are, under certain regulations, evidence against those with whom they deal. Thus, by the law of France, the books of traders, regularly kept, may be admitted as evidence, in commercial matters, between persons engaged in trade. Code de Commerce, Liv. 1, tit. 2, Des Livres de Commerce, Art. 12. So, also, the books of tradesmen make a semi-proof against all persons dealing with them, the oath of the party being added to this imperfect evidence afforded by the books. To which Pothier adds, that the tradesman must enjoy the reputation of probity; that the books must be regularly kept; that the action must be commenced within a year from the time the articles are delivered; that the amount be not 118*) too great; and that there is "nothing improbable in the demand arising from the circumstances and wants of the debtor. Des Obligations, Nos. 719, 721.

By the common law of England, books of account, or shop-books, are not allowed, of themselves, to be given in evidence for the owner; but a clerk, or servant, who made the original entries, may have recourse to them to refresh his memory, as to other written memoranda, made at the time of the transaction. So if the clerk or servant who made the entries be dead, the books may be admitted in evidence, to show the delivery of the articles, on producing proof of his handwriting. Bull. N. P. 232; Price v. Foxton, 1 Salk. 283; S. C. 2 Ld. Raym. 873; Pitman v. Madox, 2 Salk. 660. But if the clerk be living, though absent without jurisdiction of the court, the entries are inadmissible. Cooper v. Marsden, 1 Esp. N. P. C. 1.

other purposes," held, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act.

Also held, that driving living fat oxen, &c., on foot is not a transportation thereof within the true intent and meaning of the same act.

THIS cause was argued by the *Attorney-General* for the United States, and by *Hopkinson* for the defendant.

WASHINGTON, J., delivered the opinion of the court:

The defendant, George Sheldon, was indicted in the Circuit Court for the District of Vermont, for transporting, over land, in November, 1813, a certain number of fat oxen, cows, steers, and heifers, from a place in the United States to the province of Lower Canada. A special verdict was found which submitted to the court the questions, whether living fat oxen, cows, steers, and heifers, are articles of provision and munitions of war, and whether driving living fat oxen, cows, steers, and heifers, on foot, is a transportation thereof, within the true intent and meaning of the act of Congress then in force. The judges being opposed in opinion upon both these questions, the cause comes before this court upon a certificate of such disagreement.

*This indictment was founded on the [*120 act of the 6th of July, 1812: the second section of which declares "that if any citizen of the United States, or person inhabiting the same, shall transport, or attempt to transport, over land or otherwise, in any wagon, cart, sleigh, boat, or otherwise, naval or military stores, arms or munitions of war, or any articles of provision from the United States to Canada, &c., the wagon, cart, sleigh, boat, or the thing by which the said articles are transported, or attempted to be transported, together with the articles themselves, shall be forfeited; and the person aiding, or privy to the same, shall forfeit to the United States a sum equal in value to the wagon, &c., or thing by which the said articles were transported, and shall moreover be considered as guilty of a misdemeanor and liable to fine and imprisonment."

In most of the United States the English law on this subject is adhered to as the rule of practice, but in others it has been changed either by usage and decisions of the courts founded thereon or by positive statutes.

Thus it has been held, by the Supreme Court of New York, (Platt, J., dissenting,) that where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps fair and honest books of account; that some of the articles charged to the defendant have been delivered to him; and, that the plaintiff keeps no clerk, his books of account are, under these restrictions, and from the necessity of the case, admissible evidence for the consideration of the jury. Vosburgh v. Thayer, 12 Johns. Rep. 461.

In Pennsylvania, and in the eastern states generally, the plaintiff's books of account, together with his suppletory oath proving the original entries, and the sale and delivery of the articles are evidence to prove such sale and delivery. Poulteney et al. v. Ross, 1 Dall. 238; Steritt v. Bull, 1 Binney, 204; Cornewell v. Dolliver, 2 Mass. Rep. 217; Prime v. Smith, 4 Mass. Rep. 455.

In answer to the first question submitted to this court, we are unanimously of opinion that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the above-recited act.

The second question is attended with much more difficulty: Is the driving of living fat oxen, &c., a transportation of them within the true intent and meaning of the law?

There is no doubt but that the word transport, correctly interpreted as well as in its ordinary acceptation, means to carry, to convey; and in this sense it seems to a majority of the court the legislature intended to use it. The offense is made to consist in transporting in any 121*] wagon, cart, sleigh, boat, or *otherwise, the prohibited articles. Had the words "or otherwise" been omitted, it would scarcely admit of a doubt, that unless the prohibited articles had been conveyed on some one of the enumerated vehicles, no offense would have been committed within the words or the meaning of the law. What, then, is the correct interpretation of these expressions, taken in connection with the other parts of the section? To transport an article in a wagon, or otherwise, would seem necessarily to mean to carry or convey it in that or in some other vehicle, by whatever name it might be distinguished. If these words are construed to mean a removal of the article from one place to another otherwise than in a vehicle, it might well admit of a doubt whether a removal in a vehicle, other than one of those which are enumerated, would be a case within the law.

But so far from this matter being left a doubt by the law, we find, that when the punishment by way of forfeiture is prescribed, the words "or otherwise" are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports and the thing which is transported.

It may be admitted that the mischief is the same whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expressions in the 122*] same law. If it were impossible to satisfy the words "or otherwise," except in the way contended for on the part of the United States, there would be some reason for giving that interpretation to them. But it has been shown that this is not the case.

It was contended by the *Attorney-General* that these questions were in effect settled in the case of *The United States v. Barber*.¹ But this is clearly a mistake. The only question in that case which was referred to this court, was, "whether fat cattle are provisions or munitions of war?" The decision of this court was in the affirmative. But whether the fat cattle were dead or alive, and if the latter was to be intended, whether they were driven or transported in some vehicle did not appear, and, of course, the law arising out of that state of facts was not, and could not be decided.

Upon the whole, it is the opinion of a majority of this court, that driving living fat oxen, &c., on foot is not a transportation thereof, within the true intent and meaning of the above-recited act of Congress.

Judgment for the defendant.

Cited—2 Dill. 226; 5 Dill. 39, 413; 1 Blatchf. 156.

*[PRIZE.]

*123

THE MARY.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

A PPEAL from the Circuit Court for the District of Massachusetts.

The British schooner *Mary*, whereof Charles Thomas, Jr., a British subject, domiciled at St. Johns, New Brunswick, was late owner and master, sailed under convoy from St. Johns, New Brunswick, bound to Castine then in the military occupation of the British, laden with a cargo, the growth, produce, and manufacture of British possessions, shipped by British merchants domiciled in St. Johns, N. B., to merchants resident in Castine.

The schooner *Mary* was captured by the private armed schooner *Cadet*, between Duck Island and Mount Desert, on the night of the 25th of December, 1814, between the hours of 11 and 12; the convoy under which the *Mary* sailed was in sight of the *Mary* at the time of her capture; but no other vessel was in sight at that time. The *Cadet* came up with the *Mary* so suddenly that she had no opportunity to make resistance or give notice to the convoy of her danger.

After the capture of the *Mary*, the principal part *of her cargo was taken on board [*124 the *Cadet*, carried into the District of Massachusetts, and, in the District Court of said district, condemned to the *Cadet* as prize of war.

On the morning of the 26th of December, after sunrise, the *Cadet* and *Mary* being then in company, an armed brig, the *Paul Jones*, was discovered by them, under such suspicious circumstances as to induce them to believe her to be a British cruiser, and, in consequence, to part, and steer different course. The sails of the *Paul Jones* were of English canvas. She pursued the *Mary*, firing at her, until between 4 and 5 o'clock, P. M. of the 26th of December; the *Mary* had then arrived in a bay of the United States, to wit, Wheeler's Bay, a bay frequented by American vessels. The *Mary* being within half a mile of the shore, and within the same distance of the *Paul Jones*, and being in such a situation as rendered it certain that she must be intercepted by the *Paul Jones*, the prize-master and crew, considering it certain, from her appearance and actions, that the *Paul Jones* was an English cruiser, left the *Mary* for the shore, after having thrown over her anchor, and ordered the British captain, and his son of twelve years of age, who were left on board, to pay away the cable.

1.—9 Cranch, 243.

After the prize crew left the *Mary*, the British master hoisted English colors, and steered the schooner towards the Paul Jones.

Ten minutes after the prize crew left the *Mary*, she was boarded by a boat from the Paul Jones, when the English captain informed them [125*] that the **Mary* was an English vessel, prize to the *Cadet*, when the Paul Jones immediately stood off from the land with the *Mary* in company, with English colors still flying.

A boat, then out to the windward of the *Mary*, and within musketshot, or a quarter of a mile distant from her (the crew then lying on their oars, the sea smooth, and the wind light), repeatedly hailed the *Mary*, both before and after she was boarded by the Paul Jones, and received no answer.

The prize-master of the *Mary*, immediately on his getting on shore, dispatched a boat on board her to ascertain the national character of the vessel by whom she was boarded, and claim her if the boarding vessel should prove American; but, before the boat could get off, the Paul Jones had sailed with the *Mary* in company.

Libels against the *Mary* and cargo were filed in the District Court for the district of Maine, by David Elwell, in behalf of himself, and the owners, officers, and crew, of the private armed schooner *Cadet*, and by John Thomson Hilton, in behalf of himself, and the owners, officers and crew of the private armed brigantine Paul Jones. The *Mary* and cargo were condemned in the District Court for the district of Maine, to John Thomson Hilton, and the owners, officers and crew of the Paul Jones. An appeal was entered from said decree by David Elwell, and the owners, officers and crew of the *Cadet*, in the Circuit Court of Massachusetts. In consequence of the affinity of the judges to the parties, the decree of the District Court of [126*] Maine was, *by consent of parties, affirmed *pro forma*, and the cause brought, by appeal, to this court.

Jones, for the appellants. This is a case of novel impression as to the circumstances, but long since settled in principle. The prize crew of the *Cadet* were driven out of the *Mary* by the terror or the force of the Paul Jones. It is not the case of a prize abandoned and taken as

res nullius, nor retaken by the original British crew, and recaptured by the Paul Jones. The prize was in a place of safety, *infra prævidiam*; not constructively, as of a fleet, or a neutral port, but of a port of the captor's country. In order to constitute a dereliction of the property acquired in the thing captured, the abandonment must be voluntary, and with intent to relinquish the right acquired. The origin of this principle is to be found in the Roman code, which distinguishes between a voluntary and compulsory abandonment of possession; the first changing the right of property, whilst the latter has no such effect.¹ It is applied to *the law of prize by the different elementary writers.² It was practically enforced in the case of *The Lord Nelson*,³ and by this court in the case of *The Mary Ford*.⁴ Striking the colors is to be deemed the real *deditio*, and the consummation of the capture.⁵ So, also, the capture is held to be consummated where the prize is completely under the dominion of the captor, has no ability to resist, and no prospect of escape.⁶ Here was no recapture by the enemy *crew, because no resistance nor [128] escape; and the British master could clearly not have maintained a claim for salvage in the courts of his own country had the Paul Jones turned out to be a British privateer.

Webster, contra. This is a case of voluntary relinquishment of the prize; and even if it was produced by terror of a supposed enemy, that will not make it involuntary. The case of *The Lord Nelson* does not determine the present case; but Sir William Scott there puts the very case now before the court, and decides it by asking, "Suppose, therefore, that after this voluntary abandonment, the ship had been met with by some French cruiser, and that by means of jury-masts they had succeeded in carrying her into a French port, can there be any doubt that she would have been prize to the second captor?" In the case of *The Ann*, which was a question of jurisdiction in a revenue cause, the seizure being abandoned before adjudication, this court illustrate their opinion by analogy to the prize law, holding that capture gives no authority to proceed to adjudication, if abandoned before judicial proceedings are commenced.⁷ So, also, in the case of *The Astrea*,

1.—Just. Inst. L. 2, t. 1, sec. 46, 47. Alla sane causa est earum rerum, quæ in tempestate levandæ navis causa ejiciuntur. Hæ enim dominorum permanent; quia palam est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipsa navi maris periculum effugiat. Qua de causa, si quis eas fluctibus expulsa, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit. So also d'Habreu, in commenting on the 9th article of the French prize ordinance (which prescribes that, if a captured vessel, not having been recaptured, is abandoned by the enemy, or if by storms or other accidents, it returns into the possession of French subjects, before having been carried into any enemy's port, it shall be restored to the former owner, if claimed within a year and a day, although the possession of the enemy may have continued more than twenty-four hours), makes the following observation: "Quoique l'article de l'ordonnance ne paraît pas faire la différence entre un vaisseau abandonné par les ennemis, et celui qui l'a été par l'effet d'une tempête ou de quelque autre accident imprévu; il est néanmoins certain qu'il y en a lequel un. Nous n'entreprendons point ici de la faire sentir; outre que cela nous écarterait de notre objet, il n'est personne tant soit peu versé dans la jurisprudence, qui ignore que l'abandon volontaire fait perdre la propriété, tout au contraire de celui Wheat. 2.

qui est forcé." D'Habreu on Prizes, ch. 5, sec. 10, tom. 2, p. 95 of M. Bonnemaute's Translation.

2.—Bynkershoek, Q. J. Pub. ch. 4, p. 35 of Du Ponceau's Translation; Id. c. 5, p. 36; 2 Azuni, part 2, ch. 4, art. 2, sec. 1, 3, 7; 2 Woodeson, 454. See also 2 Burr. 663, Goss et al. v. Withers. In that case the true distinction on this subject is alluded to by Lord Mansfield, that by whatever length of time, or other circumstance the property in prizes is vested, so as to bar the former owner in case of recapture or sale, "the instant the captor has got possession, no friend, no fellow-soldier, or ally, can take it from him; because it would be a violation of his property." And it is in this sense must be understood what is repeated by so many writers from the civil law, *Quæ ex hostibus capiuntur, statim captivum sunt*. An inchoate title immediately accrues as against any cruiser of the same nation or its allies in the war, which title cannot be divested but by a voluntary abandonment on the part of the first captor. (2 Woodeson, 455.)

3.—Edwards, 79.

4.—3 Dall. 198.

5.—1 Rob. 195, *The Rebeckah*.

6.—3 Rob. 246, *The Edward and Mary*.

7.—9 Cranch, 289.

it was determined that an interest acquired by possession, is divested by the loss of possession from the very nature of a title acquired in war.¹ The case of *The Adventure* is likewise in point.² There was no fraud on the part of the Paul Jones. She had a right to [129*] chase under any colors; *but she neither chased nor fired under enemy's colors; whilst the prize showed no colors, and therefore invited pursuit; and was found in the possession of her original British master, and therefore authorized detention. She was not *infra præsidia* whilst lying in Wheeler's Bay; but even supposing she had been, if she was afterwards abandoned by her original captor, the Paul Jones had a right to take possession. The prize master did not think it worth while to risk being taken prisoner, and therefore abandoned his prize.

Jones, in reply. The case supposed by Sir William Scott, in delivering his judgment in *The Lord Nelson*, is of a voluntary abandonment, and not one produced by the application of force or terror. In the case of *The Ann*, this court, though incidentally describing the general doctrine, adhere to their accustomed accuracy and precision of language. "A voluntary abandonment" is the phrase used by the learned judge who delivered the opinion of the court; and he proceeds to state, "It is not meant to assert that a tortious ouster of possession, or fraudulent rescue or relinquishment after seizure, will divest the jurisdiction." The precedent of *The Astrea*, does not apply. In that case there was a capture and recapture and a second recapture; but no question whether the abandonment by the first captors was voluntary or not. The case of *The Adventure* was not a question of derelict; but whether the belligerent may invest a neutral with his rights at sea, in fraud of the contingent right of recapture by the [130*] *other belligerent. The question here is not whether fraud was used, but whether force was used. The prize crew supposed they were surrendering to British captors; but the Mary was not in a situation to be captured by a cruiser of the United States; she was not derelict, but lying in a roadstead, which is a *residium*, though not guarded by forts and castles.

JOHNSON, J., delivered the opinion of the court:

We are of opinion that the facts stated, in this appeal, make a clear case of tortious dispossession on the part of the Paul Jones. The privateer Cadet had, with great gallantry, captured the Mary, and been in possession of her part of a night and day. The prize was close in upon the American coast, and making for a port which was open before her. It was not until the superior sailing of the Paul Jones made it manifest that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize crew abandoned her. There exists not a pretext in the case that this abandonment was voluntary, or would have taken place but for the hostile approach of the Paul Jones. Whether the *vis major* acted upon the

force or the fears of the prize crew is immaterial, since actual dispossession ensued.

But it is argued that the Paul Jones showed American colors; the Mary ought not therefore to have feared her; the Mary showed no colors, she, therefore, invited pursuit; and, finally, that the Paul Jones found her in the actual possession of her *original master, and, [*131 therefore, could not have done otherwise than detain her.

We think otherwise. It was more probable that an enemy would show false than true colors. The circumstance of the Mary standing in for a friendly shore was less equivocal evidence of her character than the exhibition of colors; and, after boarding the Mary, and learning that she was a prize to the Cadet, it was the duty of the captor to have repaired the injury he had done, and, either by making signals, sending a boat on shore, or a message by the boat that did come off, to have recalled the prize crew of the Cadet. But, instead of this, she instantly mans the prize, bears away from the harbor, which was close under their lee, and, by carrying English colors until out of sight, completes the conviction of the prize crew that the recapture was by an enemy.

We are of opinion that the decision of the circuit and district courts should be reversed; that the prize should be adjudged to the Cadet; and the case remanded for the assessment of reasonable damages in favor of the Cadet. But, considering that the prize arrived in safety, and probably in a more secure harbor than that for which she was sailing when seized by the Paul Jones (although it is certainly a case for damages), we are of opinion the damages should be moderate.

*Sentence reversed.*³

*[INSTANCE COURT.]

[*132

THE SAN PEDRO. VALVERDE, *Claimant*.

Under the judiciary act of the 24th of September, 1789, ch. 20, and the act of the 3d of March, 1803, ch. 93, causes of admiralty and maritime jurisdiction, or in equity, cannot be removed, by writ of error, from the Circuit Court for re-examination in the Supreme Court.

The appropriate mode of removing such causes, is by appeal; and the rules, regulations, and restrictions contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a *supersedas*; the citation to the adverse party, the security to be given by the plaintiffs in error for prosecuting his suit, and the restrictions upon the Appellate Court as to reversals in certain enumerated cases, are applicable to appeals under the act of 1803, and are to be substantially observed; except that where the appeal is prayed at the same term when the decree or sentence is pronounced, a citation is not necessary.

ERROR to the Superior Court of the Mississippi territory.

This was a libel of information filed in that court, against the schooner San Pedro and cargo, alleging: 1st. That the San Pedro departed, on the 1st February, 1813, from Mobile for the island of Jamaica, a colony of Great Britain, in

1.—1 Wheat. 125.

2.—Ib. note (f.)

3.—Story, J., did not sit in this cause.

violation of the embargo act of the 22d December, 1807, and the several acts supplementary thereto; of the non-intercourse act of the 1st of March, 1809; and of the laws of the United States. 2d. That sundry goods, wares and merchandise were imported in the San Pedro, **133*** into *the district of Mobile on the first day of May, 1813, from the said island of Jamaica, in violation of the non-intercourse act. 3d. That sundry goods, wares and merchandise "were intended to be imported in the San Pedro, from the said island of Jamaica, into the United States, and into the district of Mobile, contrary to the provisions of the non-intercourse act," &c.

The San Pedro was originally a vessel of the United States, called the Atlas, and the property of Mr. Philip A. Lay, of New Orleans, but had given up her register, and (as alleged) was transferred to Mr. Valverde, a Spanish subject, resident at Pensacola. On the 1st of February, 1813, she sailed from Mobile, with a cargo of cotton and tobacco, for Jamaica, which was disposed of there; and on the 10th of April, 1813, she sailed from Jamaica, with a cargo, on her return voyage for the coast of Florida. On the 23d of April she was captured and brought into Mobile by an American gun-boat, and on the 29th of the same month was liberated by the commander of the flotilla, and seized by the collector of the port, in whose name the libel was filed. It was contended by the libelants that the transfer of the vessel was collusive and fraudulent, and that she, together with the cargo, belonged to citizens of the United States.

A claim was interposed on behalf of Mr. Valverde, and the vessel and cargo were decreed to be restored in the court below, from which decree the cause was brought by writ of error to this court.

The *Attorney-General*, for the United States, **134*** argued "in support of the first count in the libel, that the non-intercourse act was to be considered as in force after the declaration of war, being cumulated upon the law of war as administered in the prize court, by which all trade and intercourse with the enemy is prohibited, under the penalty of confiscation. It therefore became immaterial whether the property was Spanish or belonged to citizens of the United States. If Spanish, it was confiscable as the property of neutrals, trading with a British colony from the United States, contrary to the non-intercourse. If the property of citizens of the United States, it was liable to seizure and condemnation, being taken in trade with the public enemy. The general allegation in this count, of a breach of the laws of the United States, was sufficient to cover the latter offense. Mobile was, at the time of this transaction, a port in possession of the United States, having been annexed to their territories by the acts of Con-

gress of the 14th of May, 1812, and the 12th of February, 1813.

Harper, contra. 1. The embargo laws had ceased to exist at the time of this transaction, and therefore the first count in the libel, alleging a breach of those laws, cannot be supported. 2. The non-intercourse laws had merged in the act declaring war. By the law of war, all commercial intercourse with the enemy is prohibited, and the court has considered the laws, restricting trade, as superseded by the law of war.

MARSHALL, *Ch. J.* The court has never *considered the non-intercourse law as ***135** merged in the law of war as to neutrals.

Harper. 3. But supposing the non-intercourse laws to be in force, they can only apply in two cases: First. To British goods put on board with an intention to import the same into the United States. Second. To British goods actually imported. The third count of the libel is fatally defective in alleging, not that they were put on board with intention to import, &c., but that they were intended to be imported, and under the second count there is no proof of the growth, produce or manufacture of the goods. If a presumption arises of their British origin, from the circumstance of their being laden in a British colony, it is a case of further proof, and the court will not condemn without first allowing the claimants an opportunity to repel that presumption. 4. The act of Congress of the 12th February, 1813, did not, *proprio vigore*, make the port and district of Mobile the territory of the United States. The legal right ought to have been asserted by actual possession, in order to consummate the title.¹ But possession was not taken until after the sailing of the vessel from Mobile, although before her return to the coast of Florida from Jamaica; and there is no proof that *this ***136** change of dominion was known to the parties when the goods were shipped at Jamaica. 5. The question, whether the ship and cargo are confiscable as a droit of admiralty for the offense of trading with the enemy, depends upon the question of fact, whether they are the property of a citizen or a neutral; and it being an admiralty cause, the claimants are entitled to the privilege of further proof, if there be doubt upon the fact. 6. There is a fatal irregularity in form in bringing up the cause by writ of error, which is a common law process, not applicable to admiralty or chancery causes, which are to be brought up by appeal under the judiciary act of the 24th February, 1790, and the act of the 3d March, 1803.

The *Attorney-General*, in reply. The laws of non-intercourse were no further merged in the law of war than as concerned captors. If the property be that of a citizen, it is confiscable as a droit of admiralty under the law of war.² If it be neutral, then *the non-***137**

1.—See, on this subject, an instructive case in 5 Rob. 97, *The Fama*, in which Sir William Scott determined that the national character of Louisiana, agreed to be surrendered by the treaty of St. Idefonso, in 1763, by Spain to France, but not actually transferred, continued as it was under the ceding country.

2.—8 Cranch 382, *The Sally*. In that case it was determined that the municipal forfeiture, under the non-intercourse act, of enemy's property, or of the property of citizens taken in a trade with the Wheat. 2.

enemy, was absorbed in the more general operation of the law of war, and that the prize act of the 20th June, 1812, ch. 107, operates as a grant from the United States, of all property rightfully captured by commissioned privateers, as prize of war. The same doctrine had been before settled by Sir William Scott, in the case of *The Neilly*. 1 Rob. 219; in a note to *The Hoop*, where the court held that the same course of decisions which had established that the property of a subject taken trading with the enemy is forfeited has decided also that it is forfeited as prize. The ground of the forfeiture

intercourse act still applies to it, and it must be confiscated under the seizure by the revenue officers. If the port of Mobile had become, *de facto*, a possession of the United States, before the offense of importation was committed, it is immaterial whether the party had a previous knowledge of this transfer of territory or not; and the fact of the goods coming from a British port is conclusive evidence of their origin, and ought to exclude further proof on this point.

WASHINGTON, J., delivered the opinion of the court:

This is an admiralty cause brought into this court from the Superior Court of the Mississippi Territory by writ of error, and a preliminary question has been made, and is now to be decided, whether this is the proper process for removing a cause of admiralty and maritime jurisdiction into this court for re-examination. A similar objection has been taken in a number of equity cases standing on the docket, removed into this court by similar process from the circuit courts. The questions which these objections have given rise to, resolve themselves into the two following: *1. Whether the decree or sentence of a circuit court, in cases of equity and of admiralty and maritime jurisdiction, can be removed into the Supreme Court for re-examination, by writ of error. 2. If they cannot, then by what rule are appeals in those cases to be governed?

In deciding these questions, our attention is confined to a few sections of the act of the 24th September, 1789, ch. 20. and to the 2d section of the act of March 3, 1803, ch. 93.

The 22d section of the former of these laws declares, that from any final judgment or decree in civil actions and suits in equity brought in a circuit court by original process, or removed there from a state court, or by appeal from a district court, a writ of error may be brought to the Supreme Court, at any time within five years, the citation being signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party having at least thirty days' notice. This section, then, provides that the judge who signs the citation shall take sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to do so. The 23d section declares under what circumstances a writ of error shall operate as a *superædæas*.

The act of 1803 declares, that from all final judgments or decrees in a circuit court in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize, an appeal shall be allowed to the Supreme Court; that a transcript of the libel, bill, answers, depositions and all other proceedings in the cause shall be *139* transmitted to the Supreme Court, and that no evidence shall be admitted on such new appeal, except in admiralty and prize causes. The act then provides that such appeals shall

be subject to the same rules, regulations, and restrictions, as are prescribed by law in cases of writs of error, and it repeals so much of the 19th and 22d sections of the act of 1789 as comes within the purview of this act.

1. The first question depends upon the meaning attached by the legislature to the word "purview." It is contended by the plaintiff in error that it ought to be confined to such parts of the 19th and 22d sections as are inconsistent with the provisions of the act of 1803. If this be the correct interpretation of the term, it is then insisted that there is no incongruity between the two remedies, by appeal and writ of error, even in admiralty and equity cases, and, consequently, that the former remedy is to be considered as merely cumulative.

But the court does not yield its assent to that interpretation. Wherever this term is used, it is manifestly intended to designate the enacting part or body of the act, in contradistinction to the other parts of it, such as the preamble, the saving, and the proviso. And an attentive consideration of the subject-matter of the two laws to which our inquiries are confined, will lead very strongly to the conclusion that Congress meant to use the term in this sense. It is obvious that the 22d section of the act of 1789 was so intimately connected with the 19th section, so far as it respected the appellate jurisdiction of the Supreme Court, in admiralty and equity cases, that the remedy *provided by the for- [*140 mer would have been, in most cases, inoperative without the aid of the latter. Had the law merely provided the remedy by writ of error in those cases, nothing but the proceedings, together with the sentence or decree, would have been open to the inspection and re-examination of the Supreme Court. But, as in a great majority of those cases, the correctness or incorrectness of the decision of the Inferior Court would depend upon the evidence given in the cause, the remedy by writ of error, without some further legislative provision for carrying before the Appellate Court the facts or the evidence, would have been altogether defective and illusory. We find, accordingly, that the 19th section provides, that the circuit courts, in cases of equity and of admiralty and maritime jurisdiction, shall cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself or a case agreed by the parties, or their counsel, or if they disagree, by a stating of the case by the court. Thus, upon a writ of error in equity and admiralty cases, the Supreme Court was furnished with the facts upon which the Inferior Court decided, though not with the evidence, and might, therefore, correct the errors of that court, so far as they existed in wrong conclusions of law, from the facts stated.

Now, the 19th section contains but the single provision which has been just mentioned, and, consequently, if any part of it be repealed by

is, that it is taken adhering to the enemy, and therefore the proprietor is, *pro hac vice*, to be considered as an enemy. In the case of *The Etrusco*, the Lords of Appeal had reserved the question, whether the property claimed by a British subject should be condemned to the crown or the captors; but the illegality of trade in that case was of a different na-

ture, that being a trade in violation of the charter of the East India Company. It was finally determined by the lords in *The Etrusco*, that the property should be condemned, not to the individual captor, but to the king. 4 Rob. 256. *The Caroline*, in a note.

the act of 1803, the whole must be; and if the whole, then the writ of error provided by the 141*) 22d section in admiralty *and equity cases would be rendered, as before observed, altogether ineffectual for the purpose for which it was intended in every case where the error complained of in the sentence, or decree, existed in wrong conclusions from the evidence or the facts.

Even the provisions of the 29th section were, in the view of Congress, defective, and must appear so to every person conversant with the practice of courts proceeding according to the forms of the civil law. The error of the inferior Court may frequently consist, not in wrong conclusions of law from the facts, but in wrong conclusions of fact from the evidence. We are warranted in saying that this defect in the former law was perceived by the legislature, and was intended to be remedied by the provision in the act of 1803, that the evidence (instead of the facts) should accompany the record into the Appellate Court.

Upon the whole, it is manifest that the subject of the two laws is the same, namely, the appellate jurisdiction of the Supreme Court, and the manner of exercising it. The manner of exercising it, as prescribed by the act of 1789, is essentially changed by the act of 1803, and is consequently repealed by it because it is within the purview of the latter law, being provided for in a different way. By this construction, the appellate jurisdiction of the Supreme Court is made to conform with the ancient and well-established principles of judicial proceedings. The writ of error, in cases of common law, remains in force, and submits to 142*) the revision of the Supreme Court only the law. The remedy by appeal is confined to admiralty and equity cases, and brings before the Supreme Court the facts as well as the law.

2. The second question is attended with much less difficulty. The act of 1803, after requiring that the libel bill, answers, depositions, and all other proceedings in the cause, shall be transmitted to the Supreme Court, and that no new evidence shall be admitted on such appeal except in admiralty and prize causes, provides that such appeal shall be subject to the same rules, regulations, and restrictions, as prescribed in cases of writs of error. These rules, regulations, and restrictions, are contained in the 22d and 23d sections of the act of 1789, and respect the time within which a writ of error may be brought, and in what instances it shall operate as a *superadeas*; the citation to the adverse party; the security to be given by the plaintiff in error for prosecuting his suit; and the restrictions upon the Appellate Court as to reversals in certain enumerated cases. All these are, in the opinion of a majority of the court, applicable to appeals under the act of 1803, and are to be substantially observed, except that where the appeal is prayed at the same term when the decree or sentence is made, a citation is not necessary. (*Reily v. Lamar and others*, 2 Cranch, 349.) It follows that an appeal, in admiralty, equity, and prize causes, may be taken at any time within five years from the final decree or sentence being pronounced, subject to the saving contained in the 22d sect. of the act of 1789, which is one of the points that was discussed at the bar.

Wheat. 2.

*This opinion is consistent with the [*143 case of *The United States v. Hooe* (3 Cranch, 73), although from the report of that case it would seem to be otherwise. The record has been examined, from which it appears that that case came up upon an appeal, and not upon a writ of error.

The writ of error, in this case, must therefore be dismissed.¹

Cited—14 Pet. 629; 16 Pet. 453; 6 How. 90; 12 Wall. 442; 16 Wall. 342; 20 Wall. 622; 3 Blatchf. 36; 2 Wood. & M. 540.

[PRIZE.]

THE ARIADNE.

GODDARD ET AL., Claimants.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination.

APPEAL from the Circuit Court for the District of Pennsylvania.

This vessel, belonging to citizens of the United States, and laden with a cargo of flour also belonging to citizens of the same, was captured on the 15th day of October, 1812, on a voyage from Alexandria to Cadiz, with a license or passport of protection from the British Admiral, Sawyer. The vessel and cargo were restored in the District Court; *but on appeal, [*144 sentence of condemnation was pronounced by the Circuit Court, from which sentence an appeal was entered to this court.

G. Sullivan, for the appellants and claimants, offered to read further proof, taken under the standing rule of the court (25th rule, Feb. term, 1816).

Woodward and Ingersoll, for the captors, denied the authority of the rule under which the further proof was taken. They argued that the act of Congress did not provide for taking depositions to be used as further proof in prize causes, except where the course of prize practice authorizes it; that further proof is never admissible until the cause is heard on the original evidence.

MARSHALL, Ch. J., called on the claimant's counsel to show what facts the further proof tended to establish, and stated, that if the case could be distinguished from the former determinations respecting licenses, a foundation would be laid for the admission of the depositions as further proof.

Webster, for the appellants and claimants, contended, that this case could be distinguished from those which had been decided. In the case of *The Julia*,² the court had said: "We hold that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his *views or interests, [*145 constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war; and that the facts of the present case

1.—The cause was afterwards re-entered, by consent of parties, and continued for further proof, as if it had been removed by appeal.

2.—9 Cranch, 181.

afford irrefragable evidence of such an act of illegality." This proposition, as a doctrine of law, would be equally true, leaving out all that it contains relative to a license. A voyage prosecuted in furtherance of the enemy's interests is undoubtedly illegal, and it was on this illegality of the voyage itself that the judgment of the court proceeded. The court say they are satisfied from the facts that the voyage was illegal. In the case now before the court the captors insist that the court shall shut out the facts connected with the voyage, and go merely on presumption. *The Julia* cannot be an authority for such a decision. *The Aurora*¹ was decided expressly on the grounds which had been before stated in *The Julia*, and carries the doctrine no further. In the case of *The Hiram*² no evidence was offered on the part of the claimants to repel the presumption arising from the license. That case, then, only decides, that from the possession of the license the court may presume, until the contrary appears, that the voyage was in furtherance of the enemy's objects.

In all these cases the court seems to have rested its decision on the ground that the voyages in which the vessels were engaged were, of themselves, illegal voyages, undertaken and prosecuted for the promotion of the enemy's [146*] interests; and that *this illegality was shown by the facts which the cases disclosed. But it is not understood to have decided that it would hear no proof to make out the innocence of the voyage, notwithstanding the unfavorable inferences which might be drawn from the possession of the license. In the present case such proof is offered, and the claimants are ready to show that the voyage originated in no intention to further, and from its nature could not further, the objects of the enemy. It was a voyage from Baltimore to Cadiz, with flour, at a time when neither the British nor the Spanish armies drew supplies from that city. They expect to prove it to have been, in all respects, as innocent as a voyage from Baltimore to Boston, with a similar cargo. Upon this application for permission to give proof, and until the court should hear the proof, the only question will be, whether, in the most innocent voyage which can be imagined, the having such a license is, *per se*, cause of confiscation; and cannot in any case, by any evidence, admit of explanation or excuse. On this point, the claimant's counsel wish to be heard, unless the court considers itself as having recently solemnly decided the precise question. We will contend, that although the possession of such a license might create a presumption of unlawful trade, yet, like presumptions in other cases, it is capable of being repelled by proof; and that the judgment of the court must rest, after all, on the real nature and object of the voyage, as disclosed by the facts connected with it, and not on the mere terms of the passport. In a case of this sort, the [147*] court will *not incline to hold itself bound by former decisions beyond their clear and manifest extent. No case appears to have gone so far as to prevent the court from hearing proof of the lawfulness of the voyage,

independent of the license, or to have decided that such proof, when full and satisfactory, should not avoid confiscation.

Woodward and *Ingersoll*, on the other side, were stopped by the court.

WASHINGTON, J., delivered the opinion of the court:

The view of the court is, that this case cannot be distinguished from those already decided. It is alleged that the flour was not actually destined to the use of the enemy; but whether any part of it went to his use or not, is immaterial. It is, indeed, possible that Cadiz might have fallen without the aid of these supplies; and therefore, in fact, Great Britain and her ally may have been relieved, by these supplies, from the pressure of the war in that quarter. The court, however, in the cases alluded to, proceeded on a broader ground; all the judges who concurred in those decisions were of opinion that the mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constituted, of itself, an act of illegality which subjected the property to confiscation. It was an attempt by one individual of a belligerent country to clothe himself with a neutral character *by the [*148 license of the other belligerent, and thus to separate himself from the common character of his own country.

Sentence affirmed.

Cited—1 Pet. C. C. 417; Blatchf. Pr. 85, 264, 268; Newb. 406.

[INSTANCE COURT.]

THE WILLIAM KING.

DAVIS ET AL., *Claimants*.

Under the embargo act of the 22d December, 1807, the words "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but, consequently, rendered them liable to forfeiture under the supplementary act of the 8th of January, 1808.

In such case, if the vessel be actually and *bona fide* carried by force to a foreign port, she is not liable to forfeiture.

The court being of opinion, under the facts and circumstances of the case, that the capture under which it was alleged the vessel was compelled to go to a foreign port was fictitious and collusive; the decree of condemnation in the court below was affirmed.

APPEAL from the Circuit Court for the District of New York.

A libel was filed against this vessel in the District Court of New York, March, 1809, for a breach of the act of the 22d of December, 1807, laying an embargo, and the several acts supplementary thereto, alleging that she proceeded from Baltimore, without any clearance or permit, bound on a voyage *to Exu- [*149 ma, one of the Bahama Islands, where she took in a cargo of six thousand bushels of salt, with which she returned to New York. The claimants admitted the fact of going to Exuma, and bringing away the salt, but alleged that it was

1.—8 Cranch, 283.

2.—8 Cranch, 444; 1 Wheat. 440.

from necessity; that the brig was regularly bound to Boston, but being captured soon after she left Hampton Roads, by a British privateer, was sent to Jamaica, where she sold the cargo of flour which she had on board, the government of that colony not allowing it to be brought off. That she then went to Exuma.

The testimony in the case exhibits the following summary: About the middle of October, 1808, the vessel arrived at Baltimore from Boston. At Baltimore she took on board a cargo of upwards of sixteen hundred barrels of flour, and sailed again, ostensibly for Boston, about the first of November. On reaching Hampton Roads, she stopped a few days, being, as was asserted, windbound. While there, a British privateer, of ten guns and twelve men, called the *Ino*, arrived in the Roads. On the eighth of the month the brig put to sea, the *Ino* following her. On the afternoon of the same day the *Ino* captured her, within ten leagues of the shore, putting a prize-master and one man on board. The vessels then proceeded for the West Indies. During the voyage no attempt was made by the crew either to retake the brig or to escape, though favorable opportunities were not wanting. Her crew consisted of nine persons. After a short separation from the privateer, the brig arrived off St. Nicholas Mole. Here [150*] the privateer joined her, and thence the two went to Kingston. No prize proceedings were instituted against the brig; but, on the contrary, the supposed captors relinquished all claim to their prize, on reaching Kingston. From Kingston she went to Exuma, as above stated. The District Court, on the hearing, pronounced a sentence of condemnation. A decree of affirmance, *pro forma*, was entered in the Circuit Court, from which the cause was brought, by appeal, to this court.

Hoffman, for the appellants and claimants, stated, that this case was governed by the authority of *The Short Staple*,¹ the William King having sailed from Hampton Roads in company with that vessel, and both were seized by the British privateer *Ino*, and compelled to go to the West Indies. The two cases are perfectly coincident in their circumstances, and restitution having been decreed in the case of *The Short Staple*, the same judgment must, consequently, be pronounced in the present case. He argued that the whole plan and system of the revenue laws indicated that it was not the legislative intention to cumulate a forfeiture of the ship (being a registered vessel) upon the penalty of the bond, which had been given for relanding the cargo in the United States.

The *Attorney-General* and *Hopkinson*, contra. The court expressly overruled the point made [151*] as to the construction of the embargo laws, in the case of *The Short Staple*,² although that case was determined, on its peculiar cir-

cumstances by a majority of the court, in favor of the claimants. But the restitution of the *Short Staple*, on the facts of her case, forms no ground for the acquittal of the William King, even should the facts be precisely similar. Principles of law form precedents. But an inference from evidence is not conclusive as to facts, in another cause, whether the testimony be the same or different; certainly not if it be different.

Hoffman, in reply, argued, that the court could not, without judicial inconsistency, decide this case differently from that of *The Short Staple*, unless there was some substantial and important difference in the facts of the two cases; that the opinion of a majority of the court was the opinion of the court, and a rule of conduct, whether formed upon an abstract point of law or upon a mixed question of fact and law; and that to maintain the contrary position would be to assent to an assertion, which had been hazarded in another place, that the decisions of this court are not binding as legal precedents on themselves and on others.

*JOHNSON, J., delivered the opinion [*152 of the court:

This case comes up on appeal from the Circuit Court of New York. The vessel is the same which makes her appearance in the case of *The Short Staple*, decided in this court at February term, 1815; and it has been contended that the acquittal in that case is conclusive upon this.

But we think otherwise. It might with more propriety be contended, that had the hearing of this cause come on together with that of *The Short Staple*, the latter would have found much more difficulty in escaping. As it was, the division of the court, and the acknowledgment of the judge who delivered the opinion, show that the vessel in that case was "hardly saved." In the present cause there is very material evidence which did not appear in, and could not affect the former. We shall, therefore, dispose of this case altogether upon the evidence that is peculiar to it.

It will be recollected that this vessel, as well as the *Short Staple*, were libeled for a violation of the embargo act of the 22d of December, 1807, and the supplementary act of the 9th of January, 1808, the former of which enacts, "that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage," and the latter forfeits the vessel that shall proceed to any foreign port or place, "contrary to the provisions of this act, or of the act to which this is a supplement." As the majority of the court were of opinion that no offense was committed in the case of *The Short Staple*, *it was unnecessary [*153 sary to express any opinion on the application of the law. They, therefore, waived it.

But in this case it becomes necessary to lay down the following principles: There can be no doubt that if the William King was carried off to Jamaica by actual force, it was an act which wanted the concurrence of the will, and, therefore, innocent. But, whatever is done in fraud of a law is done in violation of it; and if a vessel, with an original intention to go to a foreign port, complied with

1.—9 Cranch, 55.

2.—In delivering the opinion of the court in that case, Marshall, Ch. J., stated that this point had "been pressed with great earnestness by the counsel for the claimants; but the court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the claimants justify their going into St. Nicholas Mole is sustained by the proofs in the cause." 9 Cranch, 60.

Wheat. 2.

afford irrefragable evidence of such an act of illegality." This proposition, as a doctrine of law, would be equally true, leaving out all that it contains relative to a license. A voyage prosecuted in furtherance of the enemy's interests is undoubtedly illegal, and it was on this illegality of the voyage itself that the judgment of the court proceeded. The court say they are satisfied from the facts that the voyage was illegal. In the case now before the court the captors insist that the court shall shut out the facts connected with the voyage, and go merely on presumption. *The Julia* cannot be an authority for such a decision. *The Aurora* was decided expressly on the grounds which had been before stated in *The Julia*, and carries the doctrine no further. In the case of *The Hiram*² no evidence was offered on the part of the claimants to repel the presumption arising from the license. That case, then, only decides, that from the possession of the license the court may presume, until the contrary appears, that the voyage was in furtherance of the enemy's objects.

In all these cases the court seems to have rested its decision on the ground that the voyages in which the vessels were engaged were, of themselves, illegal voyages, undertaken and prosecuted for the promotion of the enemy's [146*] interests; and that *this illegality was shown by the facts which the cases disclosed. But it is not understood to have decided that it would hear no proof to make out the innocence of the voyage, notwithstanding the unfavorable inferences which might be drawn from the possession of the license. In the present case such proof is offered, and the claimants are ready to show that the voyage originated in no intention to further, and from its nature could not further, the objects of the enemy. It was a voyage from Baltimore to Cadiz, with flour, at a time when neither the British nor the Spanish armies drew supplies from that city. They expect to prove it to have been, in all respects, as innocent as a voyage from Baltimore to Boston, with a similar cargo. Upon this application for permission to give proof, and until the court should hear the proof, the only question will be, whether, in the most innocent voyage which can be imagined, the having such a license is, *per se*, cause of confiscation; and cannot in any case, by any evidence, admit of explanation or excuse. On this point, the claimant's counsel wish to be heard, unless the court considers itself as having recently solemnly decided the precise question. We will contend, that although the possession of such a license might create a presumption of unlawful trade, yet, like presumptions in other cases, it is capable of being repelled by proof; and that the judgment of the court must rest, after all, on the real nature and object of the voyage, as disclosed by the facts connected with it, and not on the mere terms of the passport. In a case of this sort, the [147*] court will *not incline to hold itself bound by former decisions beyond their clear and manifest extent. No case appears to have gone so far as to prevent the court from hearing proof of the lawfulness of the voyage,

independent of the license, or to have decided that such proof, when full and satisfactory should not avoid confiscation.

Woodward and *Ingersoll*, on the other side were stopped by the court.

WASHINGTON, J., delivered the opinion of the court:

The view of the court is, that this case is not to be distinguished from those already decided. It is alleged that the flour was not actually destined to the use of the enemy; but whether any part of it went to his use or not, is immaterial. It is, indeed, possible that Cadiz may have fallen without the aid of these supplies, and therefore, in fact, Great Britain and ally may have been relieved, by these supplies, from the pressure of the war in that quarter. The court, however, in the cases alluded to, proceeded on a broader ground; all those who concurred in those decisions were of opinion that the mere sailing under an enemy's license, without regard to the object of the voyage or the port of destination, constituted, of itself, an act of illegality which subjected the vessel to confiscation. It was an attempt by an individual of a belligerent country to clothe himself with a neutral character *by the license of the other belligerent, and separate himself from the common enemy of his own country.

Sentence affirmed.

Cited—1 Pet. C. C. 417; Blatchf. Pr. 45 Newb. 405.

[INSTANCE COURT.]

THE WILLIAM KING

DAVIS ET AL., Claimants.

Under the embargo act of the 22d 1807, the words "an embargo shall be laid upon the public officers the preventing the departure of registered vessels on a foreign voyage, but, rendered them liable to forfeiture under supplementary act of the 9th of January 1807. In such case, if the vessel be actually carried by force to a foreign port, liable to forfeiture.

The court being of opinion, under circumstances of the case, that the vessel which it was alleged the vessel was carried to a foreign port was fictitious and decree of condemnation in the court affirmed.

APPEAL from the Circuit Court of the District of New York.

A libel was filed against the District Court of New York, M. a breach of the act of the 22d 1807, laying an embargo, and supplementary thereto, alleging that the vessel proceeded from Baltimore, without permit, bound on a voyage to the Bahama Islands, one of the Bahama Islands, in a cargo of six thousand bushels of salt, which she returned to New York, and admitted the fact of going away the salt, but all

1.—8 Cranch, 283.

2.—8 Cranch, 444; 1 Wheat. 440.

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collusively, by the privateer *Washington*, of 24 30-95 tons, one gun and fifteen men, belonging to Portland,* in the District of Maine, and commanded by William Malcomb. They were taken in sight of each other; the *Jahnstoft* first, within about three hours, and the *Bothnea*, within about nine hours after leaving Halifax. At the time of the capture, there were on board the *Bothnea* seven persons, and on board of the *Jahnstoft* five persons, composing their respective crews, and one American passenger. The whole of the crews were taken from each vessel, and landed in a boat at Ragged Islands. The American passengers were retained on board, and under the superintendence of prize-masters and crews. The *Bothnea* was conducted into Salem, and the *Jahnstoft* into Plymouth, in the District of Massachusetts. Immediately on their arrival they were seized by the collectors of those ports, for an alleged violation of the non-importation act. Prize proceedings were also commenced by the captors against both vessels, before the District Court of Massachusetts. The American passengers were examined on the standing interrogatories, and the papers found on board deposited in court by the prize-masters. The papers found on board the *Bothnea* were the Swedish simulated papers. Two bills of lading of the cargo, dated the 23d of November, 1813, purporting that the whole cargo was shipped by John Moody & Company, merchants, of Halifax, for New London, consigned to order. A clearance from Halifax, dated on the same day. A British license from Sir John Sherbrooke, Governor, &c., dated on the 9th day of November, 1813, authorizing John Moody and others to export in any vessel, not belonging to France, to any port in the 171*] *United States, any British goods, on British or American account, which license was to continue in force for two months. And two letters dated at Halifax on the 23d November, 1813; one purporting to be addressed to the consignee of the cargo, the other to be addressed to the master of the *Bothnea*. These letters are as follows: "Halifax, November 23d, 1813. Dear Sir, We now only inclose you a bill of lading of the cargo shipped on our joint account per the *Bothnea*, agreeable to the memorandum left with us by Vandervelt, when last here. The invoices we forwarded in duplicate, one by P. Jones, and the other by Schonesburg, which you will have received before this. Z. has our particular instructions how to proceed when in with the squadron. We have settled for A.'s share of the compensation. B. 2 will pay his. We have fixed on \$200, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed, at the same time request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting with an American cruiser, to destroy all. We are very truly your friends and obedient servants, John Moody & Company."

"Halifax, Nov. 23, 1813.—Captain J* K*, schooner *Bothnea*. Sir, We hand you herewith sundry inclosures respecting the cargo of the *Bothnea*, to your most particular care. You will perceive the necessity of using every possible caution. We are only apprehensive of Shaving Mills. You will, of course, se-

crete everything respecting the transaction. "In case of British interruption we [*172 must recommend your being well assured that there is no deception, as you must be aware of the facility with which American cruisers may pass for English. The invoices of the goods are already forwarded. You will make the best of your way to N*. When in with any of the B. B. squadron, come forward with your Ex. Li. which will safely pass you, and then nothing will remain but activity and dispatch in getting the goods on shore. We should not have embarked ourselves so largely in this concern, but from the ease with which dry goods can be smuggled into those places if properly managed. The bill of lading is to order, you will, therefore, receive instructions from our friends, A. 1 and B. 2. We expect your best place will be to lay off under the protection of H. M. ships, and deliver the cargo in boats and lighters without proceeding further; and as our friends are already advised on the subject, no doubt every necessary step will be taken. Should, however, any unexpected casualty happen, we recommend your getting out of the way, as we would rather the whole should be sacrificed than any mischief happen to —. But, above all, keep out of sight your Ex. Li. clearance and this letter. Do not confide too much. If you have any suspicions destroy all at once, and, after committing this to memory, be sure to put it perfectly out of danger. As to the return cargo we need not say anything on the subject, having the fullest confidence that a voyage to St. Barts may be profitably effected with certain articles; flour out of the question, unless rye. B *No. 2 will pay you the compensation agreed, exclusive of the freight we have allowed. A.'s proportion we will settle with our own. If it is possible to obtain conveyance we will, but it is doubtful. We are your friends and humble servants, John Moody & Co. P. S.—Do not write, for fear of accidents. Let your communications be verbal." The papers on board of the *Jahnstoft* were the Swedish simulated papers. A British license and clearance, of the same date and purport as in the case of *The Bothnea*. Two bills of lading of the cargo, dated the 23d November, 1813, on the same account, destination and consignment as in the case of *The Bothnea*. And two letters dated at Halifax on the same day, one addressed to Messrs. B. 2 and A. 1, at New London; and the other to the master of the *Jahnstoft*. The first of these letters is as follows: "Halifax, Nov. 23d, 1813. Dear Sir, We now inclose you a bill of lading of the cargo shipped on our joint account per the brig *Jahnstoft*, agreeable to the memoranda left with us by Vandervelt, when last here. The invoice we forwarded in duplicate, one by P. Jones, and the other by Schonesburg, which you will have received before this. Z. has our particular instructions how to proceed when in with the squad. We have settled for A.'s share of the compensation; B. No. 2 will pay his. We have fixed \$200, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed. At same time request your earliest advice how to proceed with the next. Do

"not trust too much paper. We have directed 174*" "Z. in case of meeting *with an American cruiser, to destroy all." The other letter is an exact transcript of that addressed to the master of the Bothnea, except that the direction is varied.

At the hearing in the District-Court, a claim was interposed by the district-attorney, in behalf of the United States, and of the collector, praying a condemnation to them, upon the ground of a collusive capture and fraudulent breach of the non-importation act. That court dismissed the captor's libel, and condemned the vessels and their cargoes to the United States; from which sentence an appeal was interposed to the Circuit Court, which court affirmed the condemnation, and the causes were brought to this court by appeal. Further proof was ordered at the last term, and the causes again came on for further hearing at the present term upon the proof exhibited by both parties, and directed to explain the several points indicated by the court as grounds of doubt on the original evidence.¹ Under the commissions taken out to examine witnesses, the following interrogatories were exhibited on the part of the captors: Have not some of the privateers, fitted out in the eastern ports, during the war of the revolution and the late war, been of very small burthen? Was it not usual for these privateers, armed sometimes with one carriage gun only, to proceed coastwise upon short cruises, and did they not capture prizes of great value? Was it not their practice to frequent the ports of the district of Maine and of the province of 175*] Nova Scotia, for the purpose of running out occasionally, capturing the British commerce bound in and out of Halifax and other enemy's ports, and were they not often successful? Did it not often happen that the crews of the vessels, captured by them, were put ashore by the privateers, instead of being brought in as prisoners? Has it not been the practice for sea-faring persons in the district of Maine to become owners of such privateers, and to go in them on short cruises? Did it frequently happen during the late war that unarmed vessels, under neutral or British colors, sailed without convoy from the port of Halifax, either to New London, Long Island Sound, or elsewhere? And, on the part of the United States, the following: Was it not the usual custom, during the late war, for the owners of privateers to stipulate with the officers and crew, that the latter should receive one moiety or some other definite proportion of the proceeds of all prizes? Were there any cases where the crews were engaged to serve on monthly wages, without participating in the prizes? Was it not usual for privateers to bring in the prisoners captured by them? What was the usual and adequate crew and armament of a privateer of about 25 tons burthen, intended for a cruise from the eastern ports, in the Bay of Fundy and along the coasts of Nova Scotia? Together with other interrogatories tending to show, or to negative collusion between the owners of the captured vessels and the privateer by which the capture was made. The answers to these interrogatories, by the various witnesses examined, were contradictory and in-

consistent, *and it would be obviously [*176 impossible to present any intelligible abstract of their testimony without extending the case to an inconvenient length. But, among other circumstances, it was proved that nine out of fifteen of the prize crew were joint owners.

The causes were argued on the further proof by *Harper* and *Winder* for the appellants and captors, and by the *Attorney-General*, for the United States.

JOHNSON, J., delivered the opinion of the court:

After duly weighing the evidence in these cases, a majority of the court are of opinion that the vessel and cargo must be adjudged to the owners, officers, and crew of the capturing privateer. Independently of the act of landing the entire crews of the captured vessels, there was nothing in the case which necessarily led to suspicion. And this is explained on a ground that is very plausible, to wit, that having a course to run which swarmed with enemy's vessels, their intention was to personate the original crew, and pass off the prizes on the approach of an enemy, under their original character. It is not at all impossible that nothing but this *ruse de guerre* may have been in contemplation of the crew. There is, indeed, something in it peculiarly characteristic, when we consider the spirit of adventure, and great mental resources which distinguish the people of whom the crew was composed. It is to *be [*177 regretted that this talent for enterprise had not been always more happily applied than it was in the adventure of the *Jahnstoff* and *Bothnea*. These vessels had both been employed in transporting provisions from New Haven to Halifax, and were now returning with cargoes of dry goods to be smuggled into the United States in the vicinity of the same place. The documentary evidence shows an intimate correspondence between the shippers at Halifax and some persons resident in the United States. But who they were must remain unknown, as the merchants in Halifax have, in their examination, refused to betray them. That the voyages of these vessels was loaded with infamy no one pretends to deny. The reasoning of the courts below is unanswerable on this point. But the majority of this court are of opinion that the evidence is not sufficient to fasten on the captors a participation in the fraud. The whole may have been, for aught we know, a combination of machinery, the result of the most consummate art. It is certainly true that, in one view of the case, everything may be attributed to artifice, in another to natural conduct. Scarcely a feature of it may not be indifferently pronounced the lineament of guilt or innocence. In such a case a court of justice has no alternative. It must pronounce in favor of innocence.

The decrees below will, therefore, be reversed, and the vessels and cargoes adjudged to the captors.

STORY, J., gave no opinion.

Sentence reversed.

Rev'g—2 Gall. 78.
Cited—2 Wheat. 233.

1.—See *Ante*, Vol. I., p. 408.
Wheat. 2.

178*]

*[LOCAL LAW.]

LAIDLAW ET AL. v. ORGAN.

The vendee is not bound to communicate to the vendor of goods the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which is exclusively within the knowledge of the vendee, particularly where the means of intelligence are equally accessible to both parties.

At the same time, each party must take care not to say or do anything tending to impose upon the other.

The question, whether any imposition was practised by the vendee upon the vendor, ought to be submitted to the jury.

ERROR to the District Court for the Louisiana District.

The defendant in error filed his petition or libel, in the court below, stating, that on the 18th day of February, 1815, he purchased of the plaintiffs in error one hundred and eleven hogsheads of tobacco, as appeared by the copy of a bill of parcels annexed, and that the same were delivered to him by the said Laidlaw & Co., and that he was in the lawful and quiet possession of the said tobacco, when, on the 20th day of the said month, the said Laidlaw & Co., by force, and of their own wrong, took possession of the same, and unlawfully withheld the same from the petitioner, notwithstanding he was at all times, and still was, ready to do and perform all things on his part stipulated to be done and performed in relation to said purchase, and had actually tendered to the said Laidlaw & Co., bills of exchange for the amount of the purchase money, agreeably to the said contract; to his damage, &c. Wherefore the petition prayed that the said Laidlaw & Co. might be cited to appear and answer to his plaint, and that judgment might be rendered against them for his damages, &c. And inasmuch as the petitioner did verily believe that the said one hundred and eleven hogsheads of tobacco would be removed, concealed, or disposed of by the [179*] *said Laidlaw & Co., he prayed that a writ of sequestration might issue, and that the same might be sequestered in the hands of the marshal, to abide the judgment of the court, and that the said one hundred and eleven hogsheads of tobacco might be finally adjudged to the petitioner, together with his damages, &c., and costs of suit, and that the petitioner might have such other and further relief as to the court should seem meet, &c.

The bill of parcels referred to in the petition was in the following words and figures, to wit:

"Mr. Organ Bo't of Peter Laidlaw & Co. 111 hhd's. tobacco, weighing 120,715 pounds n't. fr. \$7,544.69.

"New Orleans, 18th February, 1815."

On the 21st of February, 1815, a citation to the said Laidlaw & Co. was issued, and a writ of sequestration, by order of the court, to the marshal, commanding him to sequester 111 hogsheads of tobacco in their possession, and the same so sequestered to take into his (the marshal's) possession, and safely keep, until the further order of the court; which was duly executed by the marshal. And on the 2d of March, 1815, counsel having been heard in the case, it was ordered that the petitioner enter into a bond or stipulation, with sufficient sure-

214

ties in the sum of \$1,000, to the said Laidlaw & Co., to indemnify them for the damages which they might sustain in consequence of prosecuting the writ of sequestration granted in the case.

*On the 22d of March, 1815, the [*180 plaintiffs in error filed their answer, stating that they had no property in the said tobacco claimed by the said petitioner, or ownership whatever in the same, nor had they at any time previous to the bringing of said suit; but disclaimed all right, title, interest, and claim to the said tobacco, the subject of the suit. And on the same day, Messrs. Boorman and Johnston filed their bill of interpleader or intervention, stating that the petitioner having brought his suit, and filed his petition, claiming of the said Laidlaw & Co. 111 hogsheads of tobacco, for which he had obtained a writ of sequestration, when, in truth, the said tobacco belonged to the said Boorman & Johnston, *and was not the property of the said [*181 Laidlaw & Co., and praying that they, the said Boorman & Johnston, might be admitted to defend their right, title, and claim to the said tobacco, against the claim and pretensions of the petitioner, the justice of whose claim, under the sale as stated in his petition, was wholly denied, and that the said tobacco might be restored to them, &c.

On the 20th of April, 1815, the cause was tried by a jury, who returned the following verdict, to wit: "The jury find for the plaintiff, for the tobacco named in the petition, without damages, payable as per contract." Whereupon the court rendered judgment "that the plaintiff recover of the said defendants the said 111 hogsheads of tobacco, mentioned in the plaintiff's petition, and sequestered in this suit, with his costs of suit to be taxed; and ordered that the marshal deliver the said tobacco to the said plaintiff, and that he have execution for his costs aforesaid, upon the said plaintiff's depositing in this court his bills of exchange for the amount of the purchase money indorsed, &c., for the use of the defendants, agreeably to the verdict of the jury."

1—Sequestration, in the practice of the civil law is a process to take judicial custody of the *res* or *persona* in controversy to abide the event of the suit. It may be applied to real or personal property, the right to which is litigated between the parties, or even to persons, as to a married woman, in a cause of divorce, in order to preserve her from ill-treatment on the part of her husband, or to a minor in order to secure him from ill-treatment by his parents. Clerke's prax. tit. 43; Pothier, de la Procédure Civile, Partie I, Chap. 3. art. 2, sec. 1: Code Napoleon, Liv. 3 tit. 11, Des Dépôts et du Séquestre, art. 193; Digest of the Civil laws of Louisiana, 419. The sequestration may be demanded, either in the original petition or in the progress of the cause at any time before it is set down for hearing, by a petition from the party demanding it, with notice to the opposite party, on which the judge, after hearing counsel, pronounces his interlocutory sentence or decree. This sentence is to be provisionally executed notwithstanding an appeal. The sequestration is usually ordered, in possessory actions, where the preliminary proofs of the parties appear to be nearly balanced; where an inheritance consisting of personal effects of great value is in controversy; where there is ground to apprehend that the parties may resort to personal violence in contesting the enjoyment of the means profits; in actions of partition, where the property in litigation cannot be quietly enjoyed by the respective owners; and sometimes in cases where the suit is likely to be of long duration. Pothier, ib. and sec. 2.

Wheat. 2.

of April, 1815, the plaintiffs, following bill of exceptions, to red, that on the 20th day of our Lord 1815, the trial before a jury the said Peter disclaimer, and New York, the said witnesses, to on-ter date above then such, trade in to make for the the claim- offering the it appearing made by Or- ult, one of the , in their own that factors and nesses on their own , and there being , at the time of the dge of the existence said tobacco, except eter Laidlaw & Co. objection and rejected which decision of the the claimants aforesaid pt, and prayed that this ht be signed and allowed. evidence in the said cause the 18th of February, 1815, on, White and Shepherd from the *British fleet the news of peace had been signed at American and British commis- in a letter from Lord Ba- Lord Mayor of London, published in newspapers, and that Mr. White same to be made public in a hand- day morning, 8 o'clock, the 19th of 1815, and that the brother of Mr. l, one of these gentlemen, and who erested in one-third of the profits of the se set forth in said plaintiff's petition, on Sunday morning, the 19th of February, communicated said news to the plaintiff; the said plaintiff, on receiving said news, lled on Francis Girault (with whom he had

been bargaining for the tobacco mentioned in the petition, the evening previous), said Francis Girault being one of the said house of trade of Peter Laidlaw & Co., soon after sunrise on the morning of Sunday, the 19th of February, 1815, before he had heard said news. Said Girault asked if there was any news which was calculated to enhance the price or value of the article about to be purchased; and that the said purchase was then and there made, and the bill of parcels annexed to the plaintiff's petition delivered to the plaintiff between 8 and 9 o'clock in the morning of that day; and that in consequence of said news the value of said article had risen from 30 to 50 per cent. There being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him to think or believe that it did not exist; and it appearing that *the said Girault, when applied to on the [*184 next day, Monday, the 20th of February, 1815, on behalf of the plaintiff, for an invoice of said tobacco, did not then object to the said sale, but promised to deliver the invoice to the said plaintiff in the course of the forenoon of that day; the court charged the jury to find for the plaintiff. Wherefore, that justice, by due course of law, may be done in this case, the counsel of said defendants, for them, and on their behalf, prays the court that this bill of exceptions be filed, allowed, and certified as the law directs. (Signed.)

DOMINICK A. HALL, District Judge.

New Orleans, this 3d day of May, 1815."

On the 29th of April, 1815, a writ of error was allowed to this court, and on the 3d of May, 1815, the defendant in error deposited in the court below, for the use of the plaintiffs in error, the bills of exchange mentioned in the pleadings, according to the verdict of the jury and the judgment of the court thereon, which bills were thereupon taken out of court by the plaintiffs in error.

C. J. Ingersoll, for the plaintiffs in error.

1. The first question is, whether the sale, under the circumstances of the case, was a valid sale; whether fraud, which vitiates every contract, must be proved by the communication of positive misinformation, or by withholding information when asked. Suppression of material circumstances within the knowledge of the vendee, and not accessible *to the [*185] vendor, is equivalent to fraud, and vitiates the contract.¹ Pothier, in discussing this subject, adopts the distinction of the forum of conscience, and the forum of law; but he admits that *fides est servanda*.² The parties treated on an unequal footing, as the one *party [*186] had received intelligence of the peace of Ghent,

1.—Comyn on Contr. 38, and the authorities there cited.

2.—*Pothier, De Vente*, Nos. 233 to 241. He considers this question under the four following heads: 1st. Whether good faith obliges the vendor, at least in *foro conscientie*, not only to refrain from practising any deception, but also from using any mental reservation. 2d. What reservation binds the party in the civil forum, and to what obligations. 3d. Whether the vendor is bound, at least in *foro conscientie*, not to conceal any circumstances, even extrinsic, which the vendee has an interest in knowing. 4th. Whether the vendor may, in *foro conscientie*, sometimes sell at a price above the true Wheat 2.

value of the article. As Pothier's discussion throws great light on this subject, a translation of this part of his admirable treatise may not be unacceptable to the reader.

"ARTICLE II. 233. Although, in many transactions of civil society, the rules of good faith require us to refrain from falsehood and permit us to conceal from others that which they have an interest in knowing, if we have an equal interest in concealing it from them; yet, in interested contracts, among which is the contract of sale, good faith not only forbids the assertion of falsehood, but also all reservation concerning that which the person with whom we contract has an interest in

afford irrefragable evidence of such an act of illegality." This proposition, as a doctrine of law, would be equally true, leaving out all that it contains relative to a license. A voyage prosecuted in furtherance of the enemy's interests is undoubtedly illegal, and it was on this illegality of the voyage itself that the judgment of the court proceeded. The court say they are satisfied from the facts that the voyage was illegal. In the case now before the court the captors insist that the court shall shut out the facts connected with the voyage, and go merely on presumption. *The Julia* cannot be an authority for such a decision. *The Aurora*¹ was decided expressly on the grounds which had been before stated in *The Julia*, and carries the doctrine no further. In the case of *The Hiram*² no evidence was offered on the part of the claimants to repel the presumption arising from the license. That case, then, only decides, that from the possession of the license the court may presume, until the contrary appears, that the voyage was in furtherance of the enemy's objects.

In all these cases the court seems to have rested its decision on the ground that the voyages in which the vessels were engaged were, of themselves, illegal voyages, undertaken and prosecuted for the promotion of the enemy's [*146*] interests; and that *this illegality was shown by the facts which the cases disclosed. But it is not understood to have decided that it would hear no proof to make out the innocence of the voyage, notwithstanding the unfavorable inferences which might be drawn from the possession of the license. In the present case such proof is offered, and the claimants are ready to show that the voyage originated in no intention to further, and from its nature could not further, the objects of the enemy. It was a voyage from Baltimore to Cadiz, with flour, at a time when neither the British nor the Spanish armies drew supplies from that city. They expect to prove it to have been, in all respects, as innocent as a voyage from Baltimore to Boston, with a similar cargo. Upon this application for permission to give proof, and until the court should hear the proof, the only question will be, whether, in the most innocent voyage which can be imagined, the having such a license is, *per se*, cause of confiscation; and cannot in any case, by any evidence, admit of explanation or excuse. On this point, the claimant's counsel wish to be heard, unless the court considers itself as having recently solemnly decided the precise question. We will contend, that although the possession of such a license might create a presumption of unlawful trade, yet, like presumptions in other cases, it is capable of being repelled by proof; and that the judgment of the court must rest, after all, on the real nature and object of the voyage, as disclosed by the facts connected with it, and not on the mere terms of the passport. In a case of this sort, the [*147*] court will *not incline to hold itself bound by former decisions beyond their clear and manifest extent. No case appears to have gone so far as to prevent the court from hearing proof of the lawfulness of the voyage,

independent of the license, or to have decided that such proof, when full and satisfactory, should not avoid confiscation.

Woodward and *Ingersoll*, on the other side, were stopped by the court.

WASHINGTON, J., delivered the opinion of the court:

The view of the court is, that this case cannot be distinguished from those already decided. It is alleged that the flour was not actually destined to the use of the enemy; but whether any part of it went to his use or not, is immaterial. It is, indeed, possible that Cadiz might have fallen without the aid of these supplies; and therefore, in fact, Great Britain and her ally may have been relieved, by these supplies, from the pressure of the war in that quarter. The court, however, in the cases alluded to, proceeded on a broader ground; all the judges who concurred in those decisions were of opinion that the mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constituted, of itself, an act of illegality which subjected the property to confiscation. It was an attempt by one individual of a belligerent country to clothe himself with a neutral character *by the [*148*] license of the other belligerent, and thus to separate himself from the common character of his own country.

Sentence affirmed.

Cited—1 Pet. C. C. 417; Blatchf. Pr. 85, 264, 288; Newb. 405.

[INSTANCE COURT.]

THE WILLIAM KING.

DAVIS ET AL., *Claimants*.

Under the embargo act of the 22d December, 1807, the words "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but, consequently, rendered them liable to forfeiture under the supplementary act of the 9th of January, 1808.

In such case, if the vessel be actually and *bona fide* carried by force to a foreign port, she is not liable to forfeiture.

The court being of opinion, under the facts and circumstances of the case, that the capture under which it was alleged the vessel was compelled to go to a foreign port was fictitious and collusive; the decree of condemnation in the court below was affirmed.

APPEAL from the Circuit Court for the District of New York.

A libel was filed against this vessel in the District Court of New York, March, 1809, for a breach of the act of the 22d of December, 1807, laying an embargo, and the several acts supplementary thereto, alleging that she proceeded from Baltimore, without any clearance or permit, bound on a voyage *to Exu- [*149*] ma, one of the Bahama Islands, where she took in a cargo of six thousand bushels of salt, with which she returned to New York. The claimants admitted the fact of going to Exuma, and bringing away the salt, but alleged that it was

1.—8 Cranch, 283.

2.—8

Wheat. 440.

from necessity; that the brig was regularly bound to Boston, but being captured soon after she left Hampton Roads, by a British privateer, was sent to Jamaica, where she sold the cargo of flour which she had on board, the government of that colony not allowing it to be brought off. That she then went to Exuma.

The testimony in the case exhibits the following summary: About the middle of October, 1808, the vessel arrived at Baltimore from Boston. At Baltimore she took on board a cargo of upwards of sixteen hundred barrels of flour, and sailed again, ostensibly for Boston, about the first of November. On reaching Hampton Roads, she stopped a few days, being, as was asserted, windbound. While there, a British privateer, of ten guns and twelve men, called the *Ino*, arrived in the Roads. On the eighth of the month the brig put to sea, the *Ino* following her. On the afternoon of the same day the *Ino* captured her, within ten leagues of the shore, putting a prize-master and one man on board. The vessels then proceeded for the West Indies. During the voyage no attempt was made by the crew either to retake the brig or to escape, though favorable opportunities were not wanting. Her crew consisted of nine persons. After a short separation from the privateer, the brig arrived off St. Nicholas Mole. Here **150*** the privateer joined her, and thence the two went to Kingston. No prize proceedings were instituted against the brig; but, on the contrary, the supposed captors relinquished all claim to their prize, on reaching Kingston. From Kingston she went to Exuma, as above stated. The District Court, on the hearing, pronounced a sentence of condemnation. A decree of affirmance, *pro forma*, was entered in the Circuit Court, from which the cause was brought, by appeal, to this court.

Hoffman, for the appellants and claimants, stated, that this case was governed by the authority of *The Short Staple*,¹ the *William King* having sailed from Hampton Roads in company with that vessel, and both were seized by the British privateer *Ino*, and compelled to go to the West Indies. The two cases are perfectly coincident in their circumstances, and restitution having been decreed in the case of *The Short Staple*, the same judgment must, consequently, be pronounced in the present case. He argued that the whole plan and system of the revenue laws indicated that it was not the legislative intention to cumulate a forfeiture of the ship (being a registered vessel) upon the penalty of the bond, which had been given for relanding the cargo in the United States.

The *Attorney-General* and *Hopkinson*, contra. The court expressly overruled the point made **151*** as to "the construction of the embargo laws, in the case of *The Short Staple*," although that case was determined, on its peculiar cir-

cumstances by a majority of the court, in favor of the claimants. But the restitution of the *Short Staple*, on the facts of her case, forms no ground for the acquittal of the *William King*, even should the facts be precisely similar. Principles of law form precedents. But an inference from evidence is not conclusive as to facts, in another cause, whether the testimony be the same or different; certainly not if it be different.

Hoffman, in reply, argued, that the court could not, without judicial inconsistency, decide this case differently from that of *The Short Staple*, unless there was some substantial and important difference in the facts of the two cases; that the opinion of a majority of the court was the opinion of the court, and a rule of conduct, whether formed upon an abstract point of law or upon a mixed question of fact and law; and that to maintain the contrary position would be to assent to an assertion, which had been hazarded in another place, that the decisions of this court are not binding as legal precedents on themselves and on others.

JOHNSON, J.**, delivered the opinion [152** of the court:

This case comes up on appeal from the Circuit Court of New York. The vessel is the same which makes her appearance in the case of *The Short Staple*, decided in this court at February term, 1815; and it has been contended that the acquittal in that case is conclusive upon this.

But we think otherwise. It might with more propriety be contended, that had the hearing of this cause come on together with that of *The Short Staple*, the latter would have found much more difficulty in escaping. As it was, the division of the court, and the acknowledgment of the judge who delivered the opinion, show that the vessel in that case was "hardly saved." In the present cause there is very material evidence which did not appear in, and could not affect the former. We shall, therefore, dispose of this case altogether upon the evidence that is peculiar to it.

It will be recollected that this vessel, as well as the *Short Staple*, were libeled for a violation of the embargo act of the 22d of December, 1807, and the supplementary act of the 9th of January, 1808, the former of which enacts, "that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage," and the latter forfeits the vessel that shall proceed to any foreign port or place, "contrary to the provisions of this act, or of the act to which this is a supplement." As the majority of the court were of opinion that no offense was committed in the case of *The Short Staple*, ***it was unneces- [*153** sary to express any opinion on the application of the law. They, therefore, waived it.

But in this case it becomes necessary to lay down the following principles: There can be no doubt that if the *William King* was carried off to Jamaica by actual force, it was an act which wanted the concurrence of the will, and, therefore, innocent. But, whatever is done in fraud of a law is done in violation of it; and if a vessel, with an original intention to go to a foreign port, complied with

1.—9 Cranch, 55.

2.—In delivering the opinion of the court in that case, *Marshall, Ch. J.*, stated that this point had "been pressed with great earnestness by the counsel for the claimants; but the court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the claimants justify their going into St. Nicholas Mole is sustained by the proofs in the cause." 9 Cranch, 60.

Wheat. 2.

ground, therefore, Mr. Girault was an inadmissible witness. 4. The only real question in the cause is, whether the sale was invalid because the vendee did not communicate information which he received precisely as the vendor might have got it had he been equally diligent or equally fortunate. And, surely, on this question there can be no doubt. Even if the vendor had been entitled to the disclosure, he waived it by not insisting on an answer to his question; and the silence of the vendee might as well have been interpreted into an affirmative as a negative answer. But, on principle, he was not bound to disclose. Even admitting that his conduct was unlawful, in *foro conscientie*, does that prove that it was so in the civil forum? Human laws are imperfect in this respect, and the sphere of mortality is more extensive than the limits of civil jurisdiction. The maxim of *caveat emptor* could never have crept into the law if the province of ethics had been co-extensive with it. There was, in the present case, no circumvention or manœuvre practiced by the vendee, unless rising earlier in the morning, and obtaining by superior diligence and alertness that intelligence by which the price of commodities was regulated, be such. It is a romantic equality that is contended for on the other side. Parties never can be precisely equal in knowledge, either of facts or of the infer-

194*] ences *from such facts, and both must concur in order to satisfy the rule contended for. The absence of all authority in England and the United States—both great commercial countries—speaks volumes against the reasonableness and practicability of such a rule.

C. J. Ingersoll, in reply. Though the record may not show that anything tending to mislead by positive assertion was said by the vendee, in answer to the question proposed by Mr. Girault, yet it is a case of manœuvre; of mental reservation; of circumvention. The information was monopolized by the messengers from the British fleet, and not imparted to the public at large until it was too late for the vendor to save himself. The rule of law and of ethics is the same. It is not a romantic, but a practical and legal rule of equality and good faith that is proposed to be applied. The answer of Boorman & Johnston denies the whole of the petition, and consequently denies that payment was to be in bills of exchange; and their taking the bills out of court ought not to prejudice them. There is nothing in the record to show that the vendors were general merchants, and they disclosed their principals when they came to plead. The judge undertook to decide from the testimony that there was no fraud; in so doing he invaded the province of the jury: he should have left it to the jury, expressing his opinion merely.

195*] *MARSHALL, *Ch. J.*, delivered the opinion of the court:

The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary

doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other. The court thinks that the absolute instruction of the judge was erroneous, and that the question whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury. For these reasons the judgment must be reversed, and the cause remanded to the District Court of Louisiana, with directions to award a *venire facias de novo*.

Venire de novo awarded.

Cited—14 Pet. 222.

*[LOCAL LAW.]

[*196

RUTHERFORD v. GREENE'S HEIRS.

A question relative to the title of the late Major-General Nathaniel Greene, to 25,000 acres of land given to him, within the bounds of the land reserved for the use of the army, by the 10th section of the act of the legislature of North Carolina, passed in 1782, as a mark of the sense entertained by that state of his eminent services.

THIS was a bill in chancery, filed in the Circuit Court for the District of Tennessee, by the appellant, against the heirs of the late Major-General Greene.

The cause was argued by *Campbell* and *Harp*er for the appellant, and by *Law* and *Jones* for the appellees.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

As this case depends entirely on the validity of Greene's title, the court will notice only so much of the record as respects that title.

In the year 1777 the state of North Carolina opened a land-office, for the purpose of selling all the vacant lands east of a line described in the act.

In the year 1780 an act passed reserving a certain tract of country for the officers and soldiers of the line of that state.

This act is lost.

*In the year 1782 an act passed "for [*197 the relief of the officers and soldiers in the continental line, and for other purposes therein mentioned." This act gives certain specified quantities of land to the officers and soldiers; then the 7th section commences thus: "And, whereas, in May, 1780, an act passed at Newburn, reserving a certain tract of country to be appropriated to the aforesaid purposes, and it being represented to this present assembly that sundry families had, before the passing the said act, settled on the said tract of country, Be it enacted," &c. The section then proceeds to grant 640 acres of land to each family which had so settled. The 8th section appoints commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers. The 10th section enacts, that "25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved

Wheat. 2.

for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer."

This is the foundation of the title of the appellees.

On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state nor present interest in General Greene.

The court thinks differently. The words are words of absolute donation, not, indeed, of any **198*** specific *land, but of 25,000 acres in the territory set apart for the officers and soldiers.

"Be it enacted, that 25,000 acres of land shall be allotted for and given to Major-General Nathaniel Greene." Persons had been appointed in a previous section to make particular allotments for individuals out of this large territory reserved, and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. "Twenty-five thousand acres of land shall be allotted for, and given to, Major-General Nathaniel Greene." Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act—for it is not the practice of legislation to enact that a law shall be passed by some future legislature—but given by force of this act.

It has been said that, to make this an operative gift, the words "are hereby" should have been inserted before the word "given," so as to read, "shall be allotted for, and are hereby given to," &c. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene.

The 11th section authorizes the commissioners **199*** to *appoint surveyors, for the purpose of surveying the lands given by the preceding sections of the law.

In pursuance of the directions of this act, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed. The survey was returned to the office of the legislature, on the 11th of March, in the year 1788. The allotment and survey marked out the land given by the act of 1782, and separated it from the general mass liable to appropriation by others. The general gift of 25,000 acres, lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now become a particular gift of the 25,000 acres contained in this survey.

Against this conclusion has been urged that article in the constitution of North Carolina which directs that there should be a seal of the state, to be kept by the governor and affixed to all grants. This legislative act, it is said, cannot amount to a grant, since it wants a formality required by the constitution.

Wheat. 2.

This provision of the constitution is so obviously intended for the completion and authentication of an instrument, attesting a title previously created by law, which instrument is so obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself, that the court would certainly have thought it unnecessary to advert to it, had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability.

After urging that these lands were not positively *granted to General Greene, the **[200]** counsel for the appellant proceeded to argue that it was in the power of the legislature to retract its promise, and that the legislature had retracted it.

Before attempting the difficult task of describing the limits of the legislative power in cases where those limits are not fixed by a written constitution, the court will proceed to inquire whether the government of North Carolina has, in fact, revoked its promise or recalled its gift.

At a session begun on the 12th of April, 1788, the assembly passed "an act for opening the land-office," thereby extending the line describing the country in which lands might be entered so far west as to comprehend the territory reserved for the officers and soldiers of the North Carolina line.

The 11th section of this act contains a proviso saving from entry the lands within the bounds reserved for the officers and soldiers.

At the same session an act was passed "to amend the act for the relief of the officers and soldiers of the continental line, and for other purposes."

The first six sections of this act prescribe the mode of individual appropriation, and of obtaining titles.

The 7th section, "For prevention of disputes," enacts "that the officers and soldiers aforesaid shall enter and survey the lands within the following lines, Beginning," &c.

This section, it is said, changes the place reserved, and marks out a new territory for the officers and soldiers. It is, then, contended, that this act, and *the preceding act **[201]** for opening the land-office are to be construed together, and the proviso of the 11th section of that act applies to the 7th section of this; by which operation the whole territory before reserved for the officers and soldiers, including the land surveyed for General Greene, is opened for entry.

The court does not concur with the counsel for the appellant in any part of this argument.

There is nothing in the law leading to the opinion that the place reserved for the officers and soldiers was changed. The fair construction of the acts is that the reserve was restricted to narrower limits, not transferred to different ground.

It has been contended that the court is restrained from giving this construction to the acts under consideration, because the bill avers that the place was changed,*and the demurrer admits the fact.

The court will not inquire whether this averment is founded on an apparent misconstruction of the law, and is, therefore, to be disregarded; or is the averment of a fact compatible

with the law; because the fact itself does not essentially affect the case.

If the place in which lands were reserved generally for the officers and soldiers, but not individually appropriated, was changed, the individual appropriation made for General Greene, within their original limits, was not also changed. The act did not profess to remove him with them, and he consequently remained *on the same ground, protected by his pre-existing title, whatever it might be.

But it is contended that his title was annulled by the general authority given in the 9th section of the act, to enter all the lands within the enlarged limits then opened to purchasers.

To this argument it is answered,

1st. That the 11th section reserves the land allotted to the officers and soldiers, then comprehending the land surveyed for General Greene; and,

2d. That a general permission to enter lands within a given tract of country must, of necessity, be limited to lands not previously appropriated.

The positive exception contained in the 11th section, it is said by the appellant, must be applied to the land reserved to the officers and soldiers by the subsequent act changing their position, because the two acts must be taken together; and if so, there is no exception comprehending the lands of General Greene.

The two acts have distinct objects. The first opens a land-office for the purpose of redeeming the public debt by the sale of lands, and the second prescribes the manner in which officers and soldiers are to obtain titles for lands given to them by the state, and amends an act passed at a previous session on the same day. The legislature has not considered the reserve in the first act as transferred into the second; but has, by the 8th section of the second act, re-enacted in a modified manner the prohibition intended for the protection of those for whom this reserve was expressly made.

203* But let it be conceded that the proviso of the 11th section was repealed by implication, when the position of the officers and soldiers was changed, and a new prohibition enacted and applied to the new reserve; still it would be difficult to maintain that this silent repeal, implied from the removal of the object for which it was originally and chiefly intended, should apply to another object originally preserved by the provision, and for which it continues to be necessary.

But the court does not found its opinion on this position, however well it may be supported by justice. The proposition is believed to be perfectly correct that the act of 1783, which opened the land-office, must be construed as offering for sale those lands only which were then liable to appropriation, not those which had before been individually appropriated. Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property to which they may be fairly applicable, and not particularly applied by the legislature—no silent, implied, and constructive

repeals—ought ever to be so understood as to divest a vested right.

But it is contended that this construction of the acts of 1783 is forced upon us, because the rights of others, and not the right of General Greene, are exempted from the operation of that section which offers *for sale all [*204 the land within the described territory; and the exception of one object excludes others of the same character.

Without inquiring what would be the force of this argument, if, in point of fact, rights similar to those of General Greene were received, and his omitted, let the fact be examined.

The first reservation in the act for opening the land-office related to the lands of the Cherokee Indians.

Nothing could be more obvious than the necessity, as well as propriety, of prohibiting all entries on Indian lands lying within the boundary offered for sale, if the legislature intended they should not be entered. The Indian title was not derived from the state of North Carolina; and to infer from the recognition of this title that others actually derived from the state, if not also recognized, are annulled, is not admitted to be correct reasoning.

The only other reserve in this act is of the land within the limits allotted to the officers and soldiers, and within these limits was the land surveyed for General Greene.

Our attention is next directed to the act to amend the act "for the relief of the officers and soldiers," &c. This act narrows the limits within which the military lands shall be surveyed, or changes them so that in either case the lands of General Greene are no longer within them. Nothing can be more obvious than that provisions relating to lands within this particular territory can have no implied application to *a title previously acquired by [*205 General Greene to lands not lying within it.

The 8th section of the act prohibits all persons from entering lands within the bounds allotted to the officers and soldiers.

The 9th section excepts out of this prohibition the commissioners and surveyors, &c., appointed to lay off the military lands, and prescribes the mode by which they may appropriate and acquire title to lands given to them by the legislature.

The 13th section enacts that Governor Martin and David Wilson be entitled, agreeably to the report of the committee, to two thousand acres of land each, adjacent to lands allotted to officers and soldiers, for which they may receive titles in the same manner as the officers and soldiers.

The insertion of this reservation in this act leads almost necessarily to the opinion that the lands granted to Martin and Wilson were a part of those to which the act related; and the words of the section show that their title was acquired by this act. By no course of just reasoning can it be inferred from these permissions to make appropriations within bounds not open to entry generally, that a vested right to lands not lying within the limits to which this act relates is annulled.

It is clearly and unanimously the opinion of this court that the act of 1783 vested a title in General Greene to 25,000 acres of land, to be

laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 206* 1783, gave precision to that title, *and attached it to the land surveyed. That his rights are not impaired by the acts of 1783, and the entry of the appellant, all of which are subsequent to his survey; and that it is completed by the grant which issued in pursuance of the act of 1784, and which relates to the inception of his title. The decree of the Circuit Court, dismissing the bill of the complainant, is affirmed with costs.

Decree affirmed.

Cited—6 Pet. 733, 735, 741; 12 Pet. 236; 12 How. 78; 17 How. 542, 559, 575; 10 Wall. 233, 234; 21 Wall. 60, 61, 531; 1 Otto, 333; 11 Otto, 509; 1 Sawy. 573; 2 Sawy. 440.

[LOCAL LAW.]

JOHNSON v. PANNEL'S HEIRS.

It is essential to the validity of an entry that the land intended to be appropriated should be so described as to give notice of the appropriation to the subsequent locators.

In taking the distance from one point to another on a large river, the measurement is to be with its meanders, and not in a direct line.

In ascertaining a place to be found by its distance from another place, the vague words "about" or "nearly" and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively.

Entries made in a wilderness, most generally referring to some prominent and notorious natural object, which may direct the attention to the neighborhood in which the land is placed, and then to some particular object exactly describing it, the first of these is denominated the general or descriptive call, and the last the particular locative call of the entry. Reasonable certainty is required in both; if the descriptive call will not inform a subsequent locator in what neighborhood he is to search for the land, the entry is defective, unless 207* the particular object is one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive calls, the entry is also defective. A single call may, at the same time, be of such a nature (as, for example, a spring of general notoriety) as to constitute within itself both a call of description and of location; but, if this call be accompanied with another, such as a marked tree at the spring, it seems to be required that both should be satisfied.

The call for an unmarked tree of a kind which is common in the neighborhood of a place sufficiently described by the other parts of the entry to be fixed with certainty may be considered as an immaterial call.

Therefore, where the entry was in the following words: "D. P. enters 2,000 acres on a treasury warrant on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree on the river bank, running up the river from thence 1,060 poles, thence at right angles to the same, and back for quantity," it was held that the call for a sugar tree might be declared immaterial, and the location be sustained on the other calls.

The entry was decreed to be surveyed, beginning 12 miles below the mouth of Licking on the bank of the Ohio, and running up that river 1,060 poles; which line was to form the base of a rectangular parallelogram to include 2,000 acres of land.

THIS cause was argued by *Talbot* for the appellants, and *M. B. Hurdin* for the respondents.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

Wheat. 2.

This case depends on the validity and construction of an entry made in the state of Kentucky by David Pannel, the ancestor of the appellees, in these words: "David Pannell enters 2,000 acres on a treasury warrant on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree on the river bank, running up the *river [*208 from thence 1,060 poles, thence at right angles to the same and back for quantity."

The appellant having obtained an elder patent for the same land on a junior entry, the appellees brought a bill in the Circuit Court for the District of Kentucky, sitting in chancery, praying that the defendant, in that court, might be decreed to convey to them. The Circuit Court directed the entry of the complainant to be surveyed, beginning twelve miles below the mouth of Licking on the bank of the Ohio, and running up that river 1,060 poles; which line was to form the base of a rectangular parallelogram, to include 2,000 acres of land. So much of this land as was within Pannell's patent, and also within Johnson's patent, the court decreed the defendant to convey to the plaintiffs. From this decree the defendant has appealed to this court.

He contends that the decree is erroneous, because,

1st. It affirms the validity of this entry, which is too uncertain and defective to be established.

2d. If the entry be established, it ought to be so surveyed that the whole land should lie twelve miles below the mouth of Licking.

First. It is undoubtedly essential to the validity of an entry that it shall be made so specially and precisely that others may be enabled, with certainty, to locate the adjacent *residuum*. The land intended to be appropriated must consequently be so described as to give notice of the appropriation to subsequent locators. In obtaining this information, however, it would seem to be the plain dictate of common sense that the person about to take up adjoining *lands would read the whole of a pre- [*209 vious entry which he wished to avoid, compare together its different parts, and judge, from the entire description, what land was appropriated. If with common attention and common intelligence the land could be ascertained and avoided, the requisites of the law would seem to be complied with.

Test Pannel's entry by this standard.

The mouth of Licking is a place of acknowledged and universal notoriety, which no man in the country could be at a loss to find. When placed there, he is informed by the entry that Pannel's land lies twelve miles below him on the Ohio. He proceeds down the river twelve miles, and is there informed that the entry begins at a hickory and sugar tree on the river bank. He looks around him and sees hickory and sugar trees. Here, then, he would say, while uninformed of decisions which have since been made, is the beginning of the entry. In what direction does the land lie? The paper which is to give his information says, "running up the river from thence 1,060 poles, thence at right angles to the same, and back, for quantity." Would he say this description is repugnant in itself, containing equal and contradictory directions, neither of which is entitled to

any preference over the other, and leaving the judgment in such a state of doubt and perplexity as to be incapable of deciding the real position of this land? Would he say the whole land must lie twelve miles from the mouth of Licking? This is so clearly and definitely required that the entry will admit of no other construction. That the subsequent words directed him to run up the river from that point 1,060 poles, and thus approach the mouth of Licking, are not explanatory but contradictory? That the one or the other must be totally discarded? Were this the real impression which would be made on the mind, it cannot be denied that the state of uncertainty in which these equal and irreconcilable descriptions would place a subsequent locator, ought to vitiate the entry. But if, on the contrary, the obvious and natural construction would be that, since every part of the land cannot be placed precisely twelve miles below the mouth of Licking, the distance is applicable to any part of the tract, and this part of the description may be so explained and controlled by other parts as to receive a meaning different from that which it would have if standing alone, then the subsequent locator would take the whole description together, and if its different parts could, without difficulty, be reconciled, he would reconcile them. He would say the beginning must be twelve miles from the mouth of Licking, but the residue of the land must approach that place because the entry requires positively to run from the beginning up the river. This would, it is thought, be the manner in which this entry would be understood by a person guided by no other light than is furnished by human reason. But the courts of Kentucky have constructed a vast and complex system, on the entire preservation of which their property depends, and this court will respect that system as much as the courts of Kentucky themselves.

211* In applying the decisions of that country to this cause, we find many points now settled which were formerly controverted questions. In taking the distance from one point to another on a large river the measurement is to be with its meanders, not in a direct line. And in ascertaining a place to be found by its distance from another place, the vague words "about," or "nearly," and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. A subsequent locator, then, must look for the beginning called for in this entry twelve miles below the mouth of Licking, measured by the meanders of the Ohio.

In construing locations some other principles have been established which seem to be considered as fundamental. Entries made in a wilderness would most generally refer to some prominent and notorious object which might direct the attention to the neighborhood in which the land was placed; and then to some particular object which should exactly describe it. The first of these has been denominated the general or descriptive call, and the last the particular or locative call of the entry. Reasonable certainty has always been required in both. If the descriptive call will not inform a subsequent locator in what neighborhood he is to

search for the land, the entry is defective, unless the particular object be one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive call, the entry is equally defective. They must both be found; and neither can be discarded **[*212]** unless deemed immaterial. A single call may be, at the same time, so notorious and so formed, as, for example, a spring of general notoriety, as to constitute in itself a call both of description and location; but if this call be accompanied with another, as a marked tree at the spring, it seems to be required that both calls should be satisfied.

Thus, in the case now under the consideration of the court, the call for a beginning twelve miles below the mouth of Licking would be sufficiently descriptive, and is sufficiently precise to be locative. It would be unquestionably good were it not accompanied with the additional call for a hickory and sugar tree. Whether it is vitiated by this additional call is to be determined by a reference to the decisions in Kentucky.

The case of *Grubbs et al. v. Rice* (2 Bibb, 107), depended on the validity of an entry made in these words: "James Thomas enters 300 acres of land, &c., on the south side of Kentucky, about two miles below the mouth of Red River, beginning at a tree marked I. S. on the bank of the river, and running down the river for quantity."

No tree marked I. S. was found at or near the distance required. It was proved that a tree had been marked I. S. by the person who afterwards made the entry for Thomas, and that it stood on the south side of Kentucky; but instead of being two miles it was three miles and a quarter, by the meanders of the river, and two miles and two-thirds of a mile on a direct course, below the mouth of Red River. The inferior court disregarded the call **[*213]** for the tree, and fixed the beginning of the entry at the termination of two miles below the mouth of Red River. On an appeal this decree was reversed, and Judge Wallace, in delivering the opinion of the court, said: "This rejection of the call for the tree marked I. S. is certainly subversive of the well-established principle that no part of an entry ought to be rejected unless what is evidently mere surplusage, or absolutely repugnant to other expressions which are more important; because, to do more would not be construing entries, but making them. But the expression 'about two miles below the mouth of Red River' is obviously only a general call, and to substitute this in the place of the expression 'beginning at a tree marked I. S.,' &c., which is the only special or locative call in the entry, is still more inadmissible."

The case of *Kincaid v. Blythe and others* (2 Bibb, 479) turned on the validity of an entry made "on a branch of Silver Creek, about four miles from the little fort on Boone's old trace, including a tree marked D. B." In this case, too, the inferior court disregarded the call for the tree, which could not be proved to have existed when the location was made, and directed the land to be surveyed at the termination of the distance of four miles from the little fort. On appeal, this decree also was

Wheat. 2.

reversed, and, in delivering the opinion of the court, Judge Wallace said: "It is evident that when the entry was made, Boone's old trace, the little fort, and Silver Creek, were all well known by those names to the generality of 214*] those who were conversant in 'the vicinity. And it further appears that about four miles from the little fort, on a southern direction, Boone's old trace struck Hayes' fork of Silver Creek, which may be presumed to be the branch of Silver Creek intended; and, if the entry contained no other calls, it would deserve serious consideration whether the place where the trace crossed Hayes' fork of Silver Creek ought not to be assumed as the center of the survey to be made thereon. But this entry calls to include a tree marked D. B., which is obviously a locative and material call, and, therefore, conformably to the uniform decisions of this court on similar entries, must be taken into consideration in deciding on this entry."

These cases are admitted to have settled the law to be that a material locative call, as for a marked tree, cannot be disregarded; and that, if the existence of the tree cannot be proved, the entry cannot be sustained. The only distinction between these cases and that under the consideration of the court is that, in them, the entries call for a marked tree; in this it calls for a sugar tree and hickory, not stating them to be marked. For the importance of this distinction we are again referred to the decisions of Kentucky.

The case of *Greenup v. Lyne's heirs*,¹ turned on an entry of land "lying on Kentucky River, opposite to Leesburg, beginning at a beech tree and running up the river and back for quantity." The validity of this entry was affirmed in the inferior court, and, on an appeal, was 215*] also affirmed in the Superior Court. *In delivering the opinion of the superior court, Judge Logan said: "Had the only call in the entry been to lie on the river opposite to Leesburg we should have concurred with the Circuit Court in the manner of surveying it, by running up and down the river equal distances from a point opposite the centre of Leesburg; and if the call to begin at 'a beech tree' had been the only other call, we should still have thought that opinion correct, as the common growth of the timber there is beech, and a tree of the description could have been had at almost any point within the limits of the claim. This circumstance, we conceive, ought not to affect the entry; for whether the call is regarded or rejected, in the construction of the entry, is totally immaterial; because, it seems to the court that where an uncertainty arises from the number of objects presented, answering the calls of an entry, and it has other calls sufficiently precise to sustain it, that, of the many doubtful objects, that should be taken as intended, which will best preserve the consistency of the others; and in this case it seems the call for the tree could be complied with without changing in the least the position given by the first call, so that it is left as an immaterial call. We are more confirmed in this opinion when we consider that the entry, from any other view, must be invalid for uncertainty, although we believe no one could doubt, from a liberal

and just construction of it, as to the general body and position of the land it calls for."

*This case, if not overruled, certainly- [*216 ly goes far in distinguishing between a call for a marked tree, and for a tree not marked, provided such trees as the call requires are found about the place where the entry must begin. It goes further, and strongly indicates the opinion that an unmarked tree was an object of less importance in the mind of the locator than one selected from all others by a mark peculiar to itself. While the latter must have been deemed important, and have strongly fixed his attention, the former may have been thought not very essential. Coming to the place where he intended to begin, looking around him when there, and, seeing trees of a particular kind from the common growth, he might suppose it unimportant at which of these trees he should commence and call for one of them. In such a case, a court may well say "whether the call is regarded or rejected in the construction of the entry is totally immaterial." There is much reason for this opinion. Certainty is required in entries for the purpose of giving notice to subsequent locators. The subsequent locator who comes to the place described in the entry, in order to find the land he wishes to avoid, will, if a marked tree be called for, search for that marked tree; and, if it cannot be found, may well conclude that this is not the land intended to be appropriated; but if only a tree is called for, and trees stand all around him, he will naturally suppose that the nearest may be taken as a beginning, and that to him it is quite immaterial whether the commencement be at the spot on which he stands or within ten feet or ten yards of him. *The subsequent [*217 locator is not misled by this call; nor is there any danger of his mistaking the position of the land. It is not without reason, therefore, that the call is pronounced immaterial, and one which may be regarded or rejected. The entry may be sustained by other calls which are sufficiently precise to sustain it.

If in the case at bar it had been proved that sugar trees and hickories were as common at the termination of twelve miles from the mouth of Licking as the beech tree opposite to Leesburg, the two cases would, in this respect, be precisely alike. But this is not proved. Only one witness has been examined to this point, and his testimony is that there are sugar trees on the bank of the Ohio, in the neighborhood, and that the maple or sugar tree might be found for many miles above and below the corner, standing within fifty yards of each other, on the second bank of the river. The report of the surveyor shows that three elms and a hickory stood at the termination of the twelve miles from the mouth of Licking.

There would certainly be much difficulty in supporting this as a locative call, although it is not absolutely certain that it might not be so supported. The not less important question is, whether it may be considered as an immaterial call. No case has been cited in which the call for an unmarked tree has been thought material; and there are cases in which a circumstance not important in itself has been dispensed with. The difference between calling for a marked and an unmarked tree has been *al- [*218 ready noticed. It is difficult to suppose that

1—2 Bibb, 300.

Wheat, 2.

they are viewed as equally important by the person making the entry, or by a subsequent locator. If the person making the entry designed to select for the beginning a particular tree, in exclusion of all others, it is in a high degree improbable that he should omit to mark it. If he made the entry from memory, then the place only, and not the particular tree, would be the object to which his mind would attach importance. So with the subsequent locator. The distance would bring him to the place, or sufficiently near to it for every beneficial purpose, and whether a sugar tree and hickory stood at the end of twelve miles as measured by his chain, or within thirty, forty, or fifty yards, would not essentially vary his views with respect to adjacent lands. He could not doubt, to use the expression of the court in the case of *Greenup v. Lyne's heirs*, "as to the general body and position of the land" described in the entry. The opinion that the call for an unmarked tree of a kind which is common in the neighborhood of a place sufficiently described by other parts of the entry to be fixed with certainty may be considered as an immaterial call, is supported by the decision of the court in the case which has been last mentioned. Although in that case the judge shows that a tree might be found to satisfy the call at the place fixed as the beginning, yet it is apparent that different places within a few yards of each other would answer equally well for the beginning, and that different trees might be selected for that purpose. And the judge, after stating 219*] that this call "might either be considered as satisfied, or in itself immaterial, proceeds to show that he thought it immaterial. "Regarding," he proceeds to say, "the call for a beech tree as immaterial, we come to consider," &c.

Upon the authority of the case of *Greenup v. Lyne's Heirs*, then, and upon a view of the whole of this entry, it would seem that the call for the sugar tree and hickory may be declared immaterial, and the location be sustained on its other calls.

The second question is, in what manner ought this entry to be surveyed?

It is admitted to be a general principle that, where a location calls for land to lie a given distance from a given point, the whole land must be placed at or beyond that distance, if there be no other words in the location which control this construction. But it is not admitted that this call can overrule the plain meaning of the whole entry taken together. It is believed to be unquestionably decided that every material part of the entry is to be considered, and that such construction is to be put upon the whole as is best adapted to all its material calls.

This principle was laid down in *Greenup v. Lyne's Heirs*, which, on this point, bears a strong analogy to that under the consideration of the court. In *Greenup v. Lyne's Heirs* the entry called for land "lying on Kentucky River, opposite to Leesburg, beginning at a beech tree, and running up the river and back for quantity."

It is perfectly settled in Kentucky, that on a call for land lying opposite to Leesburg, the center of the land would be placed opposite to the center of the town, and a square would

be formed on a base line running up and down the river to include the quantity. The entry could not otherwise be sustained. The inferior court laid off this entry in that manner; and the Appellate Court declared that it would be the proper manner were there not other words in it which controlled this general description by one which was more particular. That more particular description was, "running up the river and back for quantity."

These cases are in principle the same. The one calls for land twelve miles below the mouth of Licking, which description would require land the nearest part of which is at the given distance; the other calls for land lying opposite Leesburg, which requires a tract the center of which is opposite to the center of the town. The one calls for a beginning at a sugar tree and hickory, without naming a place for the beginning otherwise than by the description of the position of the land; the other calls for a beech tree under precisely the same circumstances. In the case of *Greenup v. Lyne's Heirs* the words "running up the river and back for quantity" have changed the place of beginning from the center to the lower end of the town, and the position of the land, so that instead of lying above and below Leesburg, in equal quantities, it lies entirely above that place. Why shall not the same words influence in the same manner, the position of Pannel's land?

From the language of Pannel's entry, every man would expect the survey to begin at the place called "for, twelve miles below [*221 the mouth of Licking. If that is not the beginning the location is unquestionably uncertain and void. If that is the beginning it is the plain mandate of the entry to run up the river 1,060 poles and back for quantity.

It is the opinion of the majority of the court that the decree ought to be affirmed with costs.

Decree affirmed.

Cited—11 Wheat. 220.

[COMMON LAW.]

PATTERSON v. THE UNITED STATES.

A verdict is bad if it varies from the issue in a substantial matter, or if it finds only a part of that which is in issue; and, though the court may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

In an action of debt, upon a bond to the United States, with condition that certain merchandise imported, and reshipped for exportation, should not be reloaded within the United States, and that the certificate and other proofs required by law, of the delivery of the same, without the limits of the United States, should be produced at the collector's office within one year from the date of the bond, an issue was formed upon the defendant's plea, that the merchandise was not reloaded, &c., and that the certificates and other proofs required by law, of the delivery of the same at Archangel, in Russia, were produced, &c., within one year from the date of the bond. The jury found a verdict that, "the within-mentioned writing obligatory is the deed of the within-named R. P. &c., and they find there is really and justly due upon the [*222 said writing obligatory the sum of \$23,000 50."

Wheat. 2.

Held, that the verdict was so defective no judgment could be rendered upon it.

A circuit court has no authority to issue a *certiorari*, or other compulsory process, to the District Court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced.

In such a case, the District Court may, and ought, to refuse obedience to the process of the Circuit Court, and either party may move the Circuit Court for a *procedendo*, after the transcript of the record is removed into that court, or may pursue the cause in the District Court as if it had not been removed.

But if the party, instead of properly taking advantage of the irregularity in the proceedings, enters his appearance in the Circuit Court, takes defense, and pleads to issue, it is too late, after verdict, to object to the irregularity, and the Supreme Court will, on error, consider the cause as an original suit in the Circuit Court.

THIS cause was argued by *Ogden and Harper* for the plaintiff in error, and by the *Attorney-General* and *Glenn*, for the United States. But as the points made were not considered by the court, and judgment was pronounced on other grounds, the argument is omitted.

WASHINGTON, J., delivered the opinion of the court:

This was an action of debt instituted in the District Court of Maryland by the United States, against Robert Patterson, the plaintiff in error, upon a bond, dated the 2d of August, 1809, in the penalty of \$35,000, with condition that certain merchandise, which had been imported into the United States, and which the said Patterson had then reshipped, in order to export the same to Tonningen, should not be relanded in any port or place within the United States, and that the certificate and other proofs required [223] *by law of the delivery of the same, at some place without the limits of the United States, should be produced at the collector's office of the port of Baltimore, within one year from the date of the bond.

After the declaration was filed in the District Court, and the defendant had entered his appearance and taken defense, a writ of *certiorari*, issued from the Circuit to the District Court, in obedience to which the record of the proceedings in that court was certified and sent up to the Circuit Court. In this court the defendant again took defense, and after sundry impanelances, and having had oyer of the bond and condition, he pleads, 1st. Performance generally of the condition. 2d. That the merchandise mentioned in the condition of the bond was not relanded in the United States, and that the certificate and other proofs required by law of the delivery of the same at Archangel, in Russia, were produced at the said collector's office within one year from the date of the said bond. 3d. That the said merchandise, or any part thereof, was not relanded in the United States, and that the certificates and other proofs required by law of the delivery of the same at Archangel, in Russia, were produced to the said collector's office on the 11th day of November, in the year 1811. The replication to the first plea alleges a breach of the condition of the bond in not producing to the said collector's office the certificate and other proofs required by law of the relanding in some place without the limits of the United States, within

Wheat. 2.

U. S., Book 4.

one year from the date of the said bond, to which a rejoinder was put in affirming that the certificate and other *proofs were produced at the said office within the said year, upon which an issue is tendered and joined. The same issue is formed upon the second plea, and to the third plea a general demurrer was put in.

The demurrer was, upon argument, sustained, and judgment was entered against the defendant for the penalty of the bond.

A jury was afterwards impaneled to try the issue who found the following verdict, viz.: "That the within-mentioned writing obligatory is the deed of the within-named Robert Patterson, &c., and they find there is really and justly due upon the said writing obligatory the sum of \$23,989.58."

Upon this verdict the court gave judgment in favor of the United States, for \$35,000, to be released on the payment of the above sum assessed by the jury, from which judgment a writ of error was obtained to remove the cause to this court.

The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it.

The issue which the jury were sworn to try was, whether the certificate and other proofs required by law, of the delivery of the cargo at some place without the limits of the United States, were produced at the collector's office at Baltimore within one year from the date of the bond. The verdict does not find the matter in issue one way or the other, but finds that the bond in the declaration mentioned is the deed of the defendant, and that there is justly due to the United States, upon the said bond, a certain *sum of money. But whether the bond [225] was the deed of the defendant or not was not a matter in issue between the parties, and, consequently, it was a false conclusion to say that, because it was his deed, therefore he was indebted to the United States.

The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the Appellate Court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

It is true that if the jury find the issue and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue.

The court deems it proper to take some notice of the mode of proceeding, for removing this cause from the District to the Circuit Court. It is believed to be novel in the practice of the courts of the United States; and it certainly wants the authority of law to sanction it. There is no act of Congress which authorizes a Circuit

15

225

Court to issue a compulsory process to the District Court, for the removal of a cause from **226*** that jurisdiction, before a final judgment or decree is pronounced. The District Court, therefore, might, and ought to have refused obedience to the writ of *certiorari* issued in this case by the Circuit Court, and either party might have moved the circuit for a *procedendo* after the transcript of the record was removed into the Circuit Court, or might have pursued the cause in the District Court in like manner as if the record had not been removed.

But if, instead of taking advantage of this irregularity at a proper time, and in a proper manner, the defendant enters his appearance to the suit in the Circuit Court, takes defense, and pleads to issue, it is too late, after verdict, to object to the irregularity in the proceedings. This court will consider the suit as an original one in the Circuit Court, made so by the consent of parties. Had a new declaration been filed in the Circuit Court, no doubt could be entertained as to the correctness of this conclusion. And it is not going too far to consider the declaration sent from the District Court in the same light, after appearance, issue, and verdict. This is the opinion of the majority of the court.

The judgment is to be reversed, and a *venire de novo* to be issued by the Circuit Court.

Judgment affirmed.

Cited—5 Pet. 215; 14 Pet. 621; 4 How. 143, 147, 154; 14 How. 246; 12 Wall. 403; 3 Blatchf. 163; 15 Blatchf. 299; 3 Cranch, C. C. 575; Hemp. 7; 1 Bald. 406; 2 McLean 624; 4 Dill. 9.

227*

*[PRIZE.]

THE PIZARRO

HIBBERSON and YONGE, Claimants.

If the court below deny an order for further proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party, and appears on the record, the Appellate Court can administer the proper relief.

But, if evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived.

Concealment or spoliation of papers is not, *per se*, a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court, but is open to explanation, and if the party, in the first instance fairly, frankly, and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled. If, on the contrary, the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labor under heavy suspicions or gross prevarications, further proof is denied, and condemnation ensues from defects in evidence which the party is not permitted to supply.

Under the Spanish treaty of 1765, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence the cause appears extremely doubtful and suspicious, and further proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of prize courts in other cases.

226

The term "subjects" in the 15th article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

*The Spanish character of the ship being [*228] ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

A PPEAL from the Circuit Court of the District of Georgia.

The ship Pizarro, under Spanish colors, was captured on the 23d of July, 1814, by the private armed schooner Midas, Alexander Thompson, commander, on a voyage from Liverpool to Amelia Island, and brought into the port of Savannah for adjudication. Prize proceedings were instituted in the District Court of Georgia against the ship and cargo, and a claim was duly interposed by Messrs. Hibberson and Yonge, merchants, of Fernandina, Amelia Island, for the ship and cargo, as their sole and exclusive property. Upon the final hearing in the District Court, the ship and cargo were decreed to be restored, and this decree was, upon an appeal to the Circuit Court, affirmed; and from the decree of the Circuit Court the cause was brought by appeal to this court.

It appears from the evidence that during the voyage a package, containing papers respecting the cargo, directed to Messrs. Hibberson and Yonge, was thrown overboard by the advice and assent of the master and supercargo. The reason alleged for this proceeding is that they were then chased by a schooner, which they supposed to be a Carthaginian privateer. The ship's documents, however, were retained [*229] ed, in which her Spanish character is distinctly asserted.

These documents were as follows: 1. A certificate of the Spanish consul at Liverpool, dated the 11th of September, 1813, certifying that the Pizarro was a Spanish ship, bound to Corunna. 2. A certificate from the same, of the same date, that Messrs. Hughes and Duncan had shipped 250 tons of salt on board the Pizarro for Corunna, consigned to Messrs. Hibberson & Yonge. 3. A certificate of health, dated at Fernandina, the 20th of December, 1813. 4. A letter from Messrs. Hibberson & Yonge, of the 10th January, 1814, to J. Walton, the navigator or sea pilot, ordering him to sail to Liverpool. 5. A bill of lading, signed by Martinez, the master, for the outward cargo. 6. The affidavit of Messrs. Hibberson & Yonge, that they had shipped the same cargo on their own account, consigned to Messrs. Hughes & Duncan, &c. 7. The shipping articles from Amelia Island to St. Augustine, or any other port in Europe, and back, dated the 11th of January, 1814. 8. Shipping articles from Liverpool to St. Augustine, and back to Liverpool, without a date. 9. A license from the Governor of East Florida, authorizing Messrs. Hibberson & Yonge to buy a vessel in the United States, and the copy of a bill of sale from Messrs. S. & W. Hale, of New Hampshire, by their agent Kimbell, dated the 24th of February, 1813, together with an order of the governor, of the 6th of March, 1813, naturalizing the ship, or permitting her to sail under Spanish colors.

*In the District Court, the cause was [*230]

Wheat. 2.

heard not merely upon the ship's papers, and the testimony of the master and supercargo (who were twice examined in open court), but the claimants were also permitted to introduce new proofs and testimony in support of their claim, without any order for further proof.

Winder, for the appellants and captors. 1. The proprietary interest in the claimants is not proved. 2. They are excluded from the benefit of further proof by the spoliation of papers. The court below made no order for further proof; yet it seems to have been admitted and considered by that court, and has crept into the transcript of the record. This was an irregularity which will be corrected by the appellate tribunal, since the case on the original evidence was free from doubt or difficulty, and condemnation ought to have ensued. The spoliation of papers is not satisfactorily accounted for by the master and supercargo, who have prevaricated in their examinations; and the spoliation being unexplained, inevitably leads to the exclusion of further proof, and, consequently, to condemnation. In the case of *The Two Brothers*,¹ spo-

1.—1 Rob. 131. See also *The Polly*, 2 Rob. 361; *The Rising Sun*, 2 Rob. 104; In this last case the master guilty of the spoliation was excluded from further proof as to his share of the cargo.

2.—ARTICLE XV.—It shall be lawful for all and singular the subjects of His Catholic Majesty, and the citizens, people, and inhabitants of the said United States to sail with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with His Catholic Majesty or the United States. It shall be likewise lawful for the subjects and inhabitants aforesaid to sail with the ships and merchandises aforesaid, and to trade with the same liberty and security from the places, ports, and havens, of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforesaid, to neutral places but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several, and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted. It is also agreed that the same liberty be extended to persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

ARTICLE XVI.—This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband: and under this name of contraband, or prohibited goods, shall be comprehended arms, great guns, bombs, with the fuses and the other things belonging to them, cannon-ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, grenades, salt-petre, muskets, musket-ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms, proper for arming soldiers, musket rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandises which follow shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing apparel, together with

Wheat. 2.

liation of papers, not being avowed with sufficient frankness by the master, was held to destroy his credit; and the defect of proof thereby induced, together with other circumstances, was deemed a cause of condemnation. In the present *case, all the documents relative [*231 to the cargo were thrown overboard, and the excuse is the same which was rejected by the English Court of Admiralty in *The Rising Sun*. Destroying the papers which might show the Spanish character of the cargo could not diminish the danger of capture by Carthaginian privateers, since the ship would still appear to be Spanish, and this, together with the want of documentary evidence as to the cargo, would involve both in the same fate. This explanation of the suppression of the papers is, therefore, weak and futile, and such as cannot relieve the parties from the imputation of *malu fides*. 3. The claimants contend that the cargo is exempt from confiscation by the Spanish treaty of 1795, which recognizes the rule that free ships make free goods.² But the term "subjects," in the 15th *and 16th articles, must be understood of subjects who owe a permanent allegiance to the crown of Spain, *not of [*233 mere domiciled merchants, such as the claimants. A vessel found without the documents

ARTICULO XV.—Se permitirá a todos y a cada uno de los súbditos de S. M. Católica, y a los ciudadanos pueblos y habitantes de dichos Estados, que puedan navegar con sus embarcaciones con toda libertad y seguridad, sin que haya la menor excepcion por este respecto, aunque los propietarios de las mercaderias cargadas en las referidas embarcaciones vengan del puerto que quieran, y las traygan destinadas a qualquiera plaza de una potencia actualmente enemiga o que lo sea despues, así de S. M. Católica como de los Estados Unidos. Se permitirá igualmente a los súbditos y habitantes mencionados navegar con sus buques y mercaderias, y frequentar con igual libertad y seguridad las plazas y puertos de las potencias enemigas de las partes contratantes, o de una de ellas sin oposicion u obstáculo, y de comerciar no solo desde los puertos de dicho enemigo a un puerto neutro directamente, si no tambien desde uno enemigo a otro tal, bien se encuentre baxo su jurisdiccion, o baxo la de muchos; y se estipula tambien por el presente tratado que los buques libres aseguraran igualmente la libertad de las mercaderias, y que se juzgaran libres todos los efectos que se hallasen a bordo de los buques que perteneciesen a los súbditos de una de las partes contratantes, aun quando el cargamento por entero o prate de él fuese de los enemigos de una de las dos, bien entendido sin embargo que el contrabando se exceptua siempre. Se ha convenido así mismo que la propia libertad gozaran los sujetos que pudiesen encontrarse a bordo del buque libre, aun quando fuesen enemigos de una de las dos partes contratantes; y por lo tanto no se podrá hacerlos prisioneros ni separarlos de dichos buques a menos que no tengan la qualidad de militares, y esto hallandose en aquella sazón empleados en el servicio del enemigo.

ARTICULO XVI.—Esta libertad de navegacion y de comercio debe extenderse a toda especie de mercaderias exceptuando solo las que se compran venden baxo nombre de contrabando, o de mercaderias prohibidas, quales son las armas, cañones, bombas con sus mechas, y demas cosas pertenecientes a lo mismo, balas, pólvora, mechas, picas, espadas, lanzas, dardos, alabardas, morteros, petardos, granadas, salitre, fusiles, balas, escudos, casacaes, corazas, cotas de malla, y otras armas de esta especie propias para armar a los soldados, portamosquetes, bándoleras, caballos con sus armas y otros instrumentos de guerra sean los que fueren. Pero los generos y mercaderias que se nombran ahora, no se comprehenderan entre los de contrabando o cosas prohibidas, a saber: toda especie de paños y qualesquiera otras telas de lana, lino, seda, algodón, u otras qualesquiera materias, toda especie de vestidos con las telas de que se acostumbra hacer, el

234*] required *by the 17th article is presumptively in the same situation as if she were with- 235*] out any documents *and no equivalent proof can be admitted, because the pre-existing 236*] law of nations, and the practice of *prize courts under that law, though they exempt neutral property from confiscation, refuse further proof where there has been spoliation of papers 237*] **mala fide*, and condemn the property as enemy's. So, also, in this case, the Spanish character of the ship cannot be established, because the claimants have forfeited the privilege of further proof by the misconduct of their own agents, and consequently cannot furnish the equivalent testimony required by the 17th article. The justifiable inference is, that the property in the ship and cargo belongs to the enemy, or to citizens of the United States trading 238*] *with the enemy, which it will not be pretended is protected by the treaty.

Key and the *Attorney-General* for the respondents, and claimants. 1. Even the total want of papers is not a substantive ground of condemnation: it may be explained, as Sir William Scott¹ observes in *The Betsey*, alluding to the ancient French law. 2. Nor is the spoliation of papers conclusive to exclude further proof, and never has been so held by any tribunal whose decisions this court will respect.² In this case the stupid and artless manner in

1—1 Rob., 84.

2—The Two Brother, 1 Rob., 113; The Rising Sun, 2 Rob., 89.

all species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat, barley and oats, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oil, wines, sugars, and all sorts of salts: and in general, all provisions which serve for the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors, and any parts of anchors, also ships' masts, planks and wood of all kind, and all other things proper either for building or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband, much less, such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods. As likewise all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods. So that they may be transported and carried in the freest manner by the subjects of both parties, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested. And except the cases in which any ship of war or squadron shall, in consequence of storms or other accidents at sea, be under the necessity of taking the cargo of any trading vessel or vessels, in which case they may stop the said vessel or vessels, and furnish themselves with necessaries, giving a receipt, in order that the power to whom the said ship of war belongs, may pay for the articles so taken, according to the price thereof, at the port to which they may appear to have been destined by the ship's papers; and the two contracting parties engage, that the vessels shall not be detained longer than may be absolutely necessary for their said ships to supply themselves with necessaries: That they will immediately pay the value of the receipts, and indemnify the proprietor for all losses which he may have sustained in consequence of such transaction.

"ARTICLE XVII.—To the end that all manner of dissensions and quarrels may be avoided and prevented on one side and the other, it is agreed that in case either of the parties hereto should be engaged in a war, the ships and vessels belonging to the

which the agents of the owners acted is a proof that the latter did not participate in, nor can they be made penally responsible for, the misconduct of the former. 8. If the owner of the ship was a domiciled subject of Spain, the ship, and, consequently, the cargo, is entitled to protection under the treaty. Commercial domicile stamps a national character for every purpose in the view of a court of prize; and if the operation of the treaty were confined to Spanish subjects (properly so called), while it is extended to all persons inhabiting the United States, it would be unaccountably deficient in reciprocity. What fortifies the contrary construction is, that the term *subjects* is several times used indiscriminately in the treaty to signify the inhabitants of both countries. The purpose for which the documents prescribed by the treaty are required shows that a merely formal defect only authorizes detention and sending in for *adjudication, [*239 and if "equivalent testimony" is produced, restitution must follow, though the captors are exempt from costs and damages. Equivalent testimony is that which satisfactorily proves the same thing as that in which there was defective proof before; and the proof we have produced is testimony more than equivalent. The form of passport alluded to in the 17th article is not annexed to the treaty, nor is it to be found in the department of state. The Spaniards have relied on the good faith with which this country has always fulfilled its en-

oro y la plata labrada en moneda ó no, el estano, hierro, laton, cobre, bronce, carbon, del mismo modo que la cevada, el trigo, la avena, y qualquiera otro género de legumbres. El tabaco y toda la especería, carne salada y ahumada, pescado salado, queso y manteca, cerveza, aceytes, vinos, azúcar, y toda especie de sal, y en general todo género de provisiones que sirvan para el sustento de la vida. Ademas toda especie de algodón, cáñamo, lino, alquitran, pez, cuerdas, cables, velas, telas para velas, áncoras, y partes de que se componen. Mástiles, tablas, maderas de todas especies, y cualesquiera otras cosas que sirvan para la construcción y reparación de los buques, y otras cualesquiera materias que no tienen la forma de un instrumento preparado para la guerra por tierra ó por mar, no serán reputadas de contrabando, y menos las que están ya preparadas para otros usos. Todas las cosas que se acaban de nombrar deben ser comprendidas entre las mercaderías libres, lo mismo que todas las demás mercaderías y efectos que no están comprendidos y nombrados expresamente en la enumeración de los géneros de contrabando, de manera que podrán ser transportados y conducidos con la mayor libertad por los súbditos de las dos partes contratantes á las plazas enemigas, exceptuando sin embargo las que se hallasen en la actualidad sitiadas, bloqueadas, ó embestidas, y los casos en que algun buque de guerra ó esquadra que por efecto de avería, ú otras causas se halle en necesidad de tomar los efectos que conduzca el buque ó buques de comercio, pues en tal caso podrá detenerlos para aprovisionarse, y dar un recibo para que la potencia cuyo sea el buque que tome los efectos, los pague según el valor que tendrían en el puerto adonde se dirigiese el propietario, según lo expresen sus cartas de navegación; obligándose las dos partes contratantes á no detener los buques mas de lo que sea absolutamente necesario para aprovisionarse, pagar inmediatamente los recibos, é indemnizar todos los danos que sufra el propietario á consecuencia de semejante suceso.

"ARTICULO XVII.—A fin de evitar entre ambas partes toda especie de disputas y quejas, se ha convenido que en el caso de que una de las dos potencias se hallase empenada en una guerra, los buques y bastimentos pertenecientes á los súbditos ó pue-

gagements; they have neglected the form, and relied on the spirit of the stipulation. The papers produced are, therefore, equivalent to a formal passport; and there is no rule by which they can be excluded as there was no attending circumstance of fraud in the destruction of the original documents, and, consequently, the case is unaffected by that *malá fides* which precludes explanation from extrinsic testimony.

STORY, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

A preliminary objection has been taken in the argument at bar to the regularity of the proceedings in this cause, and it is urged with great earnestness and force that the further proof was not admissible except under an explicit order of the court for this purpose; and that the conduct of the master and supercargo in the suppression of the documents of the cargo, and in prevaricating in their examination, 240* has *justly forfeited the claim which the owners might otherwise have to introduce the further proof.

The proceedings in the District Court were certainly very irregular; and this court cannot but regret that so many deviations from the correct prize practice should have occurred at so late a period of the war. The ship's papers ought to have been brought into court, and verified, on oath, by the captors, and the examinations of the captured crew ought to have been taken upon the

standing interrogatories, and not *visa voce* in open court. Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon their first examination; and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule.

It is upon the ship's papers, and the examinations thus taken in preparatory, that the cause ought, in the first instance, to be heard in the District Court; and upon such hearing it is to judge whether the cause be of such doubt as to require further proof; and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or allow it when it ought to be denied, and the objection be taken by the party and appear upon the record, the Appellate Court can administer the proper relief. *If, however, evidence [*241 in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the District Court; and we should not, therefore, incline to reject the further proof, even

subjects or people of the other party must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year.

"It is likewise agreed, that such ships being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form. And if anyone shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so. Without which requisites they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.

"ARTICLE XVIII.—If the ships of the said subjects, people, or inhabitants, of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateer, the said ship of war or privateer, for the avoiding of any disorder, shall remain out of cannon-shot, and may send their boats aboard the merchant ship, which they shall so meet with, and may enter her to number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course."

Wheat. 2.

blos de la otra, deberán llevar consigo patentes de mar ó pasaportes que expresen el número, la propiedad, y el porte del buque, como tambien el nombre y morada de su dueño y comandante de dicho buque, para que de este modo conste que pertenece real y verdaderamente á los súbditos de una de las dos partes contratantes; y que dichos pasaportes deberán expedirse segun el modelo adjunto al presente tratado. Todos los años deberán renovarse estos pasaportes en el caso de que el buque vuelva á su país en el espacio de un año.

"Igualmente se ha conveuido en que los buques mencionados arriba, si estuviesen cargados, deberán llevar no solo los pasaportes sino tambien certificados que contengan el pormenor del cargamento, el lugar de donde ha salido el buque, y la declaracion de las mercaderias de contrabando que pudiesen hallarse a bordo, cuyos certificados feberán expedirse en la forma acostumbrada por los oficiales empleados en el lugar de donde el navio se hiciese á la vela, y si se juzgase útil y prudente expresar en dichos pasaportes la persona propietaria de las mercaderias se podra hacer libremente, sin cuyos requisitos sera conducido a uno de los puertos de la potencia respectiva, á juzgado por el tribunal competente, con arreglo n lo arriba dicho, para que examinadas bien las circunstancias de su falta, sea condenado por de buena presa si no satisficiese legalmente con los testimonios equivalentes en un todo.

"ARTICULO XVIII.—Quando un buque perteneciente á los dichos súbditos pueblos y habitantes de una de las dos partes fuese encontrado navegando a lo largo de la costa ó en plena mar por un buque de guerra de la otra ó por un corsario, dicho buque de guerra ó corsario, á fin de evitar todo desórden, se mantendrá fuera del tiro de canon, y podrá enviar su chalupa á bordo del buque mercante, haocer entrar en él dos ó tres hombres á los quales enseñará el patron ó comandante del buque su pasaporte y demas documentos, que deberán ser conformes á lo prevenido en el presente tratado, y probará la propiedad del buque, y despues de haber exhibido semejante pasaporte y documentos, se les dexará seguir libremente su viage, sin que les sea lícito el molestarle ni procurar de modo alguno darle caza, ú obligarle á dexar el rumbo que seguia."

if we were of opinion that it ought not, in strictness, to have been admitted.

The objection which is urged against the admission of the further proof would, under other circumstances, deserve great consideration. Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

In the present case there can be no doubt that there has been a gross prevarication and **242*** suppression of testimony by the master and supercargo. Nothing can be more loose and unsatisfactory than their first examinations; and the new and circumstantial details given upon their second examinations are inconsistent with the notion of perfect good faith in the first instance. The excuse, too, for throwing the packet of papers overboard is certainly not easily to be credited; for the ship's documents which still remained on board would, in the view of a Carthaginian privateer, have completely established a Spanish character. It is not, indeed, very easy to assign an adequate motive for the destruction of the papers. If the ship was Spanish, it was, as to American cruisers, immaterial to whom the cargo belonged; for, by our treaty with Spain (treaty of 1795, art. 15), declaring that free ships shall make free goods, the property of an enemy on board of such a ship is just as

much protected from capture as if it were neutral. The utmost, therefore, that this extraordinary conduct can justify on the part of the court is to institute a more rigid scrutiny into the character of the ship itself. If her national Spanish character be satisfactorily made out in evidence, the spoliation of the documentary proofs of the cargo will present no insuperable bar to a restitution. Very different would be the conclusion if the case stood upon the ground of the law of nations, unaffected by the stipulations of a treaty.¹

*Upon a full examination of the evidence we are of opinion that the Spanish character of the ship is entirely sustained, and, therefore, the claimants are entitled to a decree of restitution. Two objections have been urged against this conclusion: 1. That the ship is not documented according to the requisitions of the treaty with Spain, and, therefore, not within the protection of that treaty. 2. That it does not appear that Mr. **244** Hibberson (who is a native of Great Britain) has ever been naturalized in the dominions of Spain, and therefore he is not a subject of Spain, within the meaning of the treaty.

As to the first objection, it is certainly true that the ship was not furnished with such a sea-letter, or passport, or such certificates as are described in the 17th article of the treaty. But the want of such documents is no substantive ground for condemnation. It only justifies the capture, and authorizes the captors to send the ship into a proper port for adjudication. The treaty expressly declares that when ships shall be found without such requisites they may be sent into port, and adjudged by the competent tribunal; and "that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent." It is apparent, from this language, that the omission to comply with the requisites of the treaty was not intended to be fatal to the property. And, certainly, by the general law of nations, as well as by the particular stipulations of the

1.—By the ancient French law, spoliation of papers was a substantive ground of condemnation. Thus, by the ordinances of 1543, art. 43, and of 1584, art. 70, the throwing overboard of the charter-party, or other papers respecting the lading of the vessel, is declared cause of condemnation. And by the ordinance of August, 1681, Des Prizes, art. 8, all vessels, on board of which no charter-party, bills of lading, or invoices are to be found, are, together with their cargoes, declared good prize. Doubts having arisen as to the application of this rule of evidence, in cases where sufficient papers were found remaining on board to furnish proof of the proprietary interest, the ordinance of the 5th Sept., 1708, was rendered; by which it was provided, that every captured vessel, from which papers have been thrown overboard, shall be good prize, together with the cargo, upon proof of this fact alone, without its being necessary to examine into the nature of the papers destroyed, nor to inquire whether sufficient papers were found remaining on board to furnish evidence that the ship and the goods of her lading belonged to allies or friends. But this decision appearing too vigorous in practice, Louis XIV., in a rescript of the 2d February, 1710, addressed to the Admiral of France, directed the council of prizes to apply the terms of this ordinance according to the peculiar circumstances, and the subsidiary proofs in each case. Valin is of the opinion that, though this rescript escaped the attention of the framers of the regulation of the 21st October, 1744, (the 6th ar-

ticle of which is entirely conformable to the ordinance of the 5th September, 1708,) yet it ought to be applied to temper the rigor of this article, according to circumstances. Valin, *sur l'ordonnance*, *Id.* And, according to the authority of a celebrated modern jurist of France, such regulations should always be tempered by wisdom and equity; they are improperly styled laws; and are essentially variable *pro temporibus et causis*. He cites in confirmation of his opinion, that even the want or suppression of papers is not conclusive, a sentence of the council of prizes of the 27th December, 1779, restoring the captured vessel, notwithstanding some papers had been thrown overboard, it being proved that the papers were not of such a nature as to show the property enemy's, and the master not being accessory to the spoliation. See the opinions of M. Portalis, in the cases of the *Pigou* and the *Statura*, 1 Cranch, 98, note, a, *Id.* 104, note, a. The Spanish law as to spoliation, is conformable with that of France, and its application to the above case would probably have been urged by the counsel for the captors, upon the principle of reciprocity, had they not been precluded from resorting to that argument by a former decision of the court, in the case of the *Nereide*, 9 Cranch, 388; a majority of the judges being of opinion that the principle of reciprocity or amicable retaliation formed no rule of judicial decision in the courts of this country, until it was prescribed as such by the legislative will. *Id.* 422.

treaty, the parties would be at liberty to give further explanations of their conduct, and to make other proofs of their property. If, indeed, upon the original evidence, the cause should appear extremely doubtful or suspicious, and further proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases. But in the present case there is no necessity for such further proof, since the documents and testimony now before us are, in our opinion, as to the proprietary interest in the ship, entirely equivalent to the passports and sea-letter required by the treaty.

As to the second objection, it assumes, as its basis, that the term "subjects," as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term "subjects," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction [246*] is, that in the 18th article of the treaty, the terms "subjects," "people," and "inhabitants," are indiscriminately used as synonymous, to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country,

in war as well as in peace. The mischiefs of a different construction would be very great; for it might then be contended that ships owned by Spanish subjects could be protected by the treaty, although they were domiciled in a foreign country, with which we were at war; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in overruling this objection, even if it were proved that Mr. Hibberson was not a naturalized subject of Spain; but we think the presumption very strong that he had become, in the strictest sense of the words, a Spanish subject.

The Spanish character of the ship being ascertained, it is unnecessary to inquire into the proprietary interest of the cargo, unless so far as to ascertain that it does not belong to citizens of the United States; for the treaty would certainly not protect the property of American citizens trading with the enemy *in [*247 Spanish ships. There is no presumption, from the evidence, that any American interest is concerned in the shipment. The whole property belonged either to British subjects or to the claimants, and we think the proofs in the cause very strongly establish it to belong as claimed.

The decree of the Circuit Court is affirmed with costs.

*Decree affirmed.*¹

Cited—14 Pet. 413; Abb. Adm. 497; Blatchf. Pr. 174, 193, 289, 398, 415, 425, 537.

[COMMON LAW.]

THE UNITED STATES v. TENBROEK.

The act of Congress of the 24th of July, 1813, imposing a duty, according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicting a penalty of \$100, and double duties, for using any still or stills, or other implements in distilling spirituous liquors without first obtaining a license, as required by the act, does not extend to the rectification or purification of spirits already distilled.

1.—It is obvious that the privilege of the neutral flag of protecting enemy's property, whether conferred by treaty or by the ordinances of belligerent powers, cannot extend to a fraudulent use of the flag to cover enemy's property in the ship as well as the cargo. *The Minerva*, 1 Marriot's Adm. Dec. 235; *The Cittade de Lisdoa*, 6 Rob. 358; *The Eudraught*, 1b. note a. During the war of the American revolution the United States, recognizing the principles of the armed neutrality, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy: it was held that this exemption did not extend to a vessel which had been guilty of grossly unneutral conduct, in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States and of France the advantages they had acquired over Great Britain, by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain was interdicted. In the case in question the vessel was purchased by neutrals in London, who supplied her with false and colorable papers, and assumed on themselves the ownership of the cargo, for a voyage from London to Dominica. The continental Court of Appeals, in pronouncing the vessel and cargo liable to condemnation, observed: "Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be
Wheat. 2.

prize; because Congress had said by their ordinance, that the rights of neutrality should extend protection *to such effects and goods of an [*248 enemy. But if the neutrality were violated, Congress have not said that such a violated neutrality shall give such protection; nor could they have said so without confounding all the distinctions between right and wrong." *The Eastern*, 2 Dall. 36. The only treaties now subsisting between the United States and foreign powers, containing the stipulation that free ships shall make free goods, are the above treaty with Spain, that of 1782 with the Netherlands (which, it is presumed, still subsists, notwithstanding the changes in the political situation of that country), and the treaties with the Barbary states. The conventions between the latter and Christian powers always contain the stipulation that the flag and pass shall protect the cargo sailing under it. In the memorable case of *The Nereide* (9 Cranch, 388), it was contended by the counsel for the captors that this stipulation in the Spanish treaty, taken in connection with the law of Spain, necessarily implied the converse proposition that enemy's ships make enemy's goods, which is not expressed in the treaty. But this argument was overruled by the court, who held that the treaty did not contain, either expressly or by implication, a stipulation that enemy's ships shall make enemy's goods. *Id.* 418; see *Ward on the Relative Rights and Duties of Belligerent and Neutral powers*, 145.

249*] **E**RROR to the Circuit Court for the District of Pennsylvania.

This was an action of debt commenced in the District Court in Pennsylvania, by the United States against the defendant in error, to recover a penalty alleged to have been incurred for using a still, and distilling spirituous liquors, without having a license therefor, as required by an act of Congress passed on the 24th of July, 1813.

This act imposes a duty, according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicts a penalty of \$100, and double duties, on all persons who, after the first day of January then ensuing, should use any still, or stills, or other implements, in distilling spirituous liquors, without having first obtained a license, as required by the provisions of the act. For every license the act imposes a duty of nine cents for each gallon of the capacity of the still employed in distilling spirits from domestic materials for the term of two weeks, and in proportion for a longer period. And, on all stills employed in distilling spirits from foreign materials, a duty of 25 cents for each gallon of the capacity of the still for the time of one month.

To the declaration, which was in the usual form, the defendant, in proper person, plead *nil debet*, on which issue was joined. It was proved on the trial, and admitted by the defendant, that he was the proprietor of a distillery within the District of Pennsylvania, which he used, and for which he had not taken out a license, agreeably to the act of Congress **250*]** before recited. It was also proved, on the part of the defendant, that his distillery was not used in distilling spirits from domestic materials, but in rectifying the said spirits after they had been distilled from domestic materials; that he is not a distiller, but a rectifier of spirits. He contended that distillation and rectification of spirits are distinct vocations; that rectifying such spirits is not a part of the process of distillation, but a mere purification of the spirits themselves from feculent or useless matter; and that he was not liable to the penalty of the act of Congress. The attorney for the United States contended, that rectification of spirits in a distillery is nothing more than distillation repeated, and in this repetition the spirits must be deemed, and in fact are, domestic materials.

The court charged the jury that the act of Congress, laying duties on licenses to distillers of spirituous liquors, did not apply unless when the still is used for the purpose of distilling spirits from domestic or foreign materials; and that if the still, or other implement, be not employed in distilling spirits from domestic or foreign materials, there can be no penalty incurred for using a still for any other purpose, although no license be taken out; and that spirits cannot be considered as a domestic material. That penal laws must be construed strictly, and must not be amplified by intendment. That whether rectification be part of the process of distillation, was a fact to be left to the jury. The counsel for the United States excepted to this charge. There was a verdict and judgment for the defendant.

251*] The cause was removed by writ of error to the Circuit Court, when the judg-

ment of the District Court was affirmed with costs.

It was brought before this court by writ of error, and submitted on the observations of the Attorney-General.

The Attorney-General now contended, for the United States, that the district judge ought not to have permitted witnesses to be examined. It was no case for the application of the maxim, *quilibet in sua arte credendum est*. If the witnesses knew nothing of the subject, their testimony could not enlighten others. If they did, it was plain that their knowledge was derived from being engaged in the same line of business, which gave them an interest in the construction of the law. In the case of the *Cast-Plate Glass Company*, Chief Baron Eyre declares that in explaining an act of Parliament no evidence should be admitted; for that would be to make it a question of fact in place of a question of law. The judge alone must direct the jury on the point of law. In doing this, he must form his judgment of the meaning of the legislature, in the same manner as if the case had come before him by demurrer, where no evidence can be allowed. On demurrer, a judge may well inform himself, from dictionaries or books, on the particular subject concerning the meaning of any word. Yet, if he does so at **Nisi Prius*, and shows ***252** them to the jury, they are not to be considered as evidence, but only as the grounds on which he has formed his opinion, in the same manner as if he were to cite authorities for the point of law he lays down. The single question in the present case was, whether a person using a still for the purpose of rectifying spirits is within its true meaning. It is necessary to remark that the duty under this act was not upon the quantity of liquor distilled nor upon its removal. This, indeed, had been the case with some parts, and at other times, with this part of our excise system. But under the present act, the duty was upon the implement or still itself. To speak the language of the debates, it was upon the capacity, not the gallon; a distinction materially relevant to a right understanding of the point in controversy. By the first section of the act, a license is required to be taken out for all stills used for the purpose of distilling spirituous liquors. No exception is made as to any particular kind of still. The term spirituous liquors is so comprehensive that it must necessarily include all liquors that contain spirits, without any reference to the proportion or quantity which they may contain. By the second section, a certain amount of duty is laid on stills employed in distilling spirits from domestic materials, and a different amount on those that work on foreign materials. It is evident that no intention existed to define what was meant by materials, but barely to discriminate between foreign and domestic, with a view to make the duty lighter on spirits produced from the latter than on the ***253** former, according to the common policy of our legislation. Two points will be made for the United States: 1. That spirits are the materials upon which rectification operates. 2. That rectification is a branch of the process of distilling. The first point is so plain that the defend-

ant himself must admit it. The second alone opens a door to argument. The question lies out of the ordinary track of legal discussion. To understand it, we must have recourse to books of art. It is these which will best fix the true meaning of the terms distillation and rectification. We shall then be enabled to determine, if there be any, the difference between them. Doctor Black, in his elements of chemistry, after speaking of fermentation, says: "The spirit is separated more or less perfectly from these substances by distillation, it being more volatile than most of them, especially the acid, mucilaginous and coloring matter. The water is but imperfectly separated at first, on account of the small difference of volatility between it and the spirit. To reduce the spirit to a state of purity, we must perform several other operations, such as distilling it again once or twice with a gentle heat, which is called rectifying. By this we separate the greater part of the water which had come over in the first distillation."¹ Fourcroy, in his elements,² defines rectification to be "a second distillation, in which substances are purified, by their most volatile parts being raised by heat carefully [254*] managed. The *Attorney-General next referred to Hall's distiller (which, he said, was agreed to be a very accurate work upon this subject), and to the Encyclopedia, where the definitions were substantially the same as in Black and Fourcroy. Even the common dictionaries of the language, he said, defined rectification to be the act of "improving by repeated distillations." The point appearing to stand thus upon the score of authority, it was next to be inquired how it stood upon that of reason. The duty, as the law so plainly makes known, is laid, in the broadest manner, upon all stills used for distilling spirituous liquors. It is neither graduated by the strength of the spirits produced nor by the simplicity or complexity of the manufacture. The first process in distillation is understood to be that in which the wash is put into the still. From this low wines are drawn, or spirits of an inferior quality. From a case in Anstruther, 558, it would seem that in England the first duty attaches on the wash before distillation. For a still employed in the first process, it was on all hands admitted that a license must be taken out. The inferior spirits so drawn do not constitute marketable spirits. A second process is then used. This consists, for the most part, in putting them into a smaller still called a doubler. From the doubler they come out, having the quality of common marketable spirits. A license ought surely to be taken out for a still so employed, call it a doubler or by any other name. But the original matter, or material, is here clearly out of view, for it went into the first still. Nothing but the spirits extracted from it were carried over [255*] to the doubler. Does not this, then, establish the point that inferior spirits may become domestic materials under the act? It cannot, with any show of reason, be pretended that they have lost the properties of matter merely by being separated from substances with which they were primarily combined. Between the derivatives of matter and materials it would

be strange indeed to attempt any distinction, as applicable to the case under consideration. The spirits extracted by the doubler are understood to be generally about proof. For various purposes it is necessary to increase their strength. This is effected by a third or fourth distillation generally, though not necessarily, in the same stills. By this process, not only is the strength raised, but the purity is increased. Now, in what, may it be asked, does this operation differ from the second process in the doubler? Spirits of an inferior strength are the materials of distillation in the one case and in the other. The last, and any similar subsequent operations, may be called rectifications. But they are distillations, too. They impart to the spirits more strength as well as more purity. It is just so with the second process in the doubler. It may, perhaps, be said, that these subsequent processes are all carried on by the rectifier, on spirits previously distilled. That it is done merely to fit them for combination with other materials of which mixtures are made by persons not distillers, and that in such process extraneous matter is often introduced with a view to greater purity. To this it may be answered, first, that these processes in nowise destroy the character of distillation, as they do not [256 necessarily prevent an augmentation in the strength of spirits; and, secondly, that the introduction of extraneous matter is not confined to the higher process of distillation, as water, charcoal, and other ingredients, are not unfrequently used in the process by which low wines are converted into proof spirits. Suppose a patent to be taken out for carrying on the original process as well as rectification in the same still, how can the duty be made to attach even in the case of the doubler, except on the hypothesis assumed for the United States? It would be difficult, if not impracticable, to fall upon any other mode. Again, the duty on stills is properly considered as a commutation for that which might have been laid upon the liquor. Is it not, therefore, as just that the duty should be paid upon the still when used to produce rectified spirits as when it is used to produce any other kind of spirits? The English statutes in *pari materia* will be found to countenance the doctrine contended for on the part of the United States; particularly that of 2 Geo. III., ch. 5, from the twelfth section of which it appears that the rectifier who distills spirits and the common distiller are considered the same. Several of the other sections would also show that rectification and distillation, when an increase of strength was the object, were used as equivalent terms. The system, in England, contemplated the laying of a duty first on the low wines, and then on the spirits distilled from them. So Congress, with like equity, may have intended to impose a duty first upon the still when used [257 in the original manufacture of spirits, and again on its use in the manufacture of spirits of a higher proof. So far is such a principle from being at all repugnant to the general theory of American taxation, that it is sanctioned by the whole analogy of our impost revenue. Thus, under the present tariff, iron in bars, iron in sheets, and iron in bolts, is each charged with a different duty. Leather in different forms, as in boots, saddles, caps, slippers, pays differently. The duty levied upon imported spirits

1.—Black's Chemistry, vol. 3, p. 24.

2.—Vol. 1, p. 176.

Wheat. 2.

is graduated according to the degree of proof. Brown sugars, white sugars, lump sugars, powdered sugars, are all subject to different rates. Tobacco, under its different forms of manufacture, is chargeable with different duties, and the list might easily, if it were necessary, be extended. Other nations have refined somewhat more upon the principle. Mr. Brougham, in his Colonial Policy, mentions that there was once a particular sauce for fish used in Holland which was made to pay no less than thirty different duties of excise; a provident decree against the luxury of the palate, among a people as renowned for frugality as riches. Yet it may be that this sauce was a less noxious superfluity than the liquor of the still. Revenue laws are to be construed and applied with great exactness. They are framed for the security of great national interests, and the effect of such laws, founded on considerations of public policy, is not to be weakened by a minute tenderness to hardships, real or supposed, in particular instances. It is also a good rule, where doubts exist in a revenue case, to lean in favor of the revenue.¹

DUVALL, *J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

The court, in considering this question, must be governed by the language of the act of Congress of the 24th July, 1818. By this act a specific duty is laid on licenses to stills employed in distilling spirituous liquors from domestic or foreign materials, and a penalty is inflicted for distilling without a license.

The distillation of spirituous liquors is performed by a double process: by the application of heat to a still containing the material. The product of the first process, after running through the still, is commonly called low wines, or singlings; the low wines undergo a second process of distillation, by which spirits are produced; they are to be proof of the first, second, third, or fourth degree, as defined and required by law. These are marketable, and here the process ends. The material from which the spirits are extracted appears to be the object of the law. The rectification or purification of spirits, after their distillation has been complete, in order to fit them for certain purposes of combination with other materials, is no part of the process of distillation, and is not a breach of the provisions of the act of Congress. The distillation of spirits, and the rectification of them after they are distilled, appear to be distinct and separate acts. No duty is specifically laid by law on the rectification of spirits, nor does it appear that any was contemplated; and, if the process is confined to the rectification of spirits already distilled, no penalty is incurred, although a license is not previously obtained. It was evidently the intention of the legislature to exact one duty only on the distillation of spirits.

It is the opinion of this court that there is no error in the judgment of the Circuit Court.

This opinion is given on the request of the Attorney-General, it being probable that the

same question may frequently occur. But, as this cause is improperly brought before this court by writ of error, having been first carried from the District to the Circuit Court by the same process, it is dismissed.²

Writ of error dismissed.

Aff'g—Pet. C. C. 180.

Cited—12 Pet. 144; 14 Pet. 621.

J. C. F. CHIRAC

v.

THE LESSEE OF A. F. CHIRAC ET AL.

J. B. C., a native of France, migrated into the United States in 1793, and became domiciled in Maryland. On the 22d September, 1795, he took the oaths of citizenship according to an act of Assembly of Maryland, passed in 1779, and the next day received a conveyance in fee of lands in that state. On the 6th July, 1798, he was naturalized under the laws of the United States; and, in July, 1799, died intestate, leaving no legitimate relations, other than the plaintiffs in ejectment, who were natives and residents of France. Upon the supposition that the lands were escheatable, the state of Maryland conveyed them to his natural son, J. C. F. C., with a saving of the rights of all persons claiming by devise or descent from the intestate; under which grant J. C. F. C. took possession of the lands, and remained in possession until the ejectment was brought. In March, 1809, the defendants in error, the heirs at law of J. B. C., French subjects, brought an action of ejectment for the lands in question; and, in May, 1815, obtained a verdict in their favor, and a judgment thereon, which was affirmed.

It was held that the power of naturalization is exclusively in Congress, but that the treaty of amity and commerce between the United States and France, of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States.

Quære. What was the effect of this treaty under the confederation?

J. B. C. having died, seized in fee of the lands in question, his heirs being French subjects, the treaty of 1778 having been abrogated and the act of Maryland of 1798, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin being non-naturalized Frenchmen, with a proviso vesting the land in the state, if the French heirs should not, within ten years, become resident citizens of the state, or convey the lands to a citizen: it was determined, that the time for the performance of this condition having expired before the action was brought, the estate was terminated, unless supported in some other manner than by the act of Maryland.

But the convention of 1800, between the United States and France, enabling the people of one country holding lands in the other to dispose of the same by testament, or otherwise, and to inherit lands in the respective countries without being obliged to obtain letters of naturalization, it was held that it rendered the performance of this condition a useless formality, and that the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase, without its aid.

The further stipulation in the convention "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," was held not to affect the rights of a French subject who takes, or holds, by the convention, so as to deprive him of the power of selling to

2.—*Vide* 7 Cranch, 108, *The United States v. Goodwin*; 10, 287, *The United States v. Gordon et al.*, in which cases it was determined that a writ of error does not lie to carry to the Supreme Court a civil cause which has been carried from the District Court by writ of error.

1.—*The Betty Cathcart*, 1 Rob. 220; 1 Bl. Com. 324, (Christian's edit.)

citizens of this country; and was held to give to a French subject, who had acquired lands by descent, or devise (and, perhaps, in any other manner), the right, during life, to sell, or otherwise dispose thereof, if lying in a state where lands purchased by an alien, generally, would be immediately escheatable.

Although the convention of 1800 has expired by its own limitation, it was determined that the instant the descent was cast on a French subject during its continuance his rights became complete under it, and could not be affected by its subsequent expiration.

ERROR to the Circuit Court for the District of Maryland.

John Baptiste Chirac, a native of France, migrated into the United States in the year 1793, and settled in Maryland. On the 23d of September, 1795, he took the oaths of citizenship, according to the form prescribed by an act of Assembly of the state of Maryland, passed in the year 1779, and the next day received a conveyance in fee of land lying within that state.

On the 6th of July, 1798, he was naturalized as prescribed by the laws of the United States; and, in July, 1799, he died intestate, leaving no legitimate relations other than the plaintiffs, who are natives and residents of France.

Supposing the lands of which he died seized to be escheatable, the state of Maryland conveyed them to John Charles Francis Chirac, his natural son, with a saving of the rights of all persons claiming by devise or descent from the intestate. Under this act, John Charles Francis Chirac took possession of the land of his father, and has remained in possession ever since.

262*] *In March, 1800, the defendants in error, who are the heirs at law of John Baptiste Chirac, and subjects of the King of France, brought their ejectment for the land of which their ancestor died seized; and in May, 1815, under the instruction of the court, to which exceptions were taken, obtained a verdict in their favor, on which a judgment was rendered; which judgment is now before the court on a writ of error.

The act of Assembly of the state of Maryland, on the construction of which the cause mainly turned, was passed in 1780, and is entitled "An act to declare and ascertain the privileges of the subjects of France residing within this state." The 1st section gives to French subjects the capacity of holding lands within the state, on certain conditions. The 2d section gives to those subjects who may be resident in the state all the rights of free citizens thereof. The 3d section contains a proviso restricting and limiting the privileges granted by the act, and declaring that nothing therein contained "shall be construed: grant to those who shall continue subjects of His Most Christian Majesty, and not qualify themselves as citizens of this state, any right to purchase or hold lands, or real estate, but for their respective lives, or for years." The 4th section enacts, that if any French subject who shall become a citizen of Maryland "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent and his kindred were the citizens of this state," with **263*]** a proviso, that "whenever any French subject shall, by virtue of the act, become seized

Wheat, 2.

in fee of any real estate, his or her estate, "after the term of ten years be expired, shall vest in the state, unless the person seized of the same shall, within that time, either come and settle in, and become a citizen of this state, or enfeof thereof, some citizen of this or some other of the United States of America."

Harper, for the plaintiff in error, and the defendant in the court below. 1. The act of Congress abrogating the French treaties, in consequence of the non-fulfillment of their stipulations by France, and the second article of the convention of 1800, stipulating for further negotiation respecting the claims of the United States for indemnities, and respecting the revival of the treaties, drew after them a virtual repeal of the act of Maryland of 1780, that act being founded on the reciprocity stipulated by the treaties. The intervention of the local legislatures was deemed necessary to carry into effect treaties made by the national government under the confederation. The legislature of Maryland understood it to have been so, for their act is not a literal transcript of the treaty of 1778; it limits and controls the reciprocity stipulated by the treaty. As nobody at that period could conceive the possibility that we should ever cease to maintain the relations of friendship and alliance with France, no time for the duration of the act was limited; but when the treaty was annulled the act fell with it. Consequently, the heirs of John Baptiste Chirac had no *inheritable quality. 2. [**264** He acquired no capacity to hold by his naturalization under the local law, since, by the constitution, Congress alone has the power of prescribing uniform rules of naturalization; and the act of Maryland is a general naturalization law, not a special act authorizing aliens to hold lands, or conferring other particular privileges. If the states could make such a law, the constitution of the United States would be completely evaded; as the citizens of one state are entitled to all the privileges and immunities of citizens in every other state. 3. The heirs of John Baptiste Chirac have not conformed to the provisions of the act of Maryland by settling in the state and becoming citizens, nor by enfeofing some person of the lands within ten years from the time when they became seized; and, consequently, their right was gone before the ejectment was brought. The term *seizin* in the act means, not a *seizin* in fact, a *pedis possessio*, but a legal *seizin*; and the ten years' limitation begins to run after the *seisin* in law. The technical word *enfeof*, as here used, merely refers to the alienation of the land, which may be by bargain and sale, or any other usual mode of conveyance known in the state; and it was not necessary that they should come into the state in order to execute any of these conveyances, or even to make a feoffment.

Winder and Mercer, contra. 1. The constitution of the United States, and the laws made under it, do not, *ipso jure*, repeal a state law relative to the same matter, but only annul such parts of the latter as are inconsistent with the former. The respective *states still [**265** preserve the right of making naturalization laws, giving certain civil rights to foreigners, without conferring universal political citizenship. 2. The act of Maryland was not founded on the treaty merely; the legislature had other

objects of policy in view than a mere compliance with the stipulations of the treaty; the continuance of the act was wholly independent of the treaty. It is a part of the code of Maryland, abstracted from the treaty, and would exist with or without the treaty. It consequently remained in full force and vigor notwithstanding the abrogation of the French treaties in 1798. The time of limitation contained in the act, within which the party is obliged to come and reside in a state, or to enfeoff a citizen, does not refer to a mere seizin in law. The term "seized," if unconnected with other expressions qualifying its import, might, indeed, imply a legal seizin only; but with the injunction to "enfeoff," it necessarily imports a seizin in fact, because such a seizin is necessary to enable the party to make a feoffment. 4. But the convention of 1800, which was concluded whilst the defendant in error held an estate in fee-simple under the act of Maryland, determinable by their failure to comply with one of the alternative conditions contained in that act, is conclusive of this cause. That convention enables the citizens of both countries to dispose by testament, donation, or otherwise, of their property, whether real or personal, situate in the territories of either, to whomsoever they please; and to succeed as heirs *ab intestato*, 266*] *without being naturalized.¹ The first clause of the article gives a new power to dispose of property held by citizens of either country in the dominions of the other, viz., the power to dispose by testament or in any other manner. It, of course, repeals so much of the act of Maryland as restricts the power of disposing to the mode of feoffment only; and not only does not prescribe any period of time within which it is to be done, but necessarily gives the life-time of the party, since it allows a disposition by last will and testament, which can only take effect after the death of the party. The second clause places the citizens of both countries in the same predicament as to inheritances as if they were naturalized. The defendants in error were, by the laws of the state, heirs to John Baptiste Chirac, subject to a liability to have their estate defeated unless they became naturalized. This clause superseded the necessity of naturalization, or, rather, naturalized them for this particular purpose. The further stipulation "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," can only refer to the laws made by the two contracting parties, *i. e.*, France and the United States; not any particular state of our domestic confederacy; for the states of the Union, as separate and independent sovereignties 267*] are not included. *No act of theirs could affect the convention. It is to them the supreme law; and no state law incompatible with it can be valid; therefore, that part of the act of Maryland which prescribes only one mode of disposing of real property belonging to Frenchmen is void. The treaty secures the right to dispose of it in any mode.

Martin, in reply. 1. It is a general rule

adopted by sovereign states that the real property within their dominions should not be owned by aliens; not that this universal rule is considered as a deprivation of property, the suffering a penalty, or the incurring of a forfeiture, but as an absolute disability to acquire, to hold, and to enjoy the property, founded upon reasons of public policy.¹ The act of Maryland merely dispenses with this rule to a certain extent, and upon certain conditions; it does not inflict any penalty or forfeiture on the kindred of the decedent; nor create in them any disabilities; nor deprive them of any property; nor infringe any of their rights whatsoever. Consequently, they must show that they have strictly complied with the terms on which this boon has been granted. 2. The moment the French subject, on whom the act confers a capacity to hold, dies, his kindred inherit; and the moment the kindred inherit, they become seized in fee; and the moment they become seized in fee, the time of limitation begins to run, within *which they must either [268 come and settle in the state, &c., or enfeoff a citizen. The policy of the legislature in prescribing this limitation was, that not more than ten years should elapse from the decease of the French proprietor, before the lands should again be held and owned by a citizen, whose interest it might be to cultivate and improve the same for the benefit of the community. It was, therefore, perfectly immaterial by what technical mode of conveyance the property should be conveyed, and whether the seizin of the heirs should be a seizin in fact, or a legal seizin. The conveyance might be by any sufficient deed; and even a feoffment might be made by an attorney, without obtaining actual possession. 3. The stipulation in the convention of 1800 does not, of itself, give to French citizens property which they had not before, nor enlarge or alter their estates in the lands held by them. They must have been legally entitled to property when the convention took place, or must have legally acquired it afterwards. The ancestor of the defendants in error had in his life-time a fee-simple, and died seized thereof; but of this estate he was seized, not as a French citizen, but as a citizen of Maryland; and upon his death his heirs, being aliens, could have had no legal claim to the property, and it would have escheated to the state had it not been for the act of Maryland. Under that act they became seized of an estate in fee-simple, but conditional and liable to be defeated, unless they complied with the terms of the act. Had they, within the ten years, become citizens of the state, they would not have wanted the protection *of the treaty, for their property [269 would have been protected as that of citizens. Had they, within the same time, enfeoffed a citizen, the estate would have vested in him, and the protection of the treaty would have been equally superfluous. As the heirs performed neither the one nor the other of these alternative conditions, their estate was defeated at the expiration of the term of ten years, and became vested in the state. From that time the defendants in error have not been seized of any estate to be operated on by the convention; and,

1.—1 Bac. Abr., Alien. Letter, c. 132, in *Notis*, Parker, 144; 5 Brown's Parl. Cas. 91; *The Attorney-General v. Duplessis*.

consequently, it can give them no right to recover the lands either from the state or from the plaintiff in error, who claims under the state.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

The first point made by the plaintiff in error is, that the estate of which John Baptiste Chirac died seized was, in his life-time, escheatable, because it was acquired before he became a citizen of the United States; the law of the state of Maryland, according to which he took the oaths of citizenship, being virtually repealed by the constitution of the United States, and the act of naturalization enacted by Congress.

That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be controverted; but, it is contended that the act of Maryland, passed in the year 1780, "To declare and ascertain the privileges of the subjects of France residing [270*] within that state," gives to those "subjects the power of holding land on the performance of certain conditions prescribed in that act.

The 2d section gives to the subjects of France who may reside within the state of Maryland, all the rights of free citizens of that state. The 3d section contains a proviso restricting the privileges granted by the act, and declaring that nothing therein contained shall be construed to grant to those who should continue subjects of His Most Christian Majesty, and not qualify themselves as citizens of this state, any right to purchase or hold lands or real estate, but for their respective lives or for years.

This act certainly requires that a French subject who would entitle himself, under it, to hold lands in fee, should be a citizen according to the law which might be in force at the time of acquiring the estate. Otherwise he could only purchase or hold for life or years. John Baptiste Chirac was not a citizen according to that law when he purchased the land in controversy.

It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declared that "The subjects and inhabitants of the United States, or any one of them, shall not be reputed Aubains (that is aliens) in France." "They may, by testament, donation, or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem [271*] good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat*,

without being obliged to obtain letters of naturalization. The subjects of the most christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present articles."

Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.

It is unnecessary to inquire into the effect of this treaty under the confederation, because, before John Baptiste Chirac emigrated to the United States the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land.

*The repeal of this treaty could not [*272 effect the real estate acquired by John Baptiste Chirac, because he was then a naturalized citizen, conformably to the act of Congress; and no longer required the protection given by treaty.

John Baptiste Chirac having died seized in fee of the land in controversy, his heirs at law being subjects of France, and there being, at that time, no treaty in existence between the two nations, did his land pass to these heirs, or did it become escheatable?

This question depends on the law of Maryland. The 4th section of the act already mentioned enacts, among other things, that if any subject of France who shall become a citizen of Maryland, "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent and his kindred were the citizens of this state."

An attempt has been made to avoid the effect of this claim in the act, by contending that it was passed for the sole purpose of enforcing the treaty, and was repealed by implication when the treaty was repealed.

The court does not think so. The enactment of the law is positive, and in its terms perpetual. Its provisions are not made dependent on the treaty; and, although the peculiar state of things then existing might constitute the principal motive for the law, the act remains in force from its words, however that state of things may change.

But, to this enacting clause is attached a proviso *that whenever any subject of [*273 France shall, by virtue of this act, become seized in fee of any real estate, his or her estate, "after the term of ten years be expired, shall vest in the state, unless the person seized of the same shall, within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof some citizen of this or some other of the United States of America."

The heirs of John Baptiste Chirac, then, on his death, became seized of his real estate in fee, liable to be defeated by the non-performance of

1.—Before the French revolution the *droit d'aubains* (*jus aubainus*) was abolished, or rather modified, by the treaties between France and the greater part of the other civilized powers of the world. But, it seems, according to an observation of M. Tronchet, in the discussions on the civil code, that this conventional law only excluded the royal fisc from taking by escheat the property of foreigners deceased in France, but did not exclude their French relations from inheriting, in preference to their foreign heirs in the same or a nearer degree of affinity; because the foreign heirs had

not the active power of inheriting. This was given to all foreigners, without distinction, and, independent of treaties, by the national assembly in 1789. But this concession was repealed by the civil code, which again placed the matter upon its original footing of reciprocity, by enacting that foreigners should enjoy in France the same civil rights which are, or shall be, conceded to Frenchmen by the treaties with the nation to which such foreigners may belong. Liv. 1, chap. 1, De la Jouissance des Droits Civils, Art. II.; Discussions du Code Civil, par M. M., Jouanneau, &c., Tom. 1, p. 45.

the condition in the proviso above recited. The time given by the act for the performance of this condition expired in July, 1809, four months after the institution of this suit. It is admitted that the condition has not been performed, but it is contended that the non-performance is excused, because the heirs have been prevented from performing it by the act of law and of the party. The defendant, in the court below, has kept the heirs out of possession, under the act of the state of Maryland, so that they have been incapable of enfeoffing any American citizen; and, having been thus prevented from performing one condition, they are excused for not performing the other.

Whatever weight might be allowed to this argument, were it founded in fact, its effect cannot be admitted in this case. The heirs were not disabled from enfeoffing an American citizen. They might have entered, and have executed a conveyance for the land. Having failed to do so, their estate has terminated, **274*** unless it be supported in some other manner than by the act of Maryland.

This brings the court to a material question in the cause. While the defendants in error were seized of an estate in fee-simple, determinable by their failure to perform the condition contained in the act of 1780, another treaty was entered into between the United States and France, which provides for the rights of French subjects claiming lands by inheritance in the United States. This treaty enables the people of one country, holding lands in the other, to dispose of the same by testament or otherwise, as they shall think proper. It also enables them to inherit lands in the respective countries without being obliged to obtain letters of naturalization.

Had John Baptiste Chirac, the person from whom the land in controversy descended, lived till this treaty became the law of the land, all will admit that the provisions which have been stated would, if unrestrained by other limitations, have vested the estate of which he died seized in his heirs.

If no act had been passed on the subject, and the appellees had purchased lands lying in the United States, it is equally clear that the stipulations referred to would have operated on these lands so as to do away that liability to forfeiture to which the real estates of aliens are exposed.

Has it the same or any effect on the estate of which the appellees were seized when it was entered into?

It has been argued that the treaty protects **275*** existing estates, and gives to French subjects a capacity to dispose and to inherit; but does not enlarge estates.

This is true. But the estate of the defendants in error requires no enlargement. It is already a fee, although subject to be defeated by the non-performance of a condition. The question is, does this treaty dispense with the condition, or give a longer time for its performance? The condition is, that those who hold the estate shall become citizens of the United States, or shall enfeoff a citizen within ten years. Does the treaty control or dispense with this condition?

The direct object of this stipulation is, to give French subjects the rights of citizens, so

far as respects property, and to dispense with the necessity of obtaining letters of naturalization. It does away the incapacity of alienage, and places the defendants in error in precisely the same situation, with respect to lands, as if they had become citizens. It renders the performance of the condition a useless formality, and seems to the court to release the rights of the state as entirely in this case as in the case of one who had purchased, instead of taking by descent. The act of Maryland has no particular reference to the case of Chirac, but is a general rule of state policy prescribing the terms on which French subjects may take and hold lands. This rule is changed by the treaty; and it seems to the court that the new rule applies to all cases as well to those where the lands have descended by virtue of the act as to those where lands have been ***276** acquired without its aid. The general power to dispose "without limitation," which is given by the treaty, controls the particular power to enfeoff within ten years, which is given by the act of Maryland.

But the treaty proceeds to stipulate, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be."

In many of the states—perhaps in all of them—the laws do "restrain strangers from the exercise of the rights of property with respect to real estate;" consequently, this provision limits, to a certain extent, the principles antecedently granted. What is the extent of this limitation?

It will probably prevent a French subject from inheriting or purchasing the estate of a French subject, who is not also a citizen of the United States; but it cannot affect the right of him who takes or holds by virtue of the treaty, so as to deprive him of the power to do that for which this clause stipulates; that is, "to sell or otherwise dispose of the property to citizens or inhabitants of this country." This general power to sell, according to the principles of our law, and, it is presumed, of that of France, endures for life. A subject of France, then, who had acquired lands by descent or devise (perhaps also by any other mode of purchase), from a citizen of the United States, would have a right, during life, to sell or otherwise dispose of those lands, if lying in a state where lands purchased by an alien generally would ***be immediately escheatable on account** ***277** of alienage. The court can perceive no reason for restraining this construction in the application of the treaty to the state of Maryland, where the law, instead of subjecting the estate to immediate forfeiture, protects it for ten years. The treaty substitutes the term of life for the term of ten years given by the act.

If, then, the treaty between the United States and France still continued in force, the defendant would certainly be entitled to recover the land for which this suit is instituted. But the treaty is, by an article which has been added to it, limited to eight years, which have long since expired. How does this circumstance affect the case?

The treaty was framed with a view to its being perpetual. Consequently, its language is

adapted to the state of things contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. The court must decide on the effect of this added article in the case which has occurred. It will be admitted that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years or gave rights during eight years which survived it.

The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. 278*] The instant *the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent the day before its expiration has precisely the same right under it as he who acquired them the day after its formation. He is seized of the same estate, and has precisely the same power during life to dispose of it. This limitation of the compact between the two nations, would act upon, and change all its stipulations, if it could affect this case. But the court is of opinion that the treaty had its full effect the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant.

Judgment affirmed.

Cited—5 Wheat. 49; 10 Wheat. 189; 5 Pet. 44; 10 Pet. 572; 14 Pet. 413, 563, 621; 5 How. 585; 7 How. 556; 19 How. 533, 573; 10 Otto, 412, 439; 3 Cranch, C. C. 600; 1 Abb. U. S. 45; 3 Cliff. 336.

[PRIZE.]

THE GEORGE.

A question of collusive capture. The capture pronounced to be collusive, and the property condemned to the United States.

THIS is the same cause which is reported in the first volume of these Reports, p. 408, and which was ordered to further proof upon the points there stated.

279*] *The cause was argued by *Webster* and *G. Sullivan* for the captors, and by the *Attorney-General* for the United States.

JOHNSON, J., delivered the opinion of the court:

This is one of those cases which too often occur in courts exercising admiralty jurisdiction, in which the court is left to decide between the most positive testimony on the one hand, and the most obstinate circumstances on the other.

The privateer *Fly* had captured the schooner *George* and carried her into the province of Maine. But various circumstances having excited a suspicion that the capture was collusive, a claim was filed in behalf of the United States, and she was adjudged to the government, in opposition to the right set up by the captor.

Wheat. 2.

In all the courts through which this case has passed, the most ample opportunities have been given for the production of testimony. But, unfortunately, this indulgence has only served to thicken the difficulties of the case.

We have now before us the most positive depositions of the supercargo and the shippers of the *George* (men whose veracity stands unimpeached), denying, in every point, the collusion, and contradicting, in almost every material point, the evidence upon which the adjudications took place in the courts below. On the other hand, the characters of *Thomas* and *Rodick*, who swear to positive confessions on the subject of the fraud, are amply supported by *the most respectable testimony, whilst [*280 the veracity of *Wasgate* and *Stanwood*, who testify to the same point, stands wholly unimpeached.

It is painful to a court ever to express an opinion that results in an imputation of willful perjury, and, as much as it is possible in this case, we will put out of view the clashing testimony of individuals, and consider the case upon those facts concerning the truth of which the evidence leaves no doubt.

It is a notorious fact, and is expressly and repeatedly sworn to in this case, that during the restrictive system and the late war, English manufactures, in immense quantities, were accumulated in the small ports on the west coast of Nova Scotia, and it is a melancholy truth, which this court has had but too much cause to know, that many unprincipled individuals were actively engaged in introducing those goods into the United States, under innumerable artifices, and to an immense amount. The protection of the British government was openly given to this intercourse, and there were found but too many in our country who countenanced and encouraged it. Hence this illicit intercourse was actively carried on, and naturally casts a suspicion on such shipments made in that quarter. On the other hand, although an effort has been made to show that a trade in the same articles was carried on between those provinces and the Havanna, but one instance can be shown of such a shipment. All the witnesses agree that the exports from St. Johns to the Havanna consisted of fish and lumber. Indeed, from the course of trade at that time, it is notorious that the Havanna *as well [*281 as other Spanish ports to the southward were crowded with British manufactures, for the same unprincipled trade carried on at *Amelia Island*. The shipment, then, in the first instance, is a suspicious one, and leads to the opinion that the dry goods were intended for the United States, whilst the fish and lumber were to be used only as the cover under which they were to be introduced. But this reasoning may be consistent with the idea of a destination to any port of the United States, as well as the ports in that vicinity with which this privateer appears to have been connected. Let us, then, examine if the *George* was equipped for a voyage of any duration. And here the evidence is irresistible to show that she was not. She had no dunnage, or platform, for the purpose of preserving the goods from damage by water, and nothing was stowed or packed in such a manner as to indicate preparation for a protracted voyage. Her sails and rigging were

old, worn, and deficient in quantity, and her mainsail too large both for mast and boom. Her wood, and water, and provisions very scanty; and her crew, before the mast, not more than one-half of what were necessary for a long and a winter's voyage. Add to this that her captain is proved to have been a very young man, scarcely twenty-one years of age, altogether unknown to the shippers, and engaged only four days before the vessel's sailing. It cannot be believed that so valuable a cargo could have been destined for so long a voyage with such defective equipments; no court, upon **282*** such evidence, would *have hesitated to avoid a policy on either vessel or cargo.

We therefore think that her real destination must have been to some port in the vicinity of that at which her voyage commenced. How, then, was the cargo to be introduced?

Here I regret that it is necessary to notice a part of the testimony of Gregory Vanhorne, which certainly casts a shade upon all the rest of his testimony. The George, it appears, had actually sailed under convoy of the Beaver as far as Etang Harbor. There the vessel lay in a secure port, under the protection of the Martin sloop of war, and at a place occasionally assigned as a place of rendezvous to vessels that were to sail under convoy. Yet Vanhorne swears that he heard the commander of the Martin expressly order the captain of the George to depart for the place where she was captured, an open road, without protection, only fifteen miles from Etang Harbor and there to wait the indefinite arrival of some unascertained convoying vessel. This cannot be true. For, independently of the fact, which appears to be satisfactorily established, that Long Island Harbor, in the island of Grand Magnan, when this vessel was captured, had never been used as a place of rendezvous for a convoy, it is very clear that such an order would not have been obeyed by a vessel that feared exposure to capture; for it is proved to have been a place often visited by American privateers.

We therefore consider the vessel's departure from Etang Harbor to the place where she was **283*** captured as voluntary, and her patient stay at that place as manifesting that she did not fear exposure to American capture. Yet it does not follow necessarily that it was the Fly privateer that she was waiting for, nor that she expected to be captured at all. The cargo intended for the American market may, by possibility, have been intended to be introduced into the United States, by being transhipped into some smuggling vessel. So far everything comports perfectly with the innocence of this capture.

But the privateer Fly also draws suspicion upon herself in the very inception of her voyage. We find, what we pronounce absolutely unprecedented, notwithstanding every effort to prove the contrary, that the captain, Dekoven, is sole owner of the privateer, and every man under him, from the lieutenant down, is engaged on wages. In the case of *The Washington*, privateer, it was a circumstance of great weight with this court that nine out of fifteen of the ship's company were joint owners, and it was thought improbable that such a transaction, if there was fraud in it, would have been confided to so

many witnesses.¹ But here no man but the captain is to participate in the prize money, and he thus presents himself as the most convenient agent possible to be intrusted with such an undertaking. Perhaps this circumstance may give a leaning to the mind of the court in considering the effect which ought to be *given to other evidence in the cause; [**284** but if so, it is Dekoven's misfortune, and one which he has himself furnished the cause for.

It then becomes necessary to consider whether the arrival of Captain Dekoven was the object of this vessel in taking the position she did, in the island of Grand Magnan. And here it is proper to remark that Etang Harbor, lying up the bay of Passamaquoddy, N. W., and by W. of St. Johns, where this vessel took in her cargo, is off the course to Cuba, and a very convenient situation for intelligence with Machias, in the province of Maine, by means of a chain of islands extending across the bay. One of these islands is Moose Island, about five leagues distant from Grand Magnan, and something less from Etang Harbor. Now, the evidence is very satisfactory to prove that the Fly lay, some time in December, at Machias; that during that time Sebor, the lieutenant and brother-in-law of Dekoven, was absent from the vessel. And Jabez Mowry, who resides on Moose Island, swears, that during that time Sebor was on Moose Island, and holding communication with certain notorious smugglers from the states; to one of which, of the name of Toler, from New York, he had a letter. Again, the pilot who was on board the Fly swears that from all he saw on the occasion of the capture he concluded it was amicable; and Aaron Gale, a witness, resident upon the island of Grand Magnan, who saw the whole transaction, swears to the same fact, and adds, that after the capture, the captain of the privateer and his prize-master came on shore to *a neighboring house, where [**285** the witness then was, and got something to drink. This looks very little like a consciousness of being among enemies. To this he adds that he heard a British officer, who was at the time recruiting upon the island, threaten Vanhorne, the supercargo, who, together with all the crew except the supposed captain, were immediately put on shore, to put him in irons for the fraud in thus colluding with the enemy.

I will notice but two more pieces of testimony which the case offers, and which, taken with the rest, we think too strong to be resisted. The first is that of Richard Higgins, who testifies that, on the arrival of the George off the harbor called Frenchman's Bay, or, as he expresses himself, at Mount Desert, he, the deponent, was the first person who boarded her; that Sebor, the lieutenant of the Fly, who was the prize-master, told him where they had captured the George; upon the witness's inquiring what she was loaded with, he replied, fish and lumber. The witness remarked that she floated very light for such a load, upon which Sebor replied he did not know what the cargo consisted of, and that he wanted to get further to the westward. The witness then told him, distinctly, "that he presumed the capture had been made by some previous understanding, and that, if such were the case, he thought he would be likely to fare better, and undergo a less rigorous scrutiny, if he put into this dis-

1.—*Vide ante*, p. 169, *The Bothnea* and *Jahnstoff*.

strict than he would if he went into any of the more western districts, upon which, after consulting with some one of his crew, he went [286*] in." This testimony is important in two views: 1st. The plot here develops itself, and we find the fish and lumber actually resorted to as the means of cloaking the introduction of the British goods. And the resort of Sebor to this deception (for he must have known it to be such, had it been only from the inspection of the invoice) shows his privity to the secrets of the machinery. 2d. Going into the port after the suggestion of Higginson amounts to a passive acquiescence in the correctness of his suggestions, and an acceptance of the facilities held out to him to induce him to enter that port.

The last and only remaining piece of testimony that we shall notice is that of Joseph Grindel, of Penobscot, who swears that he was in St. Johns at the time the George was lading; that he was familiarly acquainted with Van-horne, the supercargo, and that he held a conversation with him, respecting a passage, and the shipment of a hogshead of molasses to the states, and remitting the money to his mother at Penobscot, which, if it be true, (and we have no cause to doubt his veracity,) puts to rest every question relative to the fraudulent design with which this adventure was undertaken. And the same witness further swears that, after consenting to take his adventure on board (an adventure that never could have been intended for the Havanna market), Van-horne sailed a day or two sooner than he had intimated to the witness. That upon this he complained to Nehemiah Merrit, the shipper, and received from him this notable answer: "He suspected your politics, and was afraid you would betray him."

[287*] "Upon the whole, we are of opinion that it was a case of collusive capture, and that the decree below should be affirmed.

Decree affirmed.

Arg.—8 Gall. 249; 8 C. 1 Wheat. 408.
Cited—8 Wheat. 384; 4 Mason, 153, 154, 156.

[PRACTICE.]

THE ARGO.

The provision in the judiciary act of 1789, ch. 20, section 30, as to taking depositions *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts. Testimony by depositions can be regularly taken for this court only under a commission issuing according to its rules.

APPEAL from the Circuit Court for the District of Massachusetts.

This was an information for a violation of the non-importation acts. On the part of the appellants it was alleged that the vessel, (which sailed from Portland, in the District of Maine, in April, 1813, and returned to that port, laden with a cargo of molasses, in the month of August, of the same year,) instead of going to Cumana, her ostensible port of destination, had proceeded to Guadaloupe, then a British possession, and there took in her cargo. This was the sole question of fact in the cause; on which the court below decreed restitution to the

Wheat. 2.

U. S. Book 4.

claimant, from which decree an appeal was entered on behalf of the United States to this court.

Webster, for the claimants, objected to [288] the reading of the depositions taken *de bene esse* in this cause. He argued, that there is no provision in the laws by which testimony in writing can be taken, to be used here, without a commission issuing from this court. The provisions of the judiciary act of 1789, ch. 20, section 30, do not extend to the Supreme Court; and the act of 1803, ch. 93, does not prescribe any new mode of taking testimony, but only declares that new evidence may be used in prize and instance causes. *Ex-parte* testimony may be taken to be used in the courts below, but here it may not; because this is the tribunal of last resort, and the other party might be surprised by the production of such proof to his irretrievable injury. It was to guard against this consequence that the laws omitted any provision for such testimony to be used in this court.

The Attorney-General, contra, stated that it had been the uniform practice to take testimony to be used in this court in the same manner as if taken for the district and circuit courts; and that the practice had been uniformly acquiesced in. He argued that this court, sitting as a court of admiralty, had a right to receive *ex-parte* affidavits, in the same manner as the circuit and district courts, or the courts of admiralty abroad, who received affidavits and permitted them to be read, whether taken *ex-parte* or under a commission.

MARSHALL, Ch. J., delivered the opinion of the court:

"On considering the 30th section of [289*] the judiciary act of 1789, the court is of opinion that the provision, as to taking depositions *de bene esse*, does not apply to cases pending in this court. In terms, the provision refers to cases in the district and circuit courts. Testimony, by depositions, can be regularly taken for this court only under a commission issuing according to its rules. A practice has hitherto prevailed to take depositions *de bene esse* in causes pending here, and, as no objection has been made at the bar, it has passed *sub silentio*. Under such circumstances we cannot say that the United States are in default in taking depositions according to the usual practice. We shall, therefore, continue this cause to the next term, to enable the parties, if they choose, to take testimony under commissions issued under the rules prescribed by this court.

*Cause continued.*¹

Cited—2 Wood. & M. 136.

1.—See the rule of the present term as to the mode of taking depositions, by commission, out of this court, or the circuit courts, in causes of admiralty and maritime jurisdiction. This rule applies both to prize and instance causes. Further proof is admissible in the latter as well as the former. The William Wells, 7 Cranch, 22; The Clarissa Claiborne, 1b. 107. But it must not be understood that instance or revenue causes stand on the same footing with prize causes, in respect to the inadmissibility of further proof, until they are heard on the original evidence. Further proof may be exhibited in these cases, in the first instance, and if the court have doubts on the hearing, still further proof may be ordered.

290*

*[CHANCERY.]

MORGAN'S HEIRS v. MORGAN ET AL.

The jurisdiction of the Circuit Court, having once vested between citizens of different states, cannot be divested by a change of domicile of one of the parties, and his removal into the same state with the adverse party, *pendente lite*.

In a suit demanding the specific performance of a contract, by conveying lands in the state of Ohio, stipulated to be conveyed as the consideration for other lands sold in the state of Kentucky, or, in lieu thereof, requiring indemnification by the payment of money; it was held that all the co-heirs of the vendor, deceased, ought to be made parties to the bill, and that the death of one of the heirs ought to be proved in order to excuse his omission as a party to the bill.

It is a universal rule of equity that he who asks for a specific performance must be in a condition to perform himself.

Therefore, the vendor, being unable to make a title free from incumbrances, to the lands sold in Kentucky, was held not to be entitled to a decree for a specific performance.

APPEAL from the Circuit Court of Kentucky.

This was a bill in equity, filed by the complainants in the court below, (who are the defendants here) founded on a bond, conditioned for the conveyance of 5,000 acres of land, to be situated within certain bounds of the state of Ohio; for which land a conveyance was prayed, if the defendant was possessed of, or had the means of acquiring, the title thereto, and, in the event of such inability on the part of the defendant to comply specifically with his stipulation, a compensation in damages in lieu thereof. [*291*] of; *and, in this latter case, that a tract of 1,000 acres of land, situate in the county of Bourbon, in the state of Kentucky, which formed the consideration on the part of the complainants, for the 5,000 acres of Ohio land, and for the conveyance of which the ancestor of the complainants had, contemporaneously with the first bond, executed his own obligation to the defendant, should be sold for the purpose of completing such indemnity, upon the suggestion of the insolvency of the defendant; on the ground of the equitable lien existing on the part of the complainants in that land, for the purpose of such indemnity. The bill further alleged that the ancestor of the complainants, discovering the inability or unwillingness of the defendant to fulfil the stipulations of his said bond, for the purpose of his ultimate indemnity against the consequences of such failure, had instituted an ejectment in the Fayette Circuit Court, against James Patton,

to whom the defendant had many years before sold, and invested with the possession of the said 1,000 acre tract, against whom judgment had been rendered in his favor. That subsequent to such judgment, an adjustment of the accounts of improvements, rents, and profits, had been effected between them, which was shown by an agreement in writing, in which it was stipulated that the said Patton should pay to the ancestor of the complainants the sum of \$80, in full for rents, and should yield up the possession of the premises on a day therein named. But that in violation of the spirit and true intention of this agreement of compromise, he, the said Patton, *had fraudulently [*292*] prosecuted a writ of error to the said judgment in ejectment; and having procured, in the appellate court, a reversal of the said judgment, had secretly, illegally, and by combination with Chilton Allen and others procured a sale, under color of an execution for the costs, on the reversal aforesaid, for the sum of \$13,72½, and sacrificed 666½ acres of the said tract, worth many thousand dollars, for that trivial sum; the said Allen having become the purchaser, and subsequently conveyed 500 acres thereof to Patton, and the residue to James Scoby, all of whom are made parties to the bill. The complainants, for the purpose of giving legal effect to the lien given them by equity, on this tract of 1,000 acres of land for the satisfaction of their demand, pray that the sale, and all other proceedings on the execution for costs, be vacated on account of the fraud and illegality by which the same was effected.

Morgan, the defendant, in his answer, admits that he was unable to comply with the contract to convey the lands N. W. of the Ohio; alleges fraud in the original contract, &c.

Allen, Patton, and Scoby, deny fraud, &c., and allege a good title under the sheriff's deed.

On the hearing, the court, at their November term, in 1814, dismissed the bill as to Allen, Patton, and Scoby; but decided that the defendant, Morgan, was responsible for the value of the lands in Ohio, and directed a jury to ascertain its value. At the May term, 1815, a jury estimated the Ohio land to be worth, on the 11th day of December, 1795, *\$5. [*293*] 000; on the 11th of December, 1796, \$6,250; and at that date, \$20,000. At the November term, 1815, a motion for a rehearing having been overruled, a decree was rendered, on behalf of the complainants, for \$6,250, with interest from the 11th December, 1796, and costs

NOTE.—It is sufficient if the vendor is able to make a good title at any time before the decree is pronounced. See *Hepburn v. Dundas*, 1 Wheat. 179. and note to that case.

Where the action was brought by part of the heirs of a deceased person to set aside a deed of the ancestor procured by fraud, it was held necessary that all the heirs should be made parties before a sale of the premises to pay charges equitably due the grantee for advances could be ordered. *Harding v. Handy*, 11 Wheat. 103.

A final decree in equity or an interlocutory decree, which in a great measure decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all parties in interest, are before the court. *Conn. v. Penn*, 5 Wheat. 424; *Pray v. Beet*, 1 Pet. 670; *Dandridge v. Curtis*, 2 Pet. 370; *Venable v. Bk. U. S.*, 2 Pet. 107; *Caldwell v. Taggart*, 4 Pet. 190; *North Ind. R. Co. v. Mich. C. R. Co.*, 15 How. 233; *Mandeville v. Riggs*, 2 Pet. 482; *Armstrong v. Leur*, 8 Pet. 52; *Boon v. Chiles*, 8 Pet. 532; *Atkins*

v. Dick, 14 Pet. 114; *Taylor v. Longworth*, 14 Pet. 172; *Hagan v. Walker*, 14 How. 29; *Lewis v. Darling*, 16 How. 1; *Platt v. Oliver*, 2 McLean, 287; *Joy v. Wirts*, 1 Wash. C. C. 517; *Van Bokkelen v. Cook*, 3 Sawy. 587; *Williams v. Bankhead*, 19 Wall. 563.

Assignees in bankruptcy are indispensable parties to an action against the bankrupt and parties to whom he conveyed property before he was decreed a bankrupt. *Russell v. Clark*, 7 Cranch. 69.

Judgment creditor must be party to action to enjoin the judgment, though the judgment is alleged to be assigned to, and it is so admitted by, the party defendant. *Marshall v. Beverly*, 5 Wheat. 313.

Where the object is to divest a *feme covert* or minor of an interest in real estate, the title of which is in a trustee for her benefit, a decree cannot be made against her without the trustee being made a party. *O'Hara v. MacConnell*, 3 Otto, 150.

Where a trustee is invested with such powers and obligations that his beneficiaries are bound by what is done against him or by him, they are not neces-

Wheat. 2.

against the defendant, Morgan, and execution ordered against his estate. Commissioners were also appointed to sell the land, if the money could not be made by execution, and the commissioners directed to convey to the purchaser. The complainants were also directed to join in the conveyance, and to stipulate to pay, at the rate of 20 shillings per acre, for any of the land that might be lost by a superior title.

By a copy of the will of C. Morgan, of Pennsylvania, exhibited in the cause, it appeared that the testator had a son, William Morgan, who was one of his heirs, and who is no party in the cause. It also appeared that there are two other executors not named in the bill.

During the progress of the suit, Daniel Morgan, one of the complainants, removed to, and became a citizen of, Kentucky. This was shown to the court, and a motion made to dismiss the suit for the want of jurisdiction, and overruled.

M. B. Hardin and Jones, for the appellants. 1. The voluntary change of citizenship by one of the complainants, *pendente lite*, is a waiver of the privilege of maintaining a suit in the Circuit Court, which exists only between citizens of different states, and ceases by the parties becoming **294*** citizens of the same state. The general rule is, that a court, once having jurisdiction of a cause, will keep it; but that relates to the subject-matter of the suit: here it is a personal privilege, which the party waives by removing into the same state with his adversary; and in this case, into any other state; because all the parties on one side must be citizens of one state, and all the parties on the other, citizens of another state. 2. There is a defect of proper parties to the bill. 3. This is, substantially, a bill by a vendor to compel the vendee to complete the contract, and ought not to be sustained; because the contract was unequal, and the vendor had himself disaffirmed it. Where there is inequality in the contract, a court of equity will not decree a specific performance even in a case where damages might be recovered at law, but will remit the parties to their legal remedy. 4. In order to obtain a specific performance, the vendor must show that he has a good title to give: which is not the case here, the land being incumbered by the judicial sale, which gives at least a presumptive title against the vendor's claim. 5. The decree is inequitable in its details. If damages ought to have been decreed, the estimated value of the land stated in the written contract was the true

measure of damages, and not the sum stated in the decree. The order for the sale of the land under incumbrances was improper; as some of the complainants were infants, some *femes covert*s, and one of the heirs not made a party to the suit; so that no legal title could be acquired by a purchaser without time, trouble, and expense.

Tulbot*, contra. 1. The removal of **[*295] one of the parties cannot oust the court of its jurisdiction. The citizens of different states have not an individual, peculiar, personal privilege; but it is a classification of persons who, under the constitution, have a right to sue in the national courts. 2. As it regards the primary object of the suit, the title to the Ohio land, the bill is that of daily and familiar use: that with a double aspect, requiring of the chancellor a specific execution of the stipulation for conveyance, in pursuance of the defendant's bond, or in the event of inability (in relation to which the complainant is ignorant), upon the ascertainment of such entire inability, compensation equivalent to the value of the land in lieu thereof. The enforcement of the equitable lien, held by the complainants on the Bourbon land; the possession of which (but not the title) their ancestor had transferred to the defendant, Morgan, is the peculiar and exclusive province of the equitable tribunal; and especially in Kentucky, by the laws of which the equitable claims to real estate are not made subject to execution. The equity of the lien on behalf of the complainants is irresistible, on the supposition of the inability of the defendant, Morgan, to convey the Ohio land; the Bourbon land constituting the entire consideration for the stipulation of the defendant for the conveyance of the other; and the ancestor of the complainants having taken no personal security, but retained the legal title as his only guarantee for the faithful execution of the stipulation on the part of the defendant, Morgan; and the embarrassments in which the title and possession of the ***Bourbon** land had become involved by **[*296]** the acts of the defendant, Morgan, and those claiming through and under him, in relation to the fraudulent and illegal sale of that land, under color of the execution, forms another distinct and unquestionable ground for the interposition of equity jurisdiction; the tribunal of the chancellor alone possessing competent powers by a single suit (avoiding multiplicity of harassing litigation), to embrace all these various subjects of controversy, and by its decree, co-extensive with the matters in contest,

ary parties to a suit against him by a stranger to defeat the trust in whole or in part; nor to a suit by him to recover trust property. *Kerrison v. Stewart*, 3 Otto, 155; *Carey v. Brown*, 2 Otto, 171.

But the jurisdiction of this court will not be ousted in equity cases by the joinder or non-joinder of merely formal parties. *Wormley v. Wormley*, 4 Wheat, 421.

The joinder of unnecessary parties, not capable of being sued in a federal court, because citizens of same state as plaintiff, will not prevent a decree against others capable of being sued. *Cameal v. Bank*, 10 Wheat, 181.

If the action can be completely decided as between the parties, an interest in another who cannot be reached by process should not prevent a decree. *Elmendorf v. Taylor*, 10 Wheat, 152; *Story v. Livingston*, 13 Pet. 359; *West v. Smith*, 8 How. 402.

When proper parties are not within the jurisdiction. *Wheat*, 2.

tion, and a decree can be made without effecting their interests, plaintiff is excused from joining them, by first section of act of February 28, 1839. 5 State at Large, 321. *Union Bk. v. Stafford*, 12 How. 327; *New Orleans C. & B. Co. v. Stafford*, 12 How. 343.

Where the court can make no decree between the parties before it, upon their own rights, which are independent of the rights of those not before it, it will not act. *Mallow v. Hinde*, 12 Wheat, 193; *Caldwell v. Taggart*, 4 Pet. 190.

The objection for want of parties, at hearing on appeal, will not avail, unless such parties are indispensably necessary. *Mech. Bk. of Alex. v. Seton*, 1 Pet. 299; *Livingston v. Woodworth*, 15 How. 546.

If the joinder of a party would defeat the jurisdiction, and the decree can be framed so as not to affect his interest, such party may be stricken out, and suit may proceed without him. *Vattier v. Hinde*, 7 Pet. 252.

to do final and complete justice to all the parties. 3. The subsequent, fraudulent, or illegal sale and purchase of the Bourbon land, effected through the agency of Patton claiming and holding possession of the same under the defendant; a sale effected not only in violation of the solemn stipulations between said Patton and the ancestor of the complainants, by the terms of which the proceedings under the ejectment and all matters in relation thereto were finally compromised between them, but, also, in defiance of the various provisions of the acts of the Kentucky legislature, authorizing the sales of real estate under execution, ought not to affect or prejudice the right of the complainants to recover of the defendant, Morgan, an indemnity for his failure to convey the Bourbon land. 4. The sale of the Bourbon land under color of the execution for costs was irregular and illegal in the following particulars: 1st. That the act of the Kentucky legislature, under which this sale is attempted to be justified, only authorizes the sale of real estate on execution for debt or damages, and 297*] *not executions for costs alone, as was that from the Court of Appeals, in the present case. 2d. The act requires that the sale to be effected under such executions shall be advertised on the door of the court-house, on a court day; thereby clearly intending that such advertisement should be placed in that situation, in time to afford the requisite information to all persons attending court, for the entire day; which was not done on this occasion, the advertisement not having been put up until the latter part, or afternoon of the day. 3d. The said sale was not advertised at the court-house, and some meeting-house door, and at the other most public places, within the county, as required by the said act; in consequence of which omissions to comply with those important requisitions of the law, the land of the complainants, worth several thousand dollars, was sacrificed for a paltry and insignificant sum.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

In this case two questions respecting the formal proceedings of the Circuit Court have been made by the counsel for the appellant.

The first is, that one of the complainants in the original suit having settled in the state of Kentucky after this bill was filed, that court could no longer entertain jurisdiction of the cause, and ought to have dismissed the bill.

We are all of opinion that the jurisdiction having once vested, was not devested by the change of residence of either of the parties.

298*] *2d. It appearing from the will that at its date the testator had a child who is not a party in this suit, the bill ought to be dismissed, or the decree opened and the cause sent back to make proper parties.

It is unquestionable that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant; and a specific performance ought not to be decreed until they shall be all before the court. It would, perhaps, be not enough to say that the child named in the will, and not made a party, is most probably dead. In such a case as this, the fact of

his death ought to be proved, not presumed.¹ But as the opinion of the court on the merits of the cause will render it unnecessary to decide this question, it is thought best for the interest of all parties to proceed to the consideration of another point which will finally terminate the contest, *so far as it is to be determined in a court of equity. [299

This is a suit for the specific performance of a contract, either by conveying lands in the state of Ohio, stipulated to be conveyed as the consideration for land sold in the state of Kentucky, or, if that be out of the power of the obligor, by paying money in lieu thereof. Although the contract is not contained in one instrument, but consists of two bonds, the one given by Charles Morgan, of Pennsylvania, binding himself to convey the land in Kentucky, and the other by Charles Morgan, of Kentucky, binding himself to convey the land in Ohio; yet, it is essentially one contract; and it sufficiently appears that the land in Ohio forms the consideration for the lands in Kentucky. It is then a case standing on those general principles which govern all applications to a court of equity, to decree the specific performance of a contract.

In cases of this character no rule is more universal than that he who asks for a specific performance must be in a condition to perform himself. This point was fully considered in the cases decided in this court between *Hepburn & Dundas* and *Colin Auld*, as the agent of Dundas & Co., and the principles laid down in those cases are believed to be entirely correct.²

Let us inquire, then, whether the plaintiffs in the court below have brought themselves within this rule.

It is incumbent on them to show an ability to convey to the defendant in that court a clear estate in *fee simple in the tract of one [300 thousand acres lying in Kentucky, which was sold to him by their ancestors. Have they done so?

The co-heirs are, some of them, *femes covert*, and some of them infants. The decree against the defendant for the value of the Ohio land is not dependent on their making him a conveyance of the land in Kentucky, but is absolute. He is to pay the consideration money, and then obtain a title if he can. It is true that in the event of selling the Kentucky land, which is to take place after exhausting the personal estate of Charles, Morgan of Kentucky, the complain-

1.—The general rule, requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must, necessarily, be affected by the decree. It is a rule of convenience merely, and may be dispensed with when it becomes extremely difficult or inconvenient. *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349. And the want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Milligan v. Milledge et ux.*, 3 Cranch, 220; *Travers v. Buckley*, 1 Ves. 385; *Cowslad v. Coley*, 1 Vern. 140. In such a case, if the property in litigation be within the control of the party who is brought before the court, it may be acted upon by the court. *Smith v. Hibernia Company*, 1 Schoales & Lefroy, 240; *Williams v. Whinyates*, 2 Brown's Ch. Cas. 369. No person need be made a party, against whom, if brought to a hearing, the plaintiff cannot have a decree; as a residuary legatee, and a bankrupt in a suit brought against the assignees. *De Golls v. Ward*, in note 1 to 3 Pere Will. 311.

2.—*Vide ante*, Vol. I. p. 179.

ants are directed to join in the conveyance; but this contingency may not happen; and if it should, a decree that *femes covert* and infants who are plaintiffs, and against whom no cross bill has been filed, should convey, might not secure a conveyance.

This might be corrected by sending the case back with instructions to new model the decree so as to adapt it to the situation of the parties, did it appear to the court that the appellees are able to make such a title as the appellant ought to receive.

But the appellees appear to the court to be incapable of making an unincumbered title to the land sold by their ancestor. Six hundred and sixty-six acres have been sold under an execution, and conveyed by the officer making the sale. The terre-tenants have been brought before the court. The bill, as to them, has been dismissed, and from the decree of dismissal there has been no appeal. Can this **301*** court close its eyes on their title, or declare it invalid?

It has been said that the sale is fraudulent, irregular, and illegal. But the court empowered to examine these allegations has decided against them, and from its decree no appeal has been taken. The incumbrance is an incumbrance in fact, and its legality can be inquired into by this court only in a suit to which the persons claiming the title are parties.

It might be urged, that as the appellant sold to Patton, and Patton holds also under the sheriff's sale, he is not now at liberty to con-

sider Patton's title as an incumbrance on the land.

This argument would be entitled to great consideration were it applicable to the whole land sold by the sheriff. But it is inapplicable to one hundred and sixty-six acres, part of the tract which has never been sold by the appellant.

If the titles acquired under the sheriff's sale be such as would be annulled in a court of law or equity (concerning which this court gives no opinion), it was incumbent on the plaintiffs to annul them before they obtained a decree for a specific performance.

Other objections have been made to the decree of the Circuit Court. It has been said that the contract was in its origin unequal, and that the ancestor of the appellees had in his life-time, by his conduct, disaffirmed the contract. It is deemed unnecessary to examine these objections, because the court is of opinion that the inability of the appellees to make ***such** [***302** a title to the land at this time as the appellant ought to accept, deprives them of the right to demand a specific performance. Neither party can at present claim the aid of this court, but ought to be left to pursue their legal remedies.

Decree reversed and bill dismissed.¹

Cited—12 Pet. 171; 15 How. 206; 17 How. 142, 506; 9 Otto, 542; 1 Bald. 494; Hemp. 712; 5 Biss. 28; 2 Sumn. 226; 1 Blatchf. 395; 1 Cliff. 133; 4 McLean, 113; 6 McLean. 70.

1.—There can be no doubt that the origin of the doctrine of the English Court of Chancery, as to the specific performance of agreements, is to be traced to the Roman law; although the commentators on that law are divided in opinion as to whether it would compel the actual delivery of the thing sold, or whether, in case of refusal, on the part of the vendor, his obligation resolves itself into the payment of pecuniary damages. Those civilians who are of the latter opinion, ground themselves, 1st. On the Code de act. vend. et empt. L. 4 tit. 49, sec. 4, which subjects the vendor to damages for refusing to deliver possession of the thing sold. 2d. On the maxim of law that *nemo potest cogi præstare ad factum*; from whence they conclude that *nemo potest cogi ad traditionem*. The contrary opinion is supported, among others, by Pothier, who states it to be conformable to the practice on the European continent to enforce a specific performance of the contract of sale. He answers the above objections drawn from the 4th law of the Code de act. vend. et empt. by stating that this law does indeed give to the vendee the action *in id quod interest*, against the vendor who refuses to deliver possession of the thing sold; but that it does not confine his remedy to this action alone. He cites Paulus, Sent. 1, 13, 4, as a precise authority that the vendor may be compelled to deliver the thing specifically, *potest cogi ut tradat*; but as it may not always be convenient or practicable for the vendee to cause himself to be put in possession *manu militari*, he is, by this law, permitted to resort to his action *in id quod interest*. He has the choice of the two remedies. As to the argument drawn from the maxim, that *nemo potest cogi ad factum*, and that those contracts which consist in the obligation to do a certain thing, resolve themselves *in id quod interest actoris*, Pothier answers, that this maxim is inapplicable, except where the act to be done is a mere personal act of the debtor, *merum factum*; as where a person contracts to "copy a manuscript, or to excavate a ditch, in which case, if the agreement be not performed, the obligation necessarily resolves itself into pecuniary damages. But that the act of delivering possession of the thing sold is not *merum factum*, *sed magis ad dationem accedit*; and that the debtor may be compelled to perform it specifically. De Vente, No. 68. This principle he extends even to personal property; but in the practice of the

English Court of Chancery agreements respecting chattels are not, in general, enforced, as has been before noticed. Ante, vol. 1, p. 154, note (a). So, also, that court refused to decree a specific performance of a covenant to make good a gravel pit. *Scholefield v. Whitehead*, 2 Vern. 127. And to refer a controversy to arbitration. *Street v. Rigby*, 6 Ves. 818. These last cases fall within the distinction stated by Pothier of a mere personal act, the obligation of which, in case of non-performance, resolves itself into pecuniary damages, to recover which the party must resort to his action at law. But Lord Hardwicke held, contrary to the principle of this distinction, in the case of the *City of London v. Nash*, 3 Atk. 512, that a covenant to build or rebuild might be specifically enforced, but not a covenant to repair. And the same case is mentioned as within the jurisdiction of the Court of Chancery in the year book of 8 E. 4, h., one of the earliest recognitions of the equitable powers of the court. But the modern authorities seem to lean against this doctrine. *Lucas v. Commerford*, 3 Brown's Ch. Cas. 137; 8 C. 1 Ves., Jun., 236; *Mosely v. Virgin*, 8 Ves. 184; *Flint v. Brandon*, 8 Ves. 164; *Errington v. Ayusley*, 2 Brown's Ch. Cas. 343.

Although the vendee is not obliged to take a defective title, yet, if there be a mistake or misrepresentation as to the quantity or quality of the property sold, or of the estate of the vendor therein, the vendee may, if he elects so to do, have the difference deducted from the purchase money by way of compensation, and a specific performance as to the rest. There is a settled distinction, when a vendor comes into a court of equity to compel the vendee to a performance, and when a vendee seeks to compel a vendor to perform. In the first case, if the vendor is unable to make out a title as to part of the subject-matter of the contract, which was the principal object of the purchaser, equity will not compel the vendee to perform the contract *pro tanto*. In the second case, the vendee may, if he chooses, take the part to which a title can be made. *Waters v. Travis*, 9 Johns. Rep. 465; *Milligan v. Cooke*, 16 Ves. 1; *Halsey v. Grant*, 13 Ves. 77; *Mortlocke v. Buller*, 10 Ves. 316; **Paton v. **304 *Rogers*, 1 Ves. & Beat. 353. But where the particular or memorandum described the estate as containing, by estimation, so many acres, "be the same more or less," the vendee was held not to be

306*] * [COMMON LAW.]

LITER ET AL. v. GREEN.

In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly, it was held that this was matter pleadable in abatement only, and that by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy.

The tenants could not, in this case, severally plead, in addition to the mise, or general issue, that neither the plaintiff nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error.

Querre. Whether the tenants could plead the mise severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue.

Under such pleas, and the replication prescribed by the statute, the mise was joined, the parties proceeded to trial, and the following general verdict was found, viz.: "The jury find that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned." It was held that this verdict, being certain to a common intent, was sufficient to sustain a judgment.

It was also held that a joint judgment against the tenants for the costs, as well as the land, was correct.

THIS cause was argued by *Hughes* for the plaintiffs in error, and by *M. B. Hardin* and *Jones* for the defendant in error.

307*] * *STORY, J.*, delivered the opinion of the court:

entitled to an abatement in the price for a deficiency in the quantity of acres sold. *Winch v. Winchester*, 1 Ves. & Beat. 375. The Court of Chancery, in decreeing a specific execution of agreements, governs itself by a moral certainty, for it is impossible in the nature of things there should be a mathematical certainty of a good title. Therefore, it was held in England that a reservation in the grant of an estate by the crown of royal mines within the premises was not such a blemish in the title as would excuse the vendee from taking it; because it seems the crown had no power to grant a license to any person to come upon a subject's estate and search for such mines; and even if it had the power, it was extremely improbable that it would ever be exercised. *Lyddal v. Weston*, 2 Atk. 20. So, also, in this country, where A. contracted to convey to B. "by a good and valid conveyance in law," a farm, which was originally parcel of a large tract of ground granted by the proprietor of a manor to the ancestor of A. in fee, "yielding and paying to the grantor, his heirs and assigns, the yearly rent of ten shillings," the proportion of which quitrent on the farm was 54 cents a year; the existence of the quitrent being known to B. at the time of the contract, it was held that the existence of such an incumbrance (if it were any) was no objection to a decree for a specific performance of the contract. *Ten Broek v. Livingston*, 1 Johns. Chan. R. 357.

In general, the vendor may compel a specific performance, if he can make a good title at the time of the decree, although he had not a good title when the land ought to have been conveyed according to the terms of the contract. *Langford v. Pitt*, 2 Perc. Will. 630; *Mortlocke v. Buller*, 10 Ves. 315; *Coffin v. Cooper*, 14 Ves. 205; *Heppburn v. Auld*, 5 Cranch, 282; *Heppburn et al. v. Dunlop et al.*, *Ante*, vol. 1, p. 179. Where, after bill, answer, and replication, no further steps were taken in the cause for upwards of twenty years, this was held as not of itself a reason for refusing a specific performance, there being acquiescence on both sides. *Cain v. Allen*, 2 Dow. 29. And where an agreement for the sale of lands was suffered to remain unexecut-

This is a writ of right for the recovery of lands brought in the form prescribed by the statute of Kentucky, in which the demandant described his land by metes and bounds, and counted against the tenants jointly. To this count the tenants demurred, and upon a joinder the demurrer was overruled by the court, and upon motion of the tenants, leave was given to them to withdraw the demurrer and plead anew. A motion was then made to the court, by the tenants, to compel the demandant to count against them severally, upon the ground that they held separate and distinct tenements, parcels of the land demanded; which motion was overruled by the court. And, in our judgment, this was very properly done, for the matter was pleadable in abatement only; and by pleading in bar, the tenants admitted their joint seisin of the freehold, and lost the opportunity to plead a several tenancy. Assuming that at common law, a writ of right patent may be brought against divers tenants, who hold their lands severally, and that the demandant may count against them severally, it does not follow that this doctrine applies to a writ of right close; but, if it did, and the demandant should, in such case, count against the tenants jointly, and the tenants should plead to the merits, it would, for all the purposes of the suit, be an admission of the joint tenancy. And the clause in the statute of Kentucky, requiring that where several tenements are demanded, the contents, situation, and boundaries of each shall be inserted in the *count, has not affected this rule. It [*308 supposes that the several tenements are held by the same tenants. The tenants next moved the court to allow them severally to plead, in addition to the mise, or general issue, that neither

ed for fourteen years, the vendee having taken, and continued to hold, possession; the court, under the peculiar facts of the case, decreed a specific performance of the contract. *Waters v. Travis*, 9 Johns. R. 406. But, as a general rule, the court will not suffer a party at *the distance of [*305 years, to come to the court and say that he is ready to make a good title, and demand a specific performance. *Jenkins v. Hiles*, 6 Ves. 646; *Wynn v. Morgan*, 7 Ves. 205. And the parties may make time of the essence of the agreement, so that if there be a default at the day, without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. *Benedict v. Lynch*, 1 Johns. Chan. Rep. 370.

The Court of Chancery will not, except under very particular circumstances, upon a bill for the specific performance of a contract, if the party be not entitled to a specific performance, direct an issue of *quantum damnificatus*, or a reference to the master to ascertain the damages. The plaintiff, if he chooses that remedy, must resort to law, it not being like the case of a defect of title as to part, or of quality, or quantity, where a specific performance may be decreed as to so much as the vendor is able to perform, and a compensation to the vendee for the residue. *Todd v. Gee*, 17 Ves. 273. But where the defendant has put it out of his power to perform the contract, the bill will be retained, and it will be referred to the master to assess the plaintiff's damages. *Denton v. Stewart*, 1 Fonb. 38, note g; and 165, note h; and 1 Ves. 329; 17 Ves. 276, note h; *Greenaway v. Adams*, 12 Ves. 385. And where a specific performance was refused, because the contract was within the statute of frauds, yet the plaintiff having sustained an injury for which he was entitled to compensation, and for which he had no remedy, or at best a doubtful and inadequate remedy at law, the court retained the bill and awarded an issue of *quantum damnificatus* to assess the damages sustained by the plaintiff by the acts of the defendants. *Phillips v. Thompeon et al.*, 1 Johns. Chan. Rep. 131.

the plaintiff nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed thereof, or of any part thereof; which motion the court refused to grant. And, in our judgment, this was very properly done. In the first place, this plea was clearly bad, as amounting to the general issue; and, indeed, for other manifest defects. In the next place, it was an application to the mere discretion of the court, which is not a subject of examination upon a writ of error. The court then permitted the tenants to sever in pleading, and to plead the mise severally as to several tenements held by them, parcel of the demanded premises, without answering or pleading anything as to the residue. Upon the propriety of this pleading we give no opinion, as it is not assigned for error by the demandant, and the error, if any, is in favor of the tenants. The replication prescribed by the act of Kentucky, was pleaded to the several pleas; and upon the mise so joined, the parties proceeded to trial. The court being divided upon several points made at the trial, the jury was discharged. At a subsequent term, the tenants again moved the court for leave to withdraw the mise joined, and to plead non-tenure as to some, and several tenancy as to others, in abatement, which was refused by the court; and in our judgment, for the reasons already stated, was properly refused. *The cause was then again tried by a jury, who returned a general verdict for the demandant, which, under the direction of the court, was amended by the jury, and recorded as follows: "The jury find that the demandant hath more right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned."

It is objected by the tenants that this verdict is insufficient, because it does not contain a several finding upon the several issues of the tenants, but is a joint finding against them all; and only by inference and argument a finding of the several issues for the plaintiff. This objection cannot be sustained. The verdict expressly and directly affirms the right of the demandant, and denies the right of the tenants to the land contained in their respective pleas, the same being parcel of the land demanded. A verdict, certain to a common intent, is sufficient to sustain a judgment. At the trial, a bill of exceptions was taken. The first point in the exceptions is the refusal of the court, upon the prayer of the counsel for the tenants, to direct the jury that the demandant was not

entitled to recover in the suit, upon the proof by the tenants, that they claimed their several tenements under distinct and several titles. This refusal was perfectly correct; for the matter did not go to the merits, and could be taken advantage of only, as has been already stated, by a plea in abatement.

*The next exception is, that the court [*310] allowed a copy of the survey of the land claimed by the demandant to go in evidence to the jury, for the purpose of identifying the same. No ground for this objection has been stated; and it seems to be utterly untenable.

Another exception is, that the court refused to allow, as evidence to the jury, to prove that the demandant did not hold the legal title to 2,000 acres, parcel of the land demanded in this suit, the copies of a certain record of a decree in chancery, in a suit between the demandant and third persons (with whom the tenants had no privity of title or estate), and, also, of a deed made in pursuance of such decree, by which deed 2,000 acres of the land demanded by the writ appeared to be conveyed to third persons. This exception is not now relied on, and is certainly open to various objections. Without adverting to the objections that neither the record nor the deed were properly authenticated, and that it was an attempt to set up an outstanding title in third persons having no privity with the tenants; it is decisive against the admission that the 2,000 acres, or any part thereof, are not shown to be within the boundaries of the land claimed by any of the tenants, or put in issue between the parties.

The last exception is, that the court refused to instruct the jury, that if it should be proved that divers of the tenants had no title to certain parcels of the demanded premises, but that they claimed the same under a third person having the legal title thereof, then, that they ought to find for the said tenants, be [*311] cause they had no title. This exception is, also, not relied on, and certainly could not be supported, for it could be given in evidence only on a plea of non-tenure.

A motion was afterwards made for a new trial, the proceedings on which, not being matters of error, need not be mentioned.

The only remaining objection, urged as a ground for reversal, is, that the judgment is a joint judgment against the tenants for the costs as well as the land. We are all of opinion that the judgment is right, and that the tenants can take nothing by this objection.

The judgment is, therefore, affirmed with costs.

Judgment affirmed.¹

Cited—11 Wall. 676.

1.—A writ of right patent is always directed to the lord of the manor, or his bailiff, and is a commission unto them that they should do right. The form of the writ is, "we command you that, without delay, you do full right (*plenum rectum teneatis*) to A, of B, of one messuage, &c., in I, which he claims to hold of you by the free service of one penny per annum for all service, of which W, of T, deforceeth him, and unless you will do this let the sheriff of, &c., do it, that we may hear no more clamor thereupon for want of right. Witness, &c." Fitz. N. Brev. 1. G. Bracton, lib. 5, ch. 2, p. 328; Reg. Brev. 1. Glanville, lib. 12, ch. 3, ch. 4; 3 Bl. Com. ap. 1. This writ is the sole authority for the lord to hold plea of the land in controversy; and without it no one is bound to answer in the lord's court.

Wheat. 2.

Glanville, lib. 12, ch. 2, ch. 25. It is called a writ of right patent, because it is an open letter of request, or command given to the plaintiff, and exposed to full view, in contradiction to writs close, which are always closed up and sealed, or are supposed to be closed up and sealed, and directed to particular persons. 2 Bl. Com. 346; 3 Bl. Com. 195; 3 Reeve's Hist. 45; Fitz. N. Brev. 1 F. When the writ of right patent was brought to the lord's court, an entry thereof was made in his "court by the steward," and the writ was then delivered back to the plaintiff. Upon the entry a summons issued from the lord's court to the tenant, commanding him to appear at the next court to answer the plea; and this was the first process by which the tenant had any knowledge of the suit. Hist. Ent. 244, 6; Booth,

[LOCAL LAW.]

SHIPP ET AL. v. MILLER'S HEIRS.

An error in description is not fatal in an entry if it does not mislead a subsequent locator. The following entry: "H. M. enters 1,687 acres of land on a treasury warrant, No. 6168, adjoining Chapman Aston on the west side, and Israel Christian on the north, beginning at Christian's north-west corner, running thence west 200 poles; thence north parallel with Aston's line until an east course to Aston's line will include the quantity," was held valid, although no such entry as that referred to could be found in the name of Aston, but the particular description clearly pointed out an entry in the name of Chapman Austin as the one intended, and this, together with Christian's entry, satisfied the calls of H. M.'s entry.

It is a general rule that when all the calls of an entry cannot be complied with, because some are vague, or repugnant, the latter may be rejected or controlled by other material calls, which are consistent and certain. Course and distance yield to known, visible, and definite objects; but they do not yield, unless to calls more material and equally certain. Chapman Austin's entry calling to lie "on the dividing ridge between Hinkston's Fork and the south fork of Licking, beginning two miles north of Harrod's Lick, at a large buffalo road, and running about north for quantity," and there being no buffalo road two miles north of Harrod's Lick (a place of general notoriety), it was determined that a call for a large buffalo road might be rejected, and the entry supported by the definite call for course and distance.

It is a settled rule that where no other figure is

called for in an entry, it is to be surveyed in a square coincident with the cardinal points, *and large enough to contain the given [*317 quantity, and that the point of beginning is deemed to be the centre of the base line of such square. Chapman Austin's entry calling to run about a north course for quantity, the word "about" is to be rejected, and the land is to run a due north course, having on each side of a due north line, drawn through the centre of the base, an equal moiety.

The act of Kentucky of 1797, taken in connection with preceding acts, declaring that entries for land shall become void, if not surveyed before the first day of October, 1798, with a proviso allowing to infants and *femes covert* three years after their several disabilities are removed to complete surveys on their entries; it was held, that if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners. Distinction between this statute and a statute of limitations of personal actions.

A call for a spring branch generally, or for a spring branch to include a marked tree at the head of such spring, is not a sufficiently specific locative call; and where further certainty is attempted to be given by a call for course and distance, and the course is not exact, and the distance, called for is a mile and a half from the place where the object is to be found, the entry is void for uncertainty.

APPEAL from the Circuit Court for the District of Kentucky.

This cause was argued by *Talbot* for the appellant, and by *Sheffey* for the appellees.

4, 88, 89, 92; Bracton, lib. 5, ch. 3, s. 3, p. 329; Id. ch. 6, p. 332. On the other hand, a writ of right close is always directed to the sheriff, and was immediately returnable into the Court of Common Pleas. Booth, 91. The form of it is, "The King, to the sheriff of ——. Command A, that he justly, and without delay, render unto B, one message with the appurtenances which he claims to be his right and inheritance, and whereof he complains that the said A unjustly deforces him; and unless he shall so do, and if the said B shall give you security of prosecuting his claim, then summon by good summoners the said A, that he appear before our justices at Westminster, on, &c., to show wherefore he hath not done it, and have you there the summoners and this writ. Witness, &c." Reg. Brev. 4; Fitz. N. B. 2 F; Booth, 91; 3 Wils. 419.

This difference between a writ of right patent and a writ of right close, may well warrant a distinction in respect to the causes of action to be joined in it. A writ of right patent, being a mere authority to the lord to take cognizance of the suit at the complaint of the plaintiff, may well include divers tenements held by several tenants, whereof the plaintiff is deforced. Nor are the rights of the several tenants affected by such joinder; for, as to them, the subsequent summons is the first process (Booth, 4, 92); and in this they are severed, each tenant being summoned to answer only for the tenements held by himself. And, for this purpose, where the land is severally held by several tenants, the writ always specifies the quantity of land in the possession of each. Reg. Brev. 1 b. The position, therefore, stated by Fitzherbert (Nat. Brev. 2 D), that a writ of right may be brought against divers tenants who hold their lands severally, may be good law when applied (as he applies it) to a writ of right patent. But it is not thence to be inferred that the same doctrine is to be applied to all the subsequent proceedings; and that in the subsequent summons, process, and pleading, the tenants are to be joined in the same manner as if they were 313* joint tenants of the whole land. In fact, the summons in a writ of right patent is a several process against each tenant for the land held severally by him; and in this respect it is exactly what the original precept is in a writ of right close.

When once the tenant is summoned into court, either upon a writ of right patent or a writ of right close, the same exceptions and pleadings in abatement or in bar, and the same defense, upon the merits, equally applies in a suit upon the one as the

other. Non-tenure, joint tenancy, sole tenancy, and several tenancy, are good pleas in abatement, wherever they apply to any parcel of the land demanded of any particular tenant or tenants. Bracton, speaking on this subject, says, "tunc demum videndum an tenens totam rem teneat quam petitur, cum certa res debeat in iudicium deduci, vel si ejus partem tunc quotam, vel si omnino nihil, et similiter si res petita pertineat ad jurisdictionem iudicantis; et ideo petitur visus rei petitur, quia ex hoc competere poterit exceptio tenenti, ne sit actio inanis cum tenente, cum rem restituere non possit vel totam secundum quod petitur." Bract. lib. 5, ch. 7, fo. 376. And he again treats more fully on the subject in the book, de Exceptionibus, "sunt etiam quaedam quæ visum sequuntur et de quibus certificari poterit tenens antiquam petens ei visum fecerit; et certa res in iudicium deducatur, de qua debeatur tenens respondere, ut tunc scribi possit, si totam rem petitam tenuerit, vel ejus partem, vel etiam nihil, et sic fiat de pertinentiis, &c. &c. Et post modum, si qua competat ex ipsa re, ut si nihil inde teneat vel non nisi ejus partem, et idem de pertinentiis." Bracton, lib. 5, de Except. ch. 1, fol. 400. "Item cadit breve, si tenens minus teneat, quam petens petit, secus tamen si plus teneat." Bracton, fol. 414, b. And in another place, speaking of the doctrine that when a writ is bad in part, it is bad in the whole, he says, "et cum breve ita in se fuerit vitiosum in aliqua parte, in nulla parte valet, quantum ad unam actionem; secus esset, si plures sint ibi actiones ratione plurium tenentium. Et si unus petat per unum breve feudum unius militis in una villa et versus alium in eodem brevi feudum alterius militis eodem villa vel in diversis, quamvis cadat breve de feodo unius militis, nihilominus stabit de feodo alterius militis versus eundem, quia ibi sunt diversæ actiones propter diversitates tenementorum, quamvis breve unicum. Item eodem modo erunt actiones plures ratione diversarum personarum et rerum ubi plures sunt tenentes." Bracton, fol. 414, a. Bracton here manifestly refers to a writ of right patent, where several tenements are demanded in the writ of several tenants severally, and in such case he considers, *that the writ may abate as to one and remain as to the other, not because they may be joined in the same action, but because the suit against them is considered as several actions (diverse actiones). In a subsequent place, the same subject is again mentioned, "Cum autem tenens

* It has been very justly remarked by Sergeant Williams in his learned note to 2 Saund. R. 43, a, note (1), that Sergeant Wilson is mistaken 248

in calling the writ of right in Tyssen v. Clarke, 3 Wils. 419, 541, 558, a writ of right patent, for it was a writ of right close.

STORY, J., delivered the opinion of the court:

This is a bill in equity brought by the appellees, who are the heirs at law and devisees of Henry Miller, deceased, to be relieved against the claims of the appellants under prior patents to a tract of land, to which the appellees assert a prior equitable title under a prior entry by their ancestor.

318*] "On the 11th of December, 1782, the said Henry Miller made the following entry: "Henry Miller enters 1,687 acres of land on a treasury warrant, No. 6,168, adjoining Chapman Aston on the west side, and Israel Christian on the north, beginning at Christian's north-west corner, running thence west 200 poles, thence north parallel with Aston's line until an east course to Aston's line will include the quantity." Henry Miller died in 1796, and in 1804 this entry was surveyed, and after that time a patent issued thereupon in due form of law. At the time of the death of Miller, and also of the survey of the entry, several of the plaintiffs were under age, and some of them at the commencement of the suit continued to be under age.

There was not, on the 11th of December, 1782, any entry upon record in the entry-taker's books in the name of Chapman Aston. But there were several in the name of Chapman Austin, and several in the name of Isaac

Christian. One in the name of Chapman Austin is dated 26th of June, 1780, for 4,000 acres of land lying on Red River, and another in the name of Israel Christian, dated the 5th of December, 1782, for 2,000 acres of land lying on the same river; but there is no proof in the cause that these entries are in the neighborhood of each other. The entries relied on by the complainants as those referred to in Miller's entry are as follows: "On the 26th of June, 1780, Chapman Austin enters 4,000 acres on the dividing ridge between Hinkston's Fork and the south fork of Licking, beginning two miles north of Harrod's Lick at a large buffalo road, and *running about a north course for [*319 quantity." "On the 29th of November, 1782, Israel Christian, assignee of Archibald Thompson, enters 200 acres of land upon a military warrant, No. 193, adjoining an entry of Chapman Austin, at his south-west corner on the dividing ridge between Hinkston's and Stoner's Fork, two miles north of Harrod's Lick, running thence west 200 poles, thence north until an east course to strike Austin's line will include the quantity."

The appellants having the elder grant, the first question arising in the cause is as to the validity of the entry of Miller. It is, in the first place, contended, that it is void, because it contains no sufficient description of the posi-

visum habuerit, vel quod tantundem valet, ac si potest utrum petenti respondere teneatur, et ad breve secum vel non teneatur secundum quod tenuerit totam rem nomine proprio, vel alieno, vel nihil inde tenuerit, vel non nisi ejus partem; quia si totam non tenuerit, amittere non potest quod non habet, et ita cadit breve, sed non actio, nisi ita sit, quod petens ostendere possit quod tenens teneat in dominio et in servitio, nisi tenens docere possit contrarium, quod nec in dominio nec in servitio, &c., &c. In hac quidem actione per breve de recto scilicet in qua libet alia actione per quam petitur res corporalis designare oportet potentem quae et qualis sit res quae petitur, ut si sit res immobilis sicut tenementum designare oportet qualitatem et quantitatem, &c. Item utrum tota petatur an ejus pars, et ne plus petatur a petente quam tenens teneat." Bracton, lib. 5, ch. 2, fol. 431, b. 432, a. Vide also, id. p. 433, b. Fleta, lib. 5, ch. 5, s. 4, asserts the same doctrine: "Item continetur in brevi qui terram illam teneat, ad quod excipit poterit quod totum non tenet sed alius talis tenet inde tantum." These quotations have been the more largely made from these venerable writers, with a view to show how deeply and early these doctrines are to be found in the rudiments of the common law.

It has been very justly observed by Booth (ch. 11, p. 31), that in real actions may be pleaded in abatement of the writ, joint tenancy, sole tenancy, and several tenancy. And although it is said that in a writ of *nuper obijt*, in an assize, or in any other action where no land certain is demanded, several tenancy is not pleadable (Bro. Rev. Tenancy, 18; 2 Leon, 8), yet this is to be understood, that several tenancy is not pleadable to the writ; for after a plaint in an assize, several tenancy may well be pleaded in abatement. Stepkin v. Wentworth, 1 Myr, 244, a; Booth, 84, 277. And several tenancy, if well pleaded and found true, abates the whole writ; and the cause assigned for this by Finckelton, (N. J., in 41 Edw. III, 20, b), is because the tenants cannot answer in common. Fitzherbert laid down the same rule in 27 Hen. 3, 30, and said "ceo several tenancy va in abatement de tout le breve, et si il soit tried versus le demandant donques tout son breve abatara, et nous impolimus donc judgment pour le demandant sur un male breve." Brook's Abrid. Several Tenancy, 1. The same rule is recognized in Theldall's *Dig. lib. 11, ch. 31, s. 7. Nor is there a single case in the books, in which it has been argued or held that several tenancy is not a good plea in abatement to a writ of right. On the contrary, the reasons for the plea as manifestly apply to this action as any other real action,

and the ancient writers who treat on the subject evidently presuppose its legal validity; and the more modern authorities are conclusive on the point. When, therefore, the court in the above case, in allusion to the passage above quoted from Fitzherbert's *Natura Brevium* (2 D.) state that "assuming at common law a writ of right patent may be brought against several tenants who hold their lands severally, and that the demandant may count against them severally, it does not, therefore, follow that this doctrine applies to a writ of right close;" it is manifest that the court have reference to the different natures of the two writs in their original state; for upon a view and after a count in a writ of right patent, if several tenements are jointly demanded of several tenants, who are jointly summoned, they may plead several tenancy in abatement of the count or lands put in view upon the writ. And as a writ of right close demands the tenements directly of the tenants, they may plead several tenancy directly to the writ, for in a *præcipe quod reddat* it is a good plea in the writ. Com. Dig. F. 13; Thel. Dig., lib. 5, ch. 3, s. 1, ch. 4, s. 2; 27 Hen. 3, 30.

In the United States all writs of right are returnable into the common law courts of the state and are directed to and returnable by the sheriff or other public officers. They are, therefore, writs of right close, and subject to the general doctrines of the common law applicable to such writs; and it is manifest that the doctrine of Fitzherbert (even supposing it to be law as to writs of right patent) cannot be admitted to control those general doctrines, or take away the right of pleading joint tenancy, sole tenancy, or several tenancy, in abatement of such writs.

Writs of right, since the reign of Queen Elizabeth, have gradually become obsolete in England; or of such rare occurrence, that the learning respecting them is not as well known as it deserves to be. Indeed, a modern treatise upon the general nature and structure of real actions, and the proper pleadings and evidence in each, is a desideratum in the science of jurisprudence. We may, however, respectfully refer those who may be desirous of a more thorough knowledge of the writ of right to the title *Droit*, in the great abridgments of Brook, Fitzherbert, Comyns, and Viner, to the learned note of Mr. Sergeant Williams, 2 Saund. Rep. 45; to Booth on Real Actions; to [*316 Reeves's History of the law; and particularly to 1 Reeves's History, ch. 7, p. 396, et seq.; and 3 Reeves's History, 45, and above all, to the venerable Bracton, lib. 5, fol. 327, et seq.; where he treats of the writ of right and its incidents.

tion of the land, and no specific reference to any other definite entries to make it certain. It is, in the next place, contended, that it is void, because Chapman Austin's entry, on which it is dependent, is void for uncertainty.

There is certainly a mistake in Miller's entry, as to the name of Aston, and the defect cannot be cured by considering Aston and Austin as one name, for they are not of the same sound. But an error in description is not fatal in an entry, if it does not mislead a subsequent locator. Upon searching the entry-book no such name could be found as Chapman Aston; and if Miller's entry had only called to adjoin Aston, there would have been great force in the objection. But it calls also to adjoin Israel Christian's entry on the north, and to begin at his north-west corner. A subsequent locator would, therefore, necessarily be led to examine that entry. On such examination he could not fail to observe that it calls to adjoin an entry of Chapman Austin, at his south-west corner, on the dividing ridge between Hinkston's and Stoner's Fork, two miles north of Harrod's Lick. This specific description would clearly point out the particular entry to which it refers. It could be no other than the entry of Chapman Austin for 4,000 acres, already stated; for that calls for the same ridge, and to begin at the same distance from Harrod's Lick. Two entries would thus be found adjoining each other, which would, as to position and course, perfectly satisfy the calls of Miller's entry. No other entries could be found which would present the same coincidences. A subsequent locator could not, therefore, doubt that these were the entries really referred to in Miller's entry, and that Chapman Aston was a misnomer of Chapman Austin. The entry, then, of Miller, contains in itself a sufficient certainty of description, if the entries to which it refers are valid; for *id certum est quod certum reddi potest*.

As no objection is alleged against Christian's entry, all consideration of it may at once be dismissed. The validity of the entry of Chapman Austin remains to be examined. It calls to lie "on the dividing ridge between Hinkston's Fork and the south fork of Licking, beginning two miles north of Harrod's Lick at a large buffalo road, and running about north for quantity." It is conceded that Harrod's lick was, at the time of the entry, a place of general notoriety; and it is proved that there was no buffalo road two miles north of that lick. The nearest buffalo road was, at its nearest approach, more than two miles from the same lick, and crossed the ridge at more than three miles distance from it; and a line drawn due north from the lick would not strike that road until after it had crossed the ridge at about four miles distance from the lick. The calls, then, in the entry cannot be completely satisfied in the terms in which they are expressed. The general descriptive call to lie on the dividing ridge, as well as the call for distance, must be rejected, if a buffalo road about four miles north of the lick were to be deemed a sufficient compliance with the call for a large buffalo road; for the whole land would then lie, not on, but beyond the ridge. Such a construction of the entry would be unreasonable. Is, then, the entry void for re-

pugnancy or uncertainty, or can it be sustained by rejecting the call for a large buffalo road? It is a general rule that when all the calls of an entry cannot be complied with, because some are vague, or repugnant, the latter may be rejected or controlled by other material calls, which are consistent and certain. On this account, course and distance yield to known, visible, and definite objects. But course and distance do not yield unless to calls more material and equally certain. The locative calls in this entry are for a point two miles north of Harrod's Lick, and for a large buffalo road. If we reject the first call, the entry is void for uncertainty, for there is no definite starting point. If we reject the last call, the other is perfectly certain. The general leaning of courts has been to support entries, if it could be done by any reasonable construction. The law, indeed, declares [*322] that every entry should contain a description of the land so certain that subsequent locators might be able to ascertain it with precision, and locate the adjoining residuum. But that description is held to be sufficiently certain which, by due diligence, inquiry, and search in the neighborhood, will enable a locator to find the land. A locator having this entry in his hands would first proceed to Harrod's Lick, as a notorious object which was to direct all his subsequent inquiries. Upon measuring off the two miles north from the lick he would arrive at a point clearly described in the entry. He would find himself very near the dividing ridge between Hinkston's Fork and the south fork of Licking, upon which the land is unequivocally declared to lie. But he could find no buffalo road in that direction until after he had crossed the ridge, nor could he find any such road within any reasonable distance in any other direction. Under such circumstances, it is not easy to perceive how he could be misled. Being arrived at a spot, to which he was directed by a definite locative call, which he could not mistake, and by a general call which is perfectly satisfied, he would scarcely be induced to direct it in search of another call, which was not to be found in the neighborhood, and which, without the first, would be uncertain and indefinite. In the opinion of the court the call for a large buffalo road may be rejected, and the entry of Chapman Austin be supported by the other definite call for course and distance. In this opinion we are the more confirmed by the admission of counsel, that the same [*323] entry has been sustained in the state courts of Kentucky.

Supposing the entry of Chapman Austin to be good, the next inquiry is, whether it is rightly surveyed; for if it is, then Christian's and Miller's entries are, also, rightly surveyed. It is contended that, as no base or figure is given by the entry, the land cannot be laid off in any direction; and if so, neither the survey made by order of the Circuit Court, nor, indeed, any other survey, can be good. But it is a settled rule, which has been repeatedly recognized by this court, that where no other figure is called for in an entry, it is to be surveyed in a square, coincident with the cardinal points, and large enough to contain the given quantity; and that the point of beginning is to be deemed the

centre of the base line of such square. In the present case, a point two miles distant from Harrod's Lick is to be taken as the centre of the base line of a square, to contain the given quantity of land. The entry calls to run *about* a north course for quantity; but, according to the course of decisions in Kentucky, the word "about" is to be rejected, and the land is to run a due north course, having on each side of a due north line, drawn through the centre of the base, an equal moiety. This is precisely the manner in which the survey was directed to be executed by the court below.

Another objection to the title of the plaintiffs is, that the survey on Miller's entry was not executed and returned within the time prescribed **324** by law. *The act of 1797, taken in connection with preceding acts, declares, that entries for land in general shall become void if not surveyed before the first day of October, 1798; with a proviso, allowing to infants and *femes covert* three years after their several disabilities are removed to complete surveys on their entries. The ancestor of the plaintiffs died in 1796, and some of them then were, and still continue to be, under the disability of infancy. The present entry was not surveyed until 1804.

It is argued that the proviso does not save any entries except where all the owners are under the disability of infancy or coverture, at the time when the general limitation takes effect. And it is likened to the case decided by this court, where a joint personal action was held not to be saved by the disability of one of the plaintiffs, from the operation of the statute of limitations. (*Marsteller v. McLean*, 7 Cranch, 156.) It is admitted that there is some analogy between the cases; but, as they do not arise upon the same statute, a decision in the one furnishes no absolute authority to govern the other. There are, also, differences in the nature and objects of these statutes, which might well justify a different construction. The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights and shutting out stale and fraudulent claims. It has, therefore, always been construed strictly against the plaintiff, and no case has been excepted from its operation, unless within the strict letter or manifest equity of some exception in the act itself. The statutes **325** of Kentucky, allowing *further time to owners to survey their entries, is made with a different aspect. It is to save a forfeiture to the government; and acts, imposing forfeitures, are always construed strictly as against the government, and liberally as to the other parties. It is manifest that the act meant to protect the rights of infants and *femes covert* from forfeiture until three years after the disability should be removed. Yet if the argument at bar be correct, their rights are completely gone in all cases where they are not the sole and exclusive owners. Such a construction would materially impair the apparent beneficial intention of the legislature. If, on the other hand, they are authorized in such cases to have their entries surveyed and returned, so as to protect their own joint interest, no reason is perceived why such survey may not be justly held to inure to the benefit of all the other joint owners. The courts of Kentucky have already decided *Wheat*, 2.

this question; and held, that if any one joint owner be under disability, it brings the entry within the saving of the proviso, as to all the other owners. (*Kennedy v. Bruice*, 2 Bibb's Rep., 371.) This is a decision upon a local law, which forms a rule of property; and this court has always held in the highest respect decisions of state courts on such subjects. We are satisfied it is a reasonable interpretation of the statute, and upon principle or authority see no ground for drawing it into doubt.

The title of the plaintiffs being established, it is next to be compared with the titles of the respondents. It is conceded on all sides that none of the titles of the latter are of superior dignity to that of *the plaintiffs, except **326** the title claimed under an entry of Thomas Swearingen, on a military warrant. This entry is as follows: "On the 26th of April, 1780, Thomas Swearingen enters 1,000 acres in Kentucky, by virtue of a military warrant, for military services performed by him last war, on a spring branch about six miles a north-eastwardly course from Stoner's Spring, to include a tree marked A. B. C. S. T. at the head of said spring." Stoner's Spring is admitted to be a place of notoriety; but the marked tree and spring branch, instead of being at the distance of six miles, is found at the distance of four miles and a half, and in a course not north-eastwardly. The call for a spring branch generally, or for a spring branch, to include a marked tree at the head of the spring, is not a sufficiently specific locative call. It requires further certainty to point out its position; and this is attempted to be given in the present entry by the call for course and distance. The course is not exact, and the distance called for is a mile and a half from the place where the object is to be found. It is the opinion of this court that it would be unreasonable to require a subsequent locator to search for the object at so great a distance from the point laid down in the entry; and the entry must, therefore, be pronounced void for uncertainty.

MARSHALL, *Ch. J.* In this case I dissent from the opinion which has been delivered on one point—the validity of Austin's entry. I am not satisfied that the call for the buffalo road ought to be discarded as immaterial. It appears to me to bear a *strong analogy to a call **327** for a marked tree. It is an object of notoriety, distinguishable from other objects, peculiar to itself, and which would be looked for by subsequent locators. Finding a buffalo road in the neighborhood, the judgment would be divided between the call for that road and the call for course and distance.

Understanding that this entry has been determined in Kentucky to be sufficiently certain, I would have acquiesced in that decision had it not also been stated that the question on its validity did not come before the court. Under these circumstances, we should, had the court thought the entry invalid, have suspended our opinion until the case could be inspected. This delay is rendered unnecessary by the opinion that the location may be sustained.

Decree affirmed.

Cited—11 Wheat. 442; 5 Pet. 488; 6 Pet. 63, 297; 4 How. 379; 1 Cliff. 439; 1 Bald. 284; 4 Dill. 598.

[PRIZE.]

THE ANNA MARIA.

A suit by the owners of captured property, lost through the fault and negligence of the captors, for compensation in damages.

The right of visitation and search is a belligerent right which cannot be drawn into question, but must be conducted with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage. [328*] Detention, after search, pronounced to be unjustifiable, under the circumstances of the case.

The value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, allowed in ascertaining the damages.

APPEAL from the Circuit Court for the District of Maryland.

This case was argued by *Harper* and *Suann* for the appellants, and by *Winder* and *Jones* for the respondents.

The schooner *Anna Maria*, belonging to citizens of the United States, sailed from Alexandria, on the 27th of September, 1812, laden with a cargo also belonging to American citizens, and bound to St. Bartholomews, a neutral island. On the 16th of October the schooner made the Virgin Islands, where she continued, it being calm, until the 19th. About midday, on the 19th, light breezes sprung up from the eastward, and the *Anna Maria*, as stated by her master, was using her utmost endeavors to make St. Bartholomews. It appears, however, that the vessel headed towards St. Thomas's, an island in possession of the British. In this situation a sail, which proved to be the *Nonsuch*, privateer, of Baltimore, was discovered bearing east north-east from them, which gave chase under English colors, and soon overtook them. The *Anna Maria* was boarded about four in the afternoon, and her master with all her papers, sent on board the *Nonsuch*. A search for other papers was commenced and [329*] continued for about two hours. The boarding officer, who had appeared in the disguise of a British officer, then returned to the *Nonsuch*, being succeeded by another officer, who kept possession of the *Anna Maria* with two men, and was ordered to continue under the lee of the *Nonsuch* till the succeeding day, when it was intended, as alleged, to continue the search. The whole crew of the *Anna Maria* were taken out, and with her master, put in irons. The next morning, about nine, two other vessels were descried, and, as stated by the master of the *Anna Maria*, and by one of the officers of the privateer, were chased by the *Nonsuch*. In the chase she lost sight of the *Anna Maria*, and soon afterwards fell in with her. The officer, with the two men on board her, attempted, as they say, to bring her into the United States; but, being in want of water, wood and candles, they went into St. Jago del Cuba, and sold a part of the cargo to enable them to purchase these necessaries. In attempting to bring the vessel out of port she was run aground and injured, after which she was sold with the residue of her cargo, and the proceeds remained in the hands of the American consul for those who may be entitled to them.

The *Nonsuch* soon afterwards returned to the United States, and a libel was filed by the owners of the *Anna Maria* and cargo, against

the owners of the *Nonsuch*, in the District Court of Maryland, claiming compensation in damages for the injury they had sustained. This libel was dismissed by the District Court, and the decree affirmed by the Circuit [*330 Court; on which the cause was brought, by appeal, to this court.

Suann and *Harper*, for the appellants, admitted that the owners of the captured property could not come into a court of prize, unless with clean hands, to claim restitution in damages. If the original seizure was justifiable, and there was no subsequent misconduct on the part of the captors, they could not be compelled to make restitution. But it is the duty of captors to send in the captured vessel immediately for adjudication before the proper tribunal, and to the most convenient port. This they had not done, and were therefore responsible to the owners in damages. Even if the commander of the privateer acted *bona fide*, he acted with gross negligence and unskillfulness, and the authority of the case of the *Der Mohr*¹ is enough to charge him with restitution in value.

Winder and *Jones*, for the respondents, argued, upon the facts of the case, that the real destination of the captured vessel was to supply the enemy, and that there was probable cause of seizure. If so, damages could not be recovered. There was sufficient ground for carrying in for adjudication, or ground of condemnation as prize; either would be sufficient to justify the captors in the seizure; the only question is, whether the right of seizure was properly exercised. The prize law [*331 does not prescribe any particular mode of exercising the right of visitation and search, nor when, nor into what particular port the prize is to be sent for adjudication. It is the exercise of a military discretion; and the case of *The Der Mohr* shows that the captors are not responsible for an accidental loss after the capture, if there is probable cause of seizure and carrying in for adjudication.

MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

To sustain the claim of the libelants, the first point to be established is the fairness of the voyage. It being admitted that the vessel and cargo were American, the only inquiry is, was the *Anna Maria* really destined for a neutral port?

Her papers show that she was destined for St. Bartholomews; her master swears that he intended to reach that port, and no other; and that he was using his best endeavors to make it when he was stopped by the *Nonsuch*.

The circumstances which might create doubt respecting the truth of this testimony, are, his situation and course when descried by the *Nonsuch*. He was within six or eight leagues of St. Thomas's, and steering a course which brought him nearer to that Island. But his place is accounted for by the current and the calm which had preceded his capture; and his course is stated by himself, and his testimony is not contradicted, to have been calculated to enable him to gain St. Bartholomew's,

¹—3 Rob. 129; 4 Rob. 314.

to the leeward of which he had fallen. This representation is supported by the fact, that being at the Virgin Islands on the 16th, he might, by availing himself of the current, have reached St. Thomas before he was descried by the *Nonsuch*. It is also supported by the great improbability of his attempting to enter an enemy's port without obtaining a license, which would have protected him from hostile capture in that port, as well as on his voyage to it. That he had not a license is proved, not only by his own oath, but by the fact that, although the master and the crew, as well as the vessel, have remained in possession of the captors, no license has been found, and there is no reason to believe that it could have been secreted, and it is not probable that it would have been destroyed on the appearance of the *Nonsuch*, since she chased and boarded under British colors.

The voyage, then, must be considered as entirely fair. The next subject of inquiry is, the right to visit and detain for search. This is a belligerent right which cannot be drawn into question. As little can it be questioned that the situation of the *Anna Maria* justified a full and rigorous search. But this search ought to have been conducted with as much regard to the rights and safety of the vessel detained as was consistent with a thorough examination of her character and voyage. All that was necessary to this object was lawful; all that transcended it was unlawful.

333*] *When the *Anna Maria* was boarded, her master gave a plain and true account of the character of the vessel and cargo, which was verified by the ship's papers, and which does not appear to have been doubted. But although the vessel and cargo were American, the trade might be hostile; and the right to examine fully into this fact was complete.

There was no prevarication in the statements of the master which could excite suspicion, and the search for other papers was continued for two hours without intermission. Although the character of British officers was maintained, nothing indicating British connection in the voyage was discovered; and, although the trunks were broken open and searched, no additional papers were found. It was pressing the right of search as far as it could bear, to determine on repeating it the next day; and an inattention to the safety of the *Anna Maria*, which only her neighborhood to the island of St. Thomas could excuse, longer to detain her. But there is some reason to doubt whether further search was the real object of this detention. It does not appear to have been recommenced at nine the next morning; and this leads to the opinion that the vessel was detained, not so much to make further search as in the hope of drawing from the master, or some of the crew, who were all in irons, something which might lead to the condemnation of the vessel and cargo. This conduct must be viewed with much lenity to be pardoned. But whatever excuse may be made for the detention thus far, none can be given for the transactions which remain to be noticed.

334*] *Before the captain of the *Nonsuch* left the *Anna Maria*, in pursuit of other objects, he ought to have decided either to seize her as prize or to restore her. Had he seized her as

prize, her master, at least, ought to have been returned to her, and her papers should have been sealed and put in possession of a prize-master. If he determined not to seize her as prize, her master and crew ought to have been restored, that she might have prosecuted her voyage. No apology can be made for leaving her in the condition in which she was placed. Stripped of her crew and of her papers, left in possession of an officer and two men, without orders whither to proceed, she was exposed to dangers; for the loss resulting from which, those who placed her in this situation must be responsible. Had she been regularly captured, many of the difficulties encountered in St. Jago del Cuba might have been avoided; had she been restored, she might, and probably would, have reached her port of destination in safety.

The proceedings of the *Nonsuch*, after a search, converted the whole transaction into a wanton marine trespass, for which no sufficient excuse has been given.

However meritorious may have been the services of the private armed vessels of the United States, in the aggregate, those individuals who have acted with this culpable disregard to the rights of others ought not to escape the animadversion of the law. The conduct of the officers of the *Nonsuch* on board the *Anna Maria* was unjustifiably licentious. Breaking open trunks when keys were offered [**335** them, taking out the crew and putting them in irons, and leaving her in this situation, were acts not to be excused. The honor and the character of the nation are concerned in repressing such irregularities; and the justice of the court requires that compensation should be made for the injury which the libelants have sustained.

The sentence of the Circuit Court must be reversed, and the cause remanded to the Circuit, with directions to reverse the sentence of the District Court, and to direct commissioners to ascertain the amount of damages sustained by the libelants; in doing which the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, with interest, are to be allowed. Out of this decree must be deducted the amount of the proceeds of the *Anna Maria* and cargo, unless the libelants shall choose to abandon those proceeds to the defendants.

Sentence reversed.

Cited—3 Wheat. 560; 1 Curt. 269; 7 Ben. 127, 130; 5 Blatchf. 494; 14 Blatchf. 489; 1 Bald. 143; 3 Ware. 106; Blatchf. Pr., 352; 3 Woods. 379.

*[CHANCERY.]

[**336**

COLSON v. THOMPSON.

Bill for the specific execution of an alleged agreement to convey to the plaintiff one-third of a certain tract of land in Kentucky, belonging to the defendant, as a compensation for locating and surveying the same. Bill dismissed.

In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them.

1.—Vide Appendix, Note I.

If the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy.

The plaintiff, who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.

APPEAL from a decree of the Circuit Court for the District of Kentucky.

The appellee filed his bill in that court, stating that, in the year 1779, a number of persons, amongst whom was the defendant below, who is the appellant in this court, employed him, the complainant, to locate lands for them, in the then district of Kentucky; that he received from the defendant certain land warrants to the amount of 25,000 acres, which he located for him on the 20th of May, 1780. That the terms on which he was to do the business were, that the owner of the warrants should furnish all the money that should be necessary for locating and surveying the said lands. That the complainant should direct the doing thereof, and receive, for his compensation, what should **337*** be given to other persons for similar services. The bill then avers, that the usual proportion which was then generally given to locators for similar services was one-third part of the land so located by them. The complainant further alleges that he was prevented from surveying the above entry by the Indians, who were very troublesome, and who rendered the execution of such business difficult and dangerous; that, during this time, the defendant procured a survey to be executed of the entry made in his name by the complainant, and obtained a patent for the same. The bill admits that the complainant received a sum of money from the defendant, which, however, he charges as paid on account of the expenses attending the locating and surveying the said entry, and not as a compensation for his services. The prayer of the bill is, for a conveyance of one-third part of the above-mentioned tract of 25,000 acres of land. It appears

by the exhibits in the cause, that the above entry was surveyed on the 28th October, 1786.

The defendant states in his answer that previously to his employing the complainant to locate and survey his warrants, he received offers from other persons to do the business upon the terms stated in the bill, which he rejected, and that he was induced to authorize his friend, Mr. Webb, to place the warrants in the complainant's hands, in consequence of his having understood that he would undertake the business for a fair compensation in money. That Mr. Peachy, the agent of the defendant, paid to the complainant upwards of 7,000 pounds of tobacco within a few months after the entry was made. The **answer** **[338]** further states that the defendant frequently applied to the complainant to have the entry, which he had caused to be made, surveyed; and that, after repeated promises to comply with these demands, made and broken, the complainant confessed that it was not in his power to execute the business, and after claiming the tobacco, which he had received as a compensation for his services, advised the defendant to apply to some other person to attend to the surveying of the entry. The defendant owns, that from the year 1785, when this advice was given, until some time after he claimed his grant, he was frequently in company with the complainant, who, to the best of his recollection, never intimated that he expected to receive any part of the lands, nor was any such demand ever made by the complainant until the institution of this suit in 1794.

There was an amended bill filed in this cause, and the above answer was, by the agreement of parties, received as an answer to this bill. The amended bill states that the entry of the 25,000 acres of land was made by the intervention of a Mr. Shelby, a particular friend of the complainant. That the defendant caused the said entry to be surveyed without consulting the complainant on the subject, although he avers that he was always ready and willing, whenever

NOTE.—See note to *Hepburn v. Dunlop*, 1 Wheat. 179, and note to *Morgan v. Morgan*, *supra*, 2 Wheat. 230, as to specific performance.

The aid of a court of chancery will be given to either party who claims specific performance of a contract, if it appear that in good faith, and within the proper time, he has performed the obligations which devolved upon him. *Watts v. Waddle*, 6 Pet. 389; *Bates v. Wheeler*, 1 Scam. 54.

The court will decree specific performance of a contract for the conveyance of land situate in this state, although the contract is in the form of a penal bond, and though the defendant resides out of the state. *Telfair v. Telfair*, 2 Desau. (So. Car.) 271.

Specific performance of a contract for sale of land will be decreed where the vendee has performed his part, and gone into possession with consent of the vendor. *Thompson v. Scott*, 1 McCord's Ch. 39.

The party who comes to compel specific performance must show that he has performed on his part, or that he has been able and willing, and still was ready, to perform his part of the contract. *Id.*

An obligor shall not be permitted to avail himself of an uncertainty in the boundaries of the land he contracts to convey, so as to avoid a specific performance; but the court will decree a conveyance according to the best lights which the circumstances afford. *Kennedy v. Davis*, 2 Bibb. 344.

A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make good title at any time before decree pronounced, although he had not such title at the

time of the contract. *Hepburn v. Dunlop*, 1 Wheat. 179, and note to same case; *Hogart v. Scott*, 1 Russ. & My. 286; *Beymour v. Delancey*, 3 Cow. 445; *Pierce v. Nichols*, 1 Paige, 244; *Hepburn v. Auld*, 5 Cranch, 262; *Cotton v. Ward*, 3 Monro, 304, 313; *Baldwin v. Salter*, 8 Paige, 473.

When the vendee is in possession, and the vendor, without any positive fault, has omitted, or from the state of the title has been unable, to comply with his covenant, a court of equity will decree specific performance in favor of the vendor; time not being essential in such cases generally. *Craig v. Martin*, 3 J. J. Marsh. 54; *Waters v. Travis*, 9 John. 450.

Upon a failure to pay a first instalment of purchase money, and a tender of the whole when the second became due, specific performance decreed. *Gibbs v. Champion*, 3 Ham. 336.

A court of equity will not generally decree specific performance in favor of a party who has not performed, especially if injury from such non-performance has resulted to the other party; but if the defendant has taken possession and paid part of the purchase money, and executed the agreement in part, the court will consider him as having waived his objection to plaintiff's neglect, and will decree execution of the agreement. *Vail v. Nelson*, 4 Rand. 478; *Ramsey v. Brailsford*, 2 Desau. 582.

To obtain specific performance plaintiff must show the performance of the conditions precedent on his part, or account for his failure and show that his default is a proper subject for compensation. *Stevenson v. Dunlop*, 7 Monro, 142.

he might have been called upon for this purpose, to show the beginning and other calls of the entry, and to give the necessary directions to the surveyor.

The depositions taken in the cause prove, that at the time when the entry was made it was usual in Kentucky for the locators of lands to **339** receive from the owners, as a compensation for their services, a proportion of the land so located, besides the expenses, which might be incurred in surveying the land, which the locator received from the owner in money. But what that proportion was is not precisely ascertained by any of the witnesses. They state, generally, that it was sometimes one-third and sometimes one-half. Mr. Peachy, the agent and attorney in fact of the defendant below, from the year 1780, when the defendant went to the West Indies until his return, states that he had lands located in Kentucky, for a part of which he allowed the locator one-fifth, and for the residue one-tenth, of the land located, as a compensation for his services, beside paying the expenses of surveying, &c. This witness further states that he never heard or understood in conversation with the complainant, the defendant, or Mr. Webb, with whom the defendant deposited his warrants to be delivered to the complainant, that the defendant was to give any part of the land in consideration of locating the same.

The Circuit Court decreed that the defendant below should convey to the complainant one-third of the said tract of 25,000 acres of land, according to certain boundaries which had been previously laid down under an order of that court, from which decree the defendant appealed.

WASHINGTON, J., delivered the opinion of the court:

In deciding this case we are necessarily led to the examination of the following questions: **340** 1. What was the contract between these parties, the specific execution of which is sought to be enforced by this bill, and how is it

proved? 2. Has the complainant entitled himself to ask for an execution of the contract, in case the same should be sufficiently proved?

The amended bill states that the complainant received certain land warrants from the defendant with instructions to locate the same in Kentucky, but that no particular stipulation was made respecting the compensation which he was to receive for his services, except that the general custom of the country in similar cases, and the general tenor of the complainant's contracts with other persons for such services were to furnish the rule of compensation to be allowed to him. This rule is averred to be one-third of the land located.

The defendant, in his answer, states that no contract of any sort was entered into between the complainant and himself. He even denies that he had any conversation with the complainant on this subject at any time previous to the entry being made. He states that offers were made to him by other persons to locate his warrants on the terms mentioned in the bill, which he rejected, and that, in consequence of his having understood that the complainant would do the business for a fair compensation in money, he deposited his warrants with his friend, Mr. Webb, with a request that he would engage the complainant to locate them.

The allegations of the bill in relation to this contract are wholly unsupported by the evidence in the cause; and, on the other hand, the answer, in relation to this point, is strongly corroborated by the testimony of Mr. **341** Peachy; by the uncertainty of the alleged usage as to the proportion of the land to be allowed to the locator; the improbability that so loose a contract would be made so early as the year 1779, when a usage, if any existed, must necessarily have been recent and unknown, especially to persons living remote from Kentucky, at that time wild and unsettled; and, above all, by the circumstance that from the year 1786, when the survey was made, under the direction of another agent, no demand of a

Specific performance of a prior contract, decreed against a subsequent purchaser, with notice of plaintiff's equitable title. And it seems that if plaintiff had been in possession under the agreement, that would have been constructive notice to the purchaser of his actual interest or equitable title under the agreement. *Wadsworth v. Wendell*, 5 John. Ch. 224.

The principle of equity, with respect to specific performance, is, that if, substantially, the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree of specific performance, when the difference is such that it can be compensated in money. *Magennis v. Fallon*, 2 Moll. 588.

If the important part of the agreement be performed, and an inconsiderable part be left unfulfilled, or partly, unable to perform the residue, without his fault, equity will decree a specific performance. *Church v. Steele*, 1 A. K. Marsh. 360; *Johnson's Heirs v. Mitchell*, 1 A. K. Marsh. 227.

Where a contract for the sale of land has been in part executed by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase money with interest. *Pratt v. Law*, 9 Cranch, 456.

The court refused to decree specific execution of a contract in a hard case, where the other party had not complied with the terms. *Rugge v. Ellis*, 1 Desau. 161; *Turner v. Clay*, 3 Bibb, 52; *Ramsay v. Brailsford*, 2 Desau. 582.

Whit, 2.

The court will not decree specific performance of a contract for the purchase of a house, where the buildings are not completed within the stipulated time. *Colcock v. Butler*, 1 Desau. 307.

The court will not compel the specific performance of an agreement of sale, and oblige defendant to accept a title which the plaintiff cannot make out to be clearly good and free from incumbrances. *Butler v. O'Hear*, 1 Desau. 382; *Lewis v. Herndon*, 3 Litt. 368; *Kelly v. Bradford*, 3 Bibb, 317; *Seymour v. Delancey*, Hopk. 436.

The purchaser's objections to taking the land need not be confined to cases of doubtful title, but may be extended to incumbrances of every description which may embarrass him in the full enjoyment of his purchase. *Garnett v. Macon*, 6 Call. 306.

An agreement must be in all respects full, fair, and honest in the beginning, and the performance of it fairly and conscientiously required, or the Court of Chancery will not enforce it. *Bowman v. Irons*, 2 Bibb, 78; *Carberry v. Tauchill*, 1 Harr. & John. 224.

Vendee's previous knowledge of defects in the title is no reason for compelling him to take such title as vendor can convey, that being defective; where the agreement stipulates that vendor shall convey good title. *Jackson v. Ligon*, 3 Leigh, 161.

If an agreement for the sale of lands be made, subject to a condition that the price thereof shall be afterwards ascertained by the parties, and one of the parties die without any price being agreed upon, such agreement is too incomplete and uncer-

part of the land appears to have been made by the complainant until the institution of this suit in the year 1794.

This defect in the proof would seem to be fatal to the pretensions of the complainant. The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or, the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.¹

342* But if these objections could be surmounted, that which remains to be considered under the second head appears to the court to be conclusive against the appellee.

2d. Has the complainant entitled himself to ask for an execution of the contract if he had proved it?

It is very obvious, from the complainant's own showing, that the contract between himself and the defendant taken in connection with the alleged usage, was, that the former should not only make the entry, but should also cause the same to be surveyed under his direction and superintendence. It was the entry and the survey which constituted the location in the contemplation of the parties, and formed the real consideration for which the allowance of a part of the land to the locator was to be

made. The complainant states, in his bill, that the owner of the warrants was bound by the usage not only to make this allowance, but was also to furnish all the *money neces- **343** sary for locating and surveying the land, and he endeavors to excuse himself for not having caused a survey to be made. Now, if the mere making of the entry amounted to a full performance of the contract on the part of the locator, any stipulation with the same person for the expenses attending the survey would have been idle and unnecessary. But the evidence of Isaac Shelby, upon this point, is conclusive. He states that the usual compensation to a locator was one-third of the land for locating and directing the survey.

If this, then, be the contract, as alleged by the complainant himself, in what manner has he performed his part of it? In the first place, the entry was made, not by him, but by Isaac Shelby, under some agreement which is not disclosed in the bill, nor proved by any testimony in the cause. In the next place, it does not appear that, from the year 1780, when this entry was made, the complainant made one effort to have the entry surveyed; but the defendant, after wasting about 6 years, was compelled to employ another agent to have that service performed.

How does the complainant excuse himself for the breach of his contract in this respect? He alleges that he was prevented, during all that

1.—See, as to agreements, the performance of which will not be decreed by a court of equity for want of certainty, the following cases: *Elliot v. Hele*, 1 Vern. 406, 1 Eq. Cas. Abr. 20; *Bromley v. Jefferies*, 2 Vern. 415; *Emery v. Wase*, 5 Ves. 449. But the court will, if practicable, execute an uncertain agreement by rendering it certain. *Allen v. Harding*, 2 Eq. Cas. Abr. 17. So an agreement to sell at a fair valuation may be enforced. *Emery v. Wase*, 5 Ves. 446; *Milnes v. Gery*, 14 Ves. 407. And if the terms of an agreement are to be ascertained by an award, being so ascertained, that agreement will be enforced in equity, if there is anything to be specifically performed; as estates to be conveyed, &c.; but where the parties have contracted that the value of their respective interests shall be as-

certain by arbitrators, or an umpire, if the acts done by the parties for the purpose of carrying their agreement into effect by an award are not valid at law, as to the time, manner, or other circumstances, the agreement cannot be enforced in equity, unless there has been acquiescence, notwithstanding the variation of circumstances, or the agreement evidenced by such award has been part performed. *Blundell v. Brettagh*, 17 Ves. 232. And if, on a covenant to build a house, the transaction is, in its nature, loose and undefined, and it is not expressed distinctly what the building is, so that the court could describe it as a subject for the report of the master, a specific performance will not be decreed. *Mosely v. Virgin*, 3 Ves. 185; *vide ante*, p. 302, note d.

tain to be carried into execution by a court of equity. *Graham v. Call*, 5 Munf. 386.

Where an agreement to make a lease is entered into, upon certain terms, the party to whom the lease is to be made cannot enforce a specific performance unless he performs his part of the agreement, or offers to perform, and unless he shows that he is willing and able to do so. *Harris v. Banks*, 1 Rand. 408.

Upon a contract for sale of an estate, at a stipulated price, neither party can compel performance in equity, until he has on his part performed, or tendered to perform. *Greenup v. Strong*, 1 Bibb, 500; *Kling v. Hamilton*, 4 Pet. 311.

Specific execution will not be decreed unless the consideration has been paid. *Tunstall v. Taylor*, 1 A. K. Marsh. 43; *Bearden v. Wood*, 1 A. K. Marsh. 451.

Specific execution of contract will not be enforced unless parties have described and identified the particular tract, or unless the contract furnishes the means of identifying with certainty the land to be conveyed. *Reed v. Homback*, 4 J. J. Marsh. 377.

Where a party having partly performed an agreement, may be placed *in statu quo*, by receiving a compensation for what he has done, and is in default as to the residue, he is not entitled to a decree for the specific execution. *Breckenridge v. Clinkinbeard*, 2 Litt. 127.

A person asking specific performance, must either show himself without default or must exhibit an excuse for such default. *Campbell v. Harrison*, 3 Litt. 232; *Moore v. Skidmore*, 3 Litt. Sel. Ca. 453.

Where the valuation, fixing the price was uncertain, specific performance cannot be enforced. *Hopcraft v. Hickman*, 2 Sim. & Stu. 130.

Where payment of the purchase money is a condition, precedent to the conveyance, and after default, defendant accepted part of the purchase money, but plaintiff, though repeatedly called upon, refused to pay the residue, and defendant, after giving notice of his intention to do so, sold and conveyed the land to another, and plaintiff afterwards tendered the money due, and filed his bill for specific performance. Held, that specific performance could not be decreed, nor decree made for compensation in damages, but party was left to his remedy at law on the covenant. *Hatch v. Cobb*, 4 John. Ch. 559; *Kempshall v. Stone*, 5 John. Ch. 193; *Doar v. Gibbs*, 1 Bal. 371.

Contract will not be specifically executed unless it is proved to exist, and it is certain in its terms. *Newman v. Carroll*, 3 Yerg. 18.

Where a purchaser cannot get a title to all he contracted for, if he can get the substantial inducement to the contract, he may insist upon taking, or he may be compelled to accept, a title to so much as the other party can give a good title to, with a reasonable compensation for what the party cannot effectually convey. *Evans v. Kingsbury*, 2 Rand. 120; *Hays v. Hall*, 4 Port. 374.

Where a tract of land was sold, and the vendor did not have legal title to a part of it. Held, that he had no right to a specific performance. *Reed v. Noe*, 9 Yerg. 238.

A conveyance is never ordered until the purchase price is paid. *Oliver v. Dix*, 1 Dev. & Bat. Eq. 605.

Wheat. 2.

time, by Indian hostility, which rendered it troublesome and dangerous to make surveys in the part of the country where this entry was made. This assertion is not proved by a single witness except Thomas Allen, who deposes, that from 1780 to 1789, he believes it was difficult [344*] to get any persons to risk their *lives in making surveys on the Ohio, towards the Yellow Bank, except for high wages, as he has been informed. Now, even if this witness had positively proved the point for which he was examined, still his testimony could not avail the complainant, since he admits that for high wages men could have been procured to perform the service; and those wages, it was incumbent on the complainant, who claims no less than between 8,000 and 9,000 acres of this land, to pay. The difficulty and expense which would have attended his endeavors to perform this part of his contract afford no excuse for his breach of it, even if, in a case like this, any excuse could be admitted. But what is conclusive as to this point is that the entry was in fact surveyed in 1786, without any danger or difficulty, so far as the record informs us.

The complainant alleges that he was always ready and willing, whenever he might have been called upon for that purpose, to show the beginning and other calls of the entry, and to give the necessary directions to the surveyor. This allegation is positively denied in the answer, which states that the complainant declined making or attending to the survey, and that he advised the defendant to employ some other person to do the business.

Thus it appears that the complainant has failed not only to prove the contract stated in the bill, but also his performance of those acts which formed the consideration of the alleged promise on the part of the defendant. [345*] *The decree must therefore be reversed, and the bill dismissed with costs.

Decree reversed.

Cited—1 Bald. 487, 494; 2 Palne, 8; Hemp. 246, 478; 5 Mason, 256; 3 Cliff. 161.

[PRIZE.]

THE ELEANOR. DONNELL, Claimant.

A libel against the commander of a squadron calling on him to proceed to adjudication, or to make restitution in value, of a vessel and cargo, detained for search by the captain of a frigate belonging to the squadron, and lost while in his possession. Libel dismissed.

The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. But, *quære*, how far is he responsible in other cases?

Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize-master may be considered as a bailee to the use of the whole squadron, who are to share in the prize money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron.

The commander of a single ship is responsible for the acts of those under his command; as are, likewise, the owners of privateers for the conduct of the commanders appointed by them.

To detain for examination, is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean.

The principal right necessarily carries with it all the means essential to its exercise; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty before they are *actually [*346 made prisoners of war, and the vessel is thereby lost, the captors are not responsible.

Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize-master and crew; not because the original crew, when left on board (in the case of a seizure of the vessel of a citizen, or neutral), are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. But this rule does not extend to the case of a mere detention for examination, which the commander of the cruising vessel may enforce by orders from his own quarter-deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew.

The modern usages of war authorize the bringing one of the principal officers of the vessel detained on board the belligerent vessel, with the papers, for examination.

APPEAL from the Circuit Court for the District of Massachusetts.

This schooner, with her cargo, the property of the claimant, on a voyage from Baltimore to Bordeaux, fell in with the President and Congress frigates, on the night of the 16th October, 1813.

Commodore Rodgers was the commander of the President, frigate, and the commodore and commander of the squadron composed of those two ships then in company. Captain Smith, deceased, and charged in the libel as a co-defendant, commanded the Congress.

On the *Eleanor* being discovered by the two frigates, she was chased by the Congress and overhauled. The President stood on her course, being out of sight at the time she was overhauled and when she was subsequently dismasted, and so continuing until the signal guns were fired from the schooner. The *master, super- [*347 cargo, and the officers and crew of the *Eleanor*, on seeing the frigates, considered them British cruisers, and when they found she could not escape them, concluded they were captured by the enemy. This produced a very general determination, on the part of the crew, to take no further concern in the navigation of the schooner. When boarded by Lieutenant Nicholson, of the Congress, the schooner was in the state of confusion to be expected from such a determination. He ordered the master to take one of his mates, and his papers, and go on board the frigate. The captain, after giving some orders to his second mate to adjust the sails of the schooner, which were not complied with, went with his first mate and papers, in the frigate's boat, to the Congress. Lieutenant Nicholson, on being asked by a boy what frigate it was, said it was the Shannon; immediately afterwards he undeceived the supercargo, whom he recognized as an old acquaintance, but said he was ordered not to make himself known, and, therefore, requested the supercargo not to disclose it. Upon endeavoring to restore order, and to provide for the safe navigation of the schooner, he could get no assistance from the crew (who refused to obey his orders, considering him a British officer), except from the second

mate, and on observing this, he disclosed the name of the frigate, and he, the supercargo and the mate, assuring the crew they were not prisoners, endeavored to prevail on them to return to their duty; they persisted in refusing; in consequence of which (the sea being tempestuous, and the weather squally) a flaw struck the **348*** vessel and both her masts went over. Lieutenant Nicholson, the mate and supercargo, endeavored to save the vessel, but the crew would not obey either of them. She was afterwards assisted, as far as possible, by the frigates, but finally abandoned and lost.

The libel was filed against Commodore Rodgers and Captain Smith, alleging that the loss of said vessel and cargo was owing "to the deception unlawfully practiced on her crew by the officers of the said squadron, and through the want of care, inattention and gross negligence of the officer of said frigate Congress, in the navigating said schooner, of which he had taken, and then had command," and praying for a monition against them to proceed to adjudication, or to show cause why restitution in value should not be decreed.

The District Court considered this allegation supported by the proof, and that Commodore Rodgers was answerable, as commander of the squadron, and decreed against him for forty-three thousand two hundred and fifty dollars, the value of said vessel and cargo. The Circuit Court affirmed the decree *pro forma*, and thereupon the cause was brought by appeal to this court. After the filing of the libel, and before the decree in the District Court, the death of Captain Smith, which had intervened, was suggested on the record.

Key, for the appellant, made three points:

1st. That it was owing to the neglect and misconduct of the captured crew the vessel was lost.

349* 2d. That this neglect and misconduct were in no degree owing to, or palliated by, the military stratagem practiced by Captain Smith.

3d. That, at all events, Commodore Rodgers was not responsible in law.

The neglect of the captured crew, in refusing to do duty, is analogous to the case of *Virtue v. Bird*,¹ where the plaintiff declared that he was employed by the defendant to carry a load of timber from W. to L., to be laid down where the defendant should appoint, and that he carried it; when the defendant, having appointed no place where it should be laid down, the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled; after a verdict for the plaintiff, judgment was arrested, for it was the plaintiff's own fault that he did not take out his horses, and lead them about; or he might have unloaded the timber in any proper place and returned. So, also, in *Butterfield v. Forrester*,² which was an action on the case for obstructing a highway, by means of which the plaintiff, who was riding along the road, was thrown down with his horse and injured; it appeared that he was riding with great violence and want of ordinary care, without which he might easily have avoided the obstruction. It was therefore decided that he could not recover; for that two

things must concur to support the action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. Upon the *principle of these cases, the appellant [**350** is exempted from all liability. Nor is he responsible upon the ground of the liability of a master and principal for the misconduct of a servant and agent. Superiors in these relations of life are answerable only for acts in the ordinary line of the duty of the servant and agent, or in consequence of the special orders of the superior. But this principle, with its limitations, does not apply to the case of a commander of a squadron. He does not elect his officers. They are appointed by the government, and amenable only to a court-martial. No officer, military or naval, would undertake so frightful a responsibility; and to impose it upon the commander of a fleet or squadron would be to incapacitate him from the performance of his duty. There is no testimony, positive or presumptive, that Commodore Rodgers gave any orders whatever to practice the stratagem in question. The authority of *The Mentor*³ shows that he is not liable, constructively, for the conduct of the officers under his command; nor is there any one case to show that he is thus liable. *The Der Mohr*⁴ is, apparently only, such a case. It only proves that a superior officer may be placed in the same relation with that of a principal, in regard to his agent. In that case, the captors had a right of property in the captured vessel, inasmuch as by the law of England captors have the entire interest in prizes; and any person may be appointed prize-master, and so become the agent of the whole squadron, the commander *of which would, con- [**351** sequently, be responsible. Public policy does not require the establishment of the principle contended for on the other side, since the injured party may have recourse to the actual wrong-doer, and may seek redress by complaining to the government of his misconduct.

D. B. Ogden, contra. The case cited from Levinz is not parallel; and that from East is one of gross folly and want of common prudence and caution on the part of the plaintiff. It is inapplicable, because it was not in the power of the libellant in this case to save his property from destruction. But the present question is not to be determined by the narrow principles of the common law; it is a marine trespass, which must be tried by the more liberal rules of the marine law. The right of visitation and search is not, and cannot be denied; but it is not essentially necessary to the due exercise of the right that the master should be taken out of his vessel: it is only necessary to send a boarding officer to make the proper examination and inquiries; but the belligerent cruisers have no right to proceed further, until they have determined to send in the vessel for adjudication. When this determination is made, a competent prize-master and crew should be put on board, instead of leaving the original crew without control or regulation. A belligerent has a right to practice deception, as a stratagem of war; but this right, which may cause a wrong to a neutral or fellow-citizen, must be exercised at the

1.—2 Lev. 196.

2.—11 East, 60.

3.—1 Rob. 179.

4.—3 Rob. 129; 4 Rob. 314.

peril of the captors. Either the seizure of the [352*] *Eleanor was as prize, or she was detained for search. If the former, then the captors had no right to require the assistance of the crew of the captured vessel,¹ who were not bound to assist in navigating her. If the latter, then the captors had no right to take out the master and mate, leaving the crew without any regular chief competent to navigate the vessel. The case of *The Der Mohr*, was, indeed, determined on general principles of law; on the ground that the prize-master was constituted agent of the captors, and the vessel (which was innocent) was used as a vehicle to bring in the cargo, which last alone was liable to suspicion. But here the trespass is joint; and the trespassers would have been joint sharers of the prize: *Qui sentit commodum sentire debet et onus*. The President was out of sight at the time of the seizure; but she was present at the inception of the tort. They were cruising in conjunction and under the orders of Commodore Rodgers, who saw the Congress, frigate, pursue the Eleanor, and did not prohibit the chase. The boarding officer was a mere passive instrument in the hands of his superiors, to whom alone the injured party can look for indemnification.

Harper, on the same side. The responsibility of the owners of privateers and the commanding officers of ships and squadrons, for the misconduct of their delegates, is a settled principle of law. The case of *Del Col v. Ar-353** *nold*² is in point, where *this court decreed the owners of a privateer to make restitution in value of a captured vessel lost by the misconduct of the prize-master. The case of *The Der Mohr*, which has been so often referred to, makes the senior officer responsible for the appointment of a prize-master by his junior officer, though there was no personal misconduct imputable to either. In the case now before the court, the proximate cause of the loss was the refusal of the seamen to work. The ultimate cause was the deception practiced by the captors in representing themselves as enemies; and whether the crew were justifiable in refusing obedience, or not, their disobedience was a consequence of the stratagem practiced by the captors, and they are responsible. On the first supposition, they are liable; because they ought to have put a prize-crew on board. On the second, because the stratagem was practiced at their peril, and it depended upon the event of the search whether they would be justified; for this mode of warfare is not to be practiced at the expense of individuals pursuing an innocent and lawful commerce. The case of *The Mentor*³ is not, as has been contended, contrary to our position. The claimant there had taken out a monition against the actual captor, which had been dismissed; it was, therefore, *res judicata*; and, besides, the lapse of time which had intervened was held to be an equitable limitation. It is true that Sir William Scott likewise lays hold of the circumstance that Admiral Digby was merely commander of the [354*] *North American station, and far off at the time when the capture was made; but here Commodore Rodgers was present, and as-

sociated in the act. The case of *The Charming Betsey*⁴ shows that innocence of intention alone in a commanding officer will not exempt him from the consequences of an illegal act. In substance and effect, this is a case between the government and the owner of the property which has been destroyed, who has become the victim of a rigorous prosecution of the rights of war and of military policy. *Respondet superior!* We pursue him; let him, in turn, look for indemnification to his government, to which experience shows that he will not look in vain.

Jones, for the captors, in reply, argued on the facts that the loss of the vessel was not a consequence, direct or indirect, of the conduct of the seizing officer; and that the right of visitation and search had been properly exercised. It is novel doctrine, that the right of search is to be exercised under the peril of being responsible for a wrong. Reason, morality and law, all concur in imposing the loss (among innocent parties) upon him on whom the elements and the act of Providence throws it. It was entirely a question of military prudence whether the papers should be examined by the boarding officer or by his superior; and there is nothing in the principles of public law to prevent the exercise of the right of visitation and search either way. Neither are the crew of the vessel which is detained *for search exempted from [*355*] obedience in consequence of the act of boarding. Until the capture is consummated, the former relations of the crew continue; and until then the cruiser is not bound to send on board a competent prize-master and sufficient crew to navigate the captured vessel. The commander of a squadron cannot, on any principle of law or justice, be made responsible, constructively, for the acts of officers on board other ships. The principles and analogies which would make Commodore Rodgers a joint trespasser must be those of municipal law. But this was not a civil connection with the officers of the other ship; all that he knew, or permitted, was the chase; and he cannot be made responsible for the subsequent supposed misconduct of his brother officer. Here was a merely military act; no *animus lucrandi*; no appropriation as prize; and, therefore, no civil constructive responsibility. In the case of *The Mentor*, Sir William Scott expressly overrules the doctrine of the constructive responsibility of a commander-in-chief; apart from the other grounds of exception, the former adjudication, and the lapse of time which he likewise notices. *The Der Mohr* was a case of joint capture, as expressly stated by the court and the reporter; and was determined on the just principle of joint participation in the wrong done, in the interest acquired by the capture, and in the appointment of the prize-master.

JOHNSON, J., delivered the opinion of the court:

This case presents two questions: 1st. Are the appellees entitled to recover?

*2. Does their right of recovery ex- [*356*] tend to the commander of the squadron?

In whatever view the case be considered, it is one of extreme hardship; both the claim and

1.—Wheaton on Capt. 100.

2.—3 Dall. 333.

3.—1 Rob. 179.

Wheat. 2.

4.—2 Cranch, 64.

the defense are founded in the most rigid principles of the *strictum jus*; and it is impossible not to regret if the libellant have no means of indemnity, or if that indemnity should be exacted of men whose characters and conduct were so far above all imputation of malice or oppression. Nor can this court altogether close its feelings against the claims to protection of that navy which has so nobly protected the reputation of the country. Yet we mistake the character of the men who constitute it, if they would not be among the first to declare the government unworthy of their skill and valor, in which the rights of the meanest individual was not as much an object of earnest solicitude as the rights of those whom their country delights most to honor. Whether the commander of a squadron be liable to individuals for the trespasses of those under his command is a question on which it would be equally incorrect to lay down a general proposition either negatively or affirmatively. In case of positive or permissive orders, or in case of actual presence and co-operation, there could not be a doubt of his liability. But on the other hand, when we consider the partial independence of each commander of a vessel, and that the association is not a subject of contract, but founded on the orders of their government, which leave them no election, it would be dangerous indeed, and dampening to the ardor of enterprise, to tram-
357* mel a commander *with fears of liability, where it is not possible, from the nature of the service, and the delicate rules of etiquette, for him always to direct or control the actions of those under his command. We feel no inclination to extend the principle of constructive trespass, and will leave each case to be decided on its own merits as it shall arise. Where a capture has actually taken place with the assent of the commodore, express or implied, the question of liability assumes a different aspect; and the prize-master may be considered as bailee to the use of the whole squadron who are to share in the prize money. To this case there is much reason for applying the principle, that *quis sentit commodum sentire debet et onus*; but not so as to mere trespasses unattended with a conversion to the use of the squadron.

The case of the commander of a single ship varies materially from that of the commander of a squadron, and the rigid rules of liability for the acts of those under our command may, with more propriety, be applied to him. The liability of the owners of a privateer for the acts of their commanders has never been disputed. And it is because they are left at large in the selection of a commander, and are not permitted to disavow his actions as being unauthorized by them. So, in the case of a commander of a ship, the absolute subordination of every officer to his command attaches to him the imputation of the marine trespasses of his subalterns on the property of individuals, when acting within the scope of his commands. Orders even giving a discretion to a subordinate
358* in such cases is no more *than adopting his actions as the actions of the commander; and placing him in a command which requires skill, integrity, or prudence, makes the commander the pledge to the individual for his competence to discharge the duties of the undertaking.

260

With these views of the subject we should have found no difficulty in deciding on the liability of Captain Smith, of the Congress, had he been a party to this libel, and the facts of the case had made out a marine trespass in himself, or in Lieutenant Nicholson, or a want of competence or due care in the latter to discharge the command assigned him. But we are of opinion that no one act is proven in the case which did not comport with the fair, honorable, and reasonable exercise of the rights of war. To detain for examination is a right which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean. And whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the forum of conscience. And the principal right necessarily carries with it also all the means essential to its exercise. Thus, in the present case, a vessel must be pursued in order to be detained for examination. But if, in the pursuit, she had been dismasted, and upset or stranded, or run on shore and lost, it would have been an unfortunate case, but the pursuing vessel would have stood acquitted. The counsel in argument *have not denied the [**359** general doctrine, but have endeavored to show that the commander of the Congress had unreasonably exercised the right of detention.

1st. By the deception, in passing himself off for an enemy, thereby reducing the crew to a state of insubordination.

2d. By taking out both the master and the mate, and thus removing the possibility of bringing the seamen back to their duty.

3d. By divesting the master of his command, without putting a competent crew on board to navigate her.

On the first of these grounds, it is only necessary to remark that, to assume the guise of a friend or an enemy is, in legitimate warfare, an act the most familiar and frequent in its occurrence. It is so ordinary a *ruse de guerre* that it ought rather to be expected than the display of real colors. And, innumerable cases that have come before this court prove that in the actual state of things during the late war it became as necessary to practice the deception upon our citizens as upon a neutral or an enemy. We, therefore, see nothing reprehensible in this. But on what ground could the crew assume the right of judging for themselves on this subject, and of abandoning their duty before they were actually made prisoners? Suppose the frigate had been an enemy, it did not follow that their vessel must be made prize, and they were unquestionably unpardonable in abandoning their duty. Their doing so was by no means a necessary consequence *of [**360** ordering their officers on board the frigate, nor ought the captain of the Congress to have anticipated such a state of things as their vessel was reduced to by their misconduct. They were bound to obey the second mate in the absence of their other officers; and if they had done so, this misfortune would not have happened. So far from actually divesting him of his command, it appears that Nicholson's

Wheat. 2.

orders were addressed to him, and only addressed to the men to try his personal influence in bringing them to order.

To the second and third grounds, the attention of this court has been drawn with peculiar force. Either of them appeared to be an irregularity, which the reasonable exercise of the right of search did not strictly justify. But, upon a close examination of the testimony, we are of opinion that neither of those grounds is supported by the evidence. It is true that both the master and first mate were taken on board the frigate, and the master and supercargo say they were both ordered on board. But Nicholson, the boarding officer, who certainly knew best what orders he gave, swears that he ordered the master to go on board with "one of his mates," thus leaving it to his election to choose between them; he further swears that these were the orders he received from the captain. And there is a fact in the case which makes it probable that the master of the schooner himself called on the first mate to attend him, for at that time the second mate was stationed at the bow, in charge of sinking certain dispatches, in case of capture. Had the master remonstrated **361*** against taking his first mate along with him, he would have done his duty, and perhaps saved his vessel. On the third point, it is unquestionably true that, whenever an officer seizes a vessel as prize he is bound to commit her to the care of a competent officer and crew. Not that the original crew, when left on board, in case of seizure of the vessel, of a citizen or neutral, are released from their duty without the assent of the master; for they are bound to attend the vessel, as she may be discharged, and pursue her original destination. But the obligation to man the prize results from the want of a right to subject the crew of the captured vessel to the authority of his own officer. If, then, this vessel had been seized as prize, and no one put on board but the prize-master, without any undertaking of the original ship's company to navigate her under his orders, it is very questionable whether the appellants would not have been liable for any loss that followed, from the insubordination of the crew. For after capture, as before observed, the prize-master becomes the bailee of the squadron, who are to share in the partition of proceeds.

But we are of opinion that this was a mere case of detention for search; that the vessel was never actually taken out of possession of her own officers; that the captain of the Congress had a right to detain the vessel by orders from his own quarter-deck, and that the officers of the schooner, at their peril, were bound to obey; that Lieutenant Nicholson was left on board for no other purpose than to enforce, in a more convenient mode, the observance, on **362*** their part, of the duty which the rights of war authorized the frigate to exact of her. And all the misfortunes which followed resulted to the appellees from the fault or folly of their own crew.

One argument, insisted on at the bar, it is proper for this court to notice before we conclude. It was contended that the master of the Eleanor ought not to have been removed from his vessel; that the right of search only authorized the sending of an officer on board to exam-

ine her papers. But we think otherwise. The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. To devest her of both her principal officers, without putting on board her, for the time, a competent officer and crew, would certainly be irregular. But it is for the interest of the commercial world that the investigation should be made by the commander himself, and not left to any subordinate officer. In that case it would be absurd to require of the commander of the commissioned vessel to quit his command for the purpose of making the necessary examinations.

*We are, upon the whole, of opinion, that the court below erred; that the decree must be annulled, and the libel dismissed.**

Cited—Blatchf. Pr. 115, 116; 1 Curt. 273.

*[PRACTICE.]

[*363

INGLEE v. COOLIDGE.

No writ of error lies to the highest court of law or equity of a state court, under the 25th section of the judicial act of 1789, unless there is something apparent on the record bringing the case within the appellate jurisdiction of this court.

The report of the judge who tries the cause at *Nisi Prius* containing a statement of the facts, is not to be considered as a part of the record; the judgment being rendered upon a general verdict, and the report being mere matter *in pais* to regulate the discretion of the court as to the propriety of granting a new trial, the writ of error, in such a case, will be dismissed.

THIS was a writ of error upon a judgment of the Supreme Judicial Court of Massachusetts, rendered in an action of assumpsit. The declaration contained three counts, to which the general issue was pleaded, and upon two of these counts the jury found a general verdict for the defendant (the plaintiff in error), and upon the third count a general verdict, with damages for the original plaintiff. The cause was then continued, as the record states, "for the opinion of the whole court upon the law of the case, as reported by the judge who tried the same." At a subsequent term, judgment was rendered by the whole court for the plaintiff, upon the verdict found in his favor. The report of the judge who tried the cause came up in the record annexed to the writ of error, with other proceedings and exhibits in the cause.

G. Sullivan*, for the plaintiff in error, **364 argued that, by the report of the judge in the court below, it appeared that the chief question in this cause involved a constructive application of the act of Congress of the 18th of June, 1812, declaring war against Great Britain, to the question whether the purchase of a British license to protect the property of a citizen was a lawful consideration for the promissory note on which the action was brought. It is contended, by the defendant in error, that however this may be, this court cannot sustain the writ of error in the present case;

1.—*Vide* Appendix, Note I.

because the report of the judge is no part of the record. To determine the question suggested by this objection, it becomes necessary to inquire of what a record consists. "A record," says Britton,¹ "is a memorial or remembrance, an authentic testimony in writing, contained in rolls of parchment, and preserved in a court of record." But a more particular definition is given by Lord Coke,² who defines it to be "a memorial of the proceedings or acts of a court of record." In modern times, to avoid the delay incident to the preparation of a special verdict at the trial, a practice has grown up of reserving the cause for the whole court, upon a special case, which is prepared by the counsel, or, as a substitute therefor, is made by the judge, and thrown into the form of a report, under a special agreement of the parties, that a nonsuit, a default, or even a different verdict may be entered, according to the decision of the court; such is the "practice in the Supreme Court of Massachusetts. Where is the substantive difference between the "special case" and a report made under such understanding and agreement? Error lies upon a special case. The judgment of the court below in the case of *Hunter v. Martin*³ was founded on a statement of facts, as settled by a case agreed. But the report of the judge, in the present case, was a necessary proceeding or act of the court, upon which its decision on the merits was founded. It ascertained all the facts in the case; and what more does a special case or verdict? The position assumed on the other side narrows the ground of remedial process, in a manner inconsistent with a liberal application of the constitutional powers of this court.

Webster, for the defendant in error, contended, that the points on which the plaintiff relied could not be raised in this case. Nothing appears on the record of the judgment in Massachusetts by which the court can pronounce that judgment to be erroneous. The general rule of law confines writs of error to matters arising on the record, and the statute expressly provides, that in cases where writs of error are brought in this court to reverse judgments rendered in state courts, on the ground that such judgments were rendered against the validity, or an erroneous construction of a statute of the United States, "no other error shall be assigned or regarded, as a ground of reversal in any **366***] such case, than *such as appears on the face of the record, and immediately respects the before-mentioned question of validity or construction." The judge's report of the evidence is no part of the record. Still less are the depositions of witnesses. Nothing, therefore, appears on the face of this record, which, in any way, respects either the validity or construction of any statute of the United States. This is, in effect, an attempt to reverse the judgment of a court for error, in refusing to grant a new trial. If a party be dissatisfied with the direction of a judge at *Nisi Prius*, in matter of law, there are two modes, in either of which he may ordinarily cause such direction to be reviewed. Without putting the question on the record, he may

move for a new trial, on the report of the judge in that court out of which the record issues; or he may tender his bill of exceptions, the object of which is to put the question on the record, and then bring his writ of error. But he cannot pursue both courses. If he relies on his motion for a new trial, then his objection does not appear on the record, and, of course, no writ of error lies. If he tender his bill of exceptions, the court where the record is will not grant a new trial on the ground stated in the bill of exceptions, for the question is then on the record, and the error, if any, may be corrected by writ of error.⁴ The discussion of questions of law on motions for new trials is attended with the well-known consequence of giving up the right of proceeding further with the cause. The *effect of this in England [**367** on the jurisdiction of the House of Lords has not escaped the notice of Lord Chancellor Eldon.⁵ But this is for the consideration of the parties themselves. In this case the plaintiff in error has made his election. He has chosen to trust to the success of his motion for a new trial in the court of Massachusetts. If that has failed, he can have no remedy here by writ of error.

STORY, J., delivered the opinion of the court, and after stating the case, proceeded as follows:

"A motion has been made to dismiss [**368** the writ of error, upon the ground that there is nothing apparent upon the record which brings the case within the appellate jurisdiction of this court, under the 25th section of the judiciary act of 1789. It is conceded, on all sides, that this is entirely correct, unless the report of the judge who tried the cause, which contains a statement of the facts, is to be considered as a part of the record. And we are unanimously of opinion that it cannot be so considered. It is not like a special verdict or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment is rendered upon a general verdict, and the report is mere matter *in pais*, to regulate the discretion

4.—*Fabrigas v. Mostyn*, 2 W. Bl. 829.

5.—2 Dow's Rep. 480, *Smith et al. v. Robertson et al.* This was an insurance cause appealed from the court of session in Scotland to the House of Lords, having been originally brought in the Court of Admiralty in Scotland. In delivering the judgment of the house, affirming the decree of the court below, Lord Eldon stated, that "their lordships were aware, and it was due to the Court of Session to mark the fact, that these cases were all heard there in such a course that there was no obstacle in point of form to prevent their coming before their lordships. By the old mode of proceeding in Westminster Hall, forty years before he had set foot in it, the practice was, to have special verdicts found, and then the case might come up on error to the House of Lords. But this practice had been altered by Lord Mansfield, upon the whole, with considerable utility; and now, for the sake of expedition, instead of entering the matter at length upon the record in a special verdict, special cases were made for the opinion of the court; and nothing appearing on the record but the general verdict, the subject might have no door by which to come into that house. But in the court of session, as he understood their practice, the cases were heard in such a form that the subject could not be prevented from coming to their lordships; and, therefore, it was no discredit to the court of session that so many of their decisions in these insurance causes were brought under the review of their lordships."

1.—C. 27.

2.—Co. Litt. 117, a, 360, b.

3.—1 Wheat. 304.

of the court as to the propriety of granting relief, or sustaining a motion for a new trial.

The writ of error must, therefore, be dismissed.

Wheaton, for the defendant in error, moved for costs.

MARSHALL, *Ch. J.* The court does not give costs where a cause is dismissed for want of jurisdiction.

*Writ of error dismissed without costs.*¹

Cited—2 Pet. 409; 10 Pet. 394; 12 Pet. 134; 16 Pet. 301; 15 How. 210; 20 How. 439, 441; 1 Wall. 603; 9 Wall. 567; 2 Wood. & M. 420, 421; 1 Cliff. 433.

369*] *[CONSTITUTIONAL LAW.]

M'CLUNY v. SILLIMAN.

This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, according to the 7th section of the act of the 10th May, 1800, "providing for the sale of the lands of the United States north-west of the Ohio, and above the mouth of Kentucky River;" which *mandamus* had been refused by the Supreme Court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state.

1.—Costs will be allowed upon the dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error. *Winches-ter v. Jackson et al.*, 3 Cranch, 515.

2.—In the case of *Marbury v. Madison*, 1 Cranch, 137, the court determined, that having, by the constitution, only an appellate jurisdiction, (except in cases of ambassadors, &c.) and it being an essential criterion of appellate jurisdiction, that it revise and corrects the proceedings in a cause already instituted, and does not create that cause. That, although a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper was, in effect, the same as to sustain an original action for that paper, and, therefore, seemed not to belong to appellate, but to original jurisdiction; and that consequently the authority given to this court by the 13th section of the judiciary act of 1789, to issue writs of *mandamus* to "persons holding office under the authority of the United States," was not warranted by the constitution. In *M'Intire v. Wood*, 7 Cranch, 504, it was decided that the power of the circuit courts to issue writs of *mandamus*, is confined by the judiciary act of 1789, exclusively, to those cases in which it may be necessary to the exercise of their jurisdiction. That case was brought up from the Circuit Court of Ohio, upon a certificate, that the judges of that court were divided in opinion upon the question whether that court had the power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, 371*) to the plaintiff, of certain lands in that state. In delivering the opinion of the court Johnson, J., stated that, "had the 11th section of the judiciary act covered the whole ground of the constitution,

HARPER moved for a *mandamus* in this cause, to the defendant, as register of the land office of the United States, at Zanesville, in the state of Ohio, commanding him to enter the application of the plaintiff, for certain tracts of land according to the provisions of the 9th section of the act of Congress of the 10th May, 1800, entitled "An act providing for the sale of the lands of the United States, in the territory of the United States, north-west of the Ohio, and above the mouth of Kentucky River." A rule to show cause had been obtained in the Supreme Court of the state of Ohio (being the highest court of law or equity of that state); whereupon the defendant appeared, and excepted to the jurisdiction of the court; but this plea was afterwards waived, and a case agreed between the parties, on which the court ordered the rule to be discharged. Harper now moved for a *mandamus* to issue from this *court, upon the [*370 ground that the case was within the appellate jurisdiction of the court under the equity of the judiciary act of 1789; that, although the court had determined that it had no original jurisdiction to issue writs of *mandamus* to persons holding office under the authority of the United States, yet it might have an appellate jurisdiction to issue a *mandamus* to such persons, where it had been refused by the highest court of law or equity of a state, in a case drawing in question the validity of a statute of, or an authority exercised under, the United States.

The motion was denied by the court.

*Motion denied.*²

S. C. 6 Wheat. 598; 3 Pet. 270.
Cited—12 Pet. 617; 13 Pet. 608; Woolw. 312.

there would be much reason for exercising this power in many cases, wherein some ministerial act is necessary to the completion of an individual right, arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause of the constitution which relates to this subject." The power of the Supreme Court to issue writs of *mandamus* to the other courts of the United States has been frequently exercised. *The United States v. Peters*, 5 Cranch, 115; *Livingston v. Dorgenois*, 7 Cranch, 577. But in the case of *Hunter v. Martin's lessee*, ante, vol. 1, p. 304, the court, in pronouncing its opinion upon its appellate jurisdiction in causes brought from the highest court of law or equity of a state, deemed it unnecessary to give any opinion on the question, whether this court has authority to enforce its own judgments on appeal, by issuing a writ of *mandamus* to the state court, as the question was not thought necessarily involved in the decision of that cause. *Id.* 362.

NOTE.—The Supreme Court, by *mandamus*, act directly upon the officer, or guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. The interference of the court with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and such a power was never intended to be given to them. *Decatur v. Paulding*, 14 Pet. 497.

The Circuit Court of the District of Columbia can
Wheat. 2.

award a *mandamus* to the Postmaster-General, to compel him to pass to the credit of certain contractors of the United States mail a sum found to be due to them by the solicitor of the treasury, under an act of Congress, which refers the matter to his decision, and there can be no review or appeal therefrom; it being a merely ministerial act, about which the Postmaster-General has no discretion. *Kendall v. U. S.*, 12 Pet. 524; 5 Cranch, C. C. 163.

A *mandamus* will not be issued to the secretary of the treasury to compel the payment of a debt

[PRIZE.]

THE LONDON PACKET.

MERINO, Claimant.

It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the Circuit Court, and to decide upon that evidence whether it is proper to allow further proof.

Affidavits to be used as further proof in causes of admiralty and maritime jurisdiction in this court must be taken by a commission.

IN the argument of this cause, *Winder*, for the claimant, stated, that there was an affidavit annexed to the record, which was taken under the order for further proof, in the court below, but which, not arriving until after the decree of condemnation was pronounced, was ordered by the Circuit Court to be transmitted, *de bene esse*, for the consideration of this court. He further stated that he had additional proof, taken since that time, to be used in this court; and he asked whether he should now be permitted to read these proofs, in order to show what was the nature of the evidence which existed, to clear away any former doubts in the cause.

MARSHALL, Ch. J. The court is of opinion that the affidavit transmitted from the Circuit Court may be now read. But as to the new proof now offered by the claimant, it is the practice of this court to hear the cause in the first instance, upon the evidence transmitted from the Circuit Court, and to decide upon that evidence whether it is proper to allow further proof. The new proof cannot, therefore, be now read; but, as the opposite party wishes it, the counsel may state the nature of the proof, though not the contents thereof in detail. If the case shall ultimately appear entitled to further proof, an order will be made for that purpose.

Further proof was ordered in the cause.

Ogden, for the claimant, offered to read affidavits, as further proof, which had not been taken under a commission. But they were rejected by the court; the cause was continued to the next term, and the further proof ordered to be taken under a commission, according to the rule of court of the present term.

*Cause continued.*¹

S. C. 1 Mason, 14; 5 Wheat., 122.
Cited—3 Wall. 460.

[CHANCERY.]

LENOX ET AL. v. ROBERTS.

Where all the property of the late Bank of the United States had been assigned by a general assignment in trust to assignees, for the purpose of liquidating its affairs, *Quere*, Whether any action at law could be maintained by the assignees, on certain promissory notes indorsed to, and the property of the bank, which had not been specially assigned nor indorsed to the assignees.

However this may be, it is clear that a suit in equity might be maintained by the assignees against the parties to the notes.

A demand of payment of a promissory note must be made of the maker, on the last day of grace; and where the indorser resides in a different place, notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day.

THIS was a suit in chancery, brought by the appellants against the respondent, in the Circuit Court of the District of Columbia, for the county of Alexandria; the complainants, in their bill, stated that the president, directors, and company of the Bank of the United States, by their deed, assigned to Thomas Willing, John Perot, and James S. Cox, their executors,

1.—*Vide* Appendix, Note I.

due from the United States, for which no appropriation has been made by law. *Reeside v. Walker*, 11 How. 272.

A writ of *mandamus* should not be issued to the secretary of the treasury, commanding him to pay to a judge of a territory his salary for the unexpired term of the office from which he had been removed by the President, and another person appointed thereto. *United States v. Guthrie*, 17 How. 284.

A *mandamus* will not lie to compel the secretary of the navy to pay an officer in the navy a sum which may be shown to be due. *Brashear v. Mason*, 6 How. 122.

The circuit courts have no power to issue a *mandamus* to the register of a land-office, commanding him to issue a final certificate of purchase to the purchaser of public lands. *McIntire v. Wood*, 7 Cranch, 504.

A *mandamus* will not be granted to compel the issuing of a patent for land, in a case where numerous questions of law and fact arise, some of them depending on circumstances which rest in parol proof yet to be obtained, and where the exercise of judicial functions is required; nor where it is reasonable to presume that there are persons at the time in possession under another title, and who should have an opportunity to defend. *U. S. v. The Commissioner*, 5 Wall. 563.

Mandamus cannot be issued to compel the commissioner of the general land-office, or the secretary of the interior, to issue a land patent. *Secretary v. McGarraban*, 9 Wall. 298.

A circuit court of the United States has power to issue a *mandamus* to a collector, commanding him to grant a clearance. *Gilchrist v. Collector of Charleston*, 1 Am. Law J. 429.

The Supreme Court has no authority to issue a *mandamus* to compel a governor of a state to return to another state a fugitive from justice. *Kentucky v. Dennison*, 24 How. 63.

The federal courts have jurisdiction to issue a *mandamus* to a municipal corporation to compel it to perform a duty, although such duty is created by state laws only. *U. S. v. Mayor, &c., of Burlington*, 2 Am. Law, Reg. N. S. 394; *Lower v. U. S.*, 1 Otto, 536.

Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of *mandamus* is the proper legal remedy. *Knox v. Aspinwall*, 24 How. 376; *Lyell v. St. Clair County*, 3 McLean, 580.

Mandamus lies to compel a collector to allow an importer, sued for unpaid duties, to inspect papers and records in the custom-house, necessary to enable him to prepare his defense. *U. S. v. Hatton*, 25 Int. Rev. Rec. 57.

Mandamus may be employed to compel an inferior court to decide a pending matter, but not to control its decision. *Ex-parte Flippin*, 4 Otto, 348; *Ex-parte Loring*, 4 Otto, 418.

Mandamus cannot be used to perform the office of an appeal or writ of error, as to compel an inferior court to grant a motion to vacate an order setting aside a judgment of non-suit. *Seldon v. Eq. T. Co.*, 4 Otto, 419; *Ex-parte Schwab*, 8 Otto, 240.

Mandamus lies, from Circuit Court, to compel officers of a municipal corporation, against which the court has rendered judgment, to levy a tax to provide means to pay the judgment. *U. S. v. Jefferson County*, 6 Reporter, 486. *Ex-parte Parsons*, 1 Hugh.

Wheat. 2.

administrators and assigns, all and singular the mortgages, judgments, suits, bonds, bills, notes, debts, securities, contracts, goods, chattels, money, and effects, whatsoever, due or belonging to the bank; together with all the ways, means, and remedies, for the recovery of the same, upon the special trust in the deed expressed. That Thomas Willing, John Perot and James S. Cox, afterwards assigned to the complainants, all and singular the debts included in the deed to them. The bill further stated that one Elisha Janney made and delivered to the defendant five promissory notes, dated and payable at Washington, and for the following sums, to wit, one note for \$1,000, payable in sixty days from the 22d February, 1809, &c.; amounting in the whole, to \$4,020. That the defendant discounted the said notes in the branch bank of the United States, at Washington, about the times they bear date, and indorsed the same at Washington. That Janney did not pay the notes when they became due, and that he was insolvent when the notes [375*] *became due. That the notes being made and dated in the county of Washington, were subject to the laws prevailing in Washington county, and the defendant bound to pay, on the failure of Janney to pay. The complainants claimed these debts as proprietors thereof; and called on the defendant specially to state whether Janney was not insolvent when the notes became due; whether the said notes were not duly protested for non-payment, and the defendant in due time notified thereof, and did not attempt to secure himself by some lien on Janney's property. The bill concluded by praying a decree against the defendant for the amount of said notes.

The defendant, in his answer, did not admit that the complainants were duly authorized to recover and receive the debts due to the bank; but he admitted that the notes were by him indorsed in blank, and delivered to Janney, but

contended that they were not obtained to be discounted in the Bank of the United States, nor were discounted for the benefit of the defendant, but for the use and benefit of Elisha Janney, who received the money from the bank. And that it was well known to the president and directors of the bank that the said notes were indorsed by the defendant for the accommodation of the said Elisha Janney, without any value being received by the defendant. The defendant's answer further alleged that due and legal notice was not given him of the non-payment of the notes; that no demand of payment of the notes was made of Elisha Janney, by the bank; that the notes were all dated at Alexandria; that Elisha Janney, on the *29th of May, conveyed all his property [*376 to Richard M. Scott, in trust for the payment of his debts, including the debt to the bank.

There was some contrariety of evidence as to the time when payment of the notes was demanded of the maker, and the time when notice to the defendant as indorser, who resided in Alexandria, was put into the post-office at Washington.

The bill was dismissed by the court below, on which the cause was brought by appeal to this court.

The cause was argued by *Swann* for the appellants, and by *Lee* for the respondent.

MARSHALL, Ch. J., delivered the opinion of the court:

The court will not give any opinion whether any action can be maintained at law upon any of the promissory notes in the record, by an assignee who does not claim the same by an indorsement upon the notes. For, in this case, there is no specific assignment of these notes; the only assignment is a general assignment, in trust, of all the property of the late Bank of the United States, and, as the act of incorpora-

22; *U. S. v. Vernon County*, 3 Dill. 281; *U. S. v. Keokuk*, 6 Wall. 514; *Walkley v. Muescatine*, 6 Wall. 481; *Lansing v. County Treas.*, 1 Dill. 522. Also to compel the board of supervisors of a county, chartered by law with the duty of levying a special tax to pay bonds and coupons for erection of county buildings, to discharge that duty, in order to pay judgment for such coupons. *Jenkins v. Culpepper County*, 1 Hugh. 568. Also to compel a county court to perform its duty of assessing a tax to pay for building levees. *Boro v. Phillips County*, 4 Dill. 216. But not to compel a county to levy taxes beyond the amount authorized by law. *U. S. v. Macon County*, 9 Otto. 582. Nor generally to compel a municipal corporation to levy a tax at any other time than at the time for the annual tax levy. *Wisdom v. Memphis*, 3 Cent. L. J. 109; 7 Reporter, 298; *U. S. v. Clark County*, 5 Otto. 799. It lies to compel levying a tax by city authorities for payment of municipal bonds. *Memphis v. U. S.*, 7 Otto. 298; *Memphis v. Brown*, 7 Otto. 300; *U. S. v. Fort Scott*, 9 Otto. 152. To compel the Union Pacific Railroad Company to operate its road over the bridge in the same general manner as it was operating the other portions of the road. *U. S. v. Un. Pac. R. Co.*, 4 Dill. 479. But not to compel a company to build and operate a railroad, although it has accepted a grant in aid of building the road. *Farm. L. Co. v. Henning*, 17 Am. L. Reg. 264. *Mandamus* will not issue to compel officers of a municipal corporation to levy a tax, unless the legislature has made it the duty of such officers to levy it. *U. S. v. New Orleans*, 2 Woods, 230. When a plain definite official duty, purely ministerial, requiring no exercise of discretion, is to be performed, and performance is refused, a *mandamus* will issue to compel its performance. *Board of Liquidation v. McComb*, 2 Otto. 531; *Gaines v. Thompson*, 7 Wall. 347.

A *mandamus* against a board of supervisors must be served on the individual members, not on the clerk. *Downs v. Board of Sup.*, 4 Biss. 508.

It furnishes no reason why the writ should not be granted, that the county commissioners had been enjoined by a state court, from levying the tax, when the *mandamus* is sought to compel the commissioners to levy the tax to pay a judgment rendered in a federal court against the *U. S.* *Clewes v. County of Lee*, 2 Woods, 474; *Smith v. Com'rs*, 2 Woods, 596; *U. S. v. Board of Supervisors*, 2 Biss. 77.

Where town officers resigned to avoid auditing and paying a judgment against a town, and their successors have not been elected, or appointed and qualified, they will be ordered to audit the judgment. *U. S. v. Badger*, 6 Biss. 208.

The power of the Circuit Court to compel, by *mandamus*, officers of a city to levy a tax to satisfy a judgment in that court, is not restricted by a provision in the charter of the city authorizing it to levy for ordinary purposes, a general tax not exceeding a certain rate. *Britton v. Platte City*, 2 Dill. 1.

It is no reason why a *mandamus* should not issue to compel payment of bonds of a city, that the entire revenue of the city is employed in paying the current municipal expenses. *U. S. v. City of Sterling*, 2 Biss. 408.

Where certain powers are confided to an officer, involving the exercise of judgment and discretion, no power exists in the courts to act upon the officer, so as to interfere with the exercise of that judgment while the matter is properly before him for action. *Gaines v. Thompson*, 7 Wall. 347.

tion had expired, no action could be maintained at law by the bank itself. Under these circumstances, the court is clearly of opinion that a suit may be maintained in equity against the other parties to the notes. Another question arises in the cause, whether the indorsers have had due notice of the non-payment by the 377* makers. As there is some contrariety of evidence in the record, the court will only lay down the rule. And it is the opinion of the court that a demand of payment should be made upon the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day.

Decree reversed.

Cited—9 Pet. 45; 10 Pet. 581; 15 How. 311; 18 How. 486; 4 Cranch, C. C. 137, 138; 1 Mason, 180.

[CONSTITUTIONAL LAW.]

COLSON ET AL. v. LEWIS.

The jurisdiction of the circuit courts of the United States extends to a case between citizens of Kentucky, claiming lands exceeding the value of five hundred dollars, under different grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land; and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant.

THE opinion of the court in this cause was delivered by WASHINGTON, J.:

This suit in equity was removed into the Circuit Court of Kentucky, upon the petition of the defendant, filed in the state court; and, upon a motion made in the Circuit Court to 378* dismiss the suit from that jurisdiction, the judges of that court were opposed in opinion, and caused the following facts to be stated, to enable this court to decide the question: Those facts are, that the value of the land in controversy exceeds \$500; that the complainants are citizens of Virginia, and that the grant, under which they claim title, is derived from the state of Kentucky by virtue of warrants issued from the land-office of Virginia, and locations upon the warrants before the separation of Kentucky from Virginia; that the defendant's grant is from the state of Virginia, by virtue of a warrant issued from the land-office, and a location made thereon, before the separation of Kentucky.

The question referred to this court is, whether the Circuit Court for the District of Kentucky can take jurisdiction of the cause, because the grants for the land in controversy, lying in Kentucky, were issued, the one by the state of Virginia, and the other by the state of Kentucky, when both grants purport to be founded upon warrants and locations made under the authority of the laws of Virginia.

It is the opinion of this court that the question which is referred to us by the Circuit Court of Kentucky is settled by the decision of

this court, in the case of the town of *Puclet v. Clark and others* (9 Cranch, 292).

The only difference between the two cases is, that in the case referred to, both parties claimed immediately under grants, the one from the state of Vermont, and the other from the state of New Hampshire, before the separation, which grants were the inception of [*379 title, and that, in this case, both parties claim under grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. But where the controversy arises upon claims founded upon grants from different states, as the present case is understood to be, the principle decided in the case which has been cited precisely governs this. The decision in that case is founded on the words of the constitution of the United States, which extends the judicial power of the United States to controversies between citizens of the same state, claiming lands under grants of different states. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case whatever may have been the equitable title of the parties prior to the grant.

Certificate accordingly.

*[CHANCERY.]

[*380

LEEDS

v.

THE MARINE INSURANCE COMPANY
OF ALEXANDRIA.

The answer of one defendant to a bill in chancery cannot be used as evidence against his co-defendant; and the answer of an agent is not evidence against his principal, nor are his admissions in *pet.*, unless where they are a part of the *res petita*.

Where a cause is set down for hearing on the bill, answer, and exhibits, without other pleadings, the whole of the answer must be considered as true.

THIS cause was argued by *Swann* for the appellants, and by *Lee* for the respondents.

NOTE.—The answer of one defendant is not evidence against his co-defendant. The cases are uniform to this general rule. *Harrison v. Edwards*, 3 Litt. 340; *Clark v. Reimsdyk*, 9 Cranch, 153; *Dale v. Madison*, 5 Leigh, 401; *Grealey's Eq. Ev.* 24, 25; *Daniel v. Ballard*, 2 Dana, 286; *Field v. Holland*, 6 Cranch, 8; *Mosely v. Armstrong*, 3 Mon. 237, 239; *Harrison v. Johnson*, 3 Litt. 286; *Haywood v. Carroll*, 4 Harr. & J. 518; *Fanning v. Pritchitt*, 6 Mon. 78, 80; *Blight v. Banks*, 6 Mon. 192, 197; *Hoomes v. Smock*, 1 Wash. (Va.) 389, 392; *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Rundlet v. Jordan*, 3 Greenl. 47; *Webb v. Pell*, 3 Paige, 368, 370; *DeForest v. Parsons*, 3 Hall. (N. Y.) 150; *Winters v. January*, Litt. Sel. Cas. 13; *Turner v. Holman*, 5 Monroe, 411; *Thomason v. Tucker*, 2 Blackf. 172; *Phoenix v. Ingraham*, 5 John. 412, 428; *Jones v. Bullock*, 3 Bibb. 467; *Hardin v. Baird*, Litt. Sel. Cas. 340; *Jones v. Tuberville*, 2 Ves. 11; *Morse v. Royal*, 12 Ves. 355, 360; *Van Reimsdyk v. Kane*, 1 Gall. 630; *Parker v. Morrell*, 12 Jur. 253; *Miller v. Gore*, 2 Pick. 25; *Wych v. Mead*, 3 P. Wms. 311; 1 Starkie Ev., 274, 285; *Grant v. Bisset*, 1 Caines' Cas. 112; *Dexter v. Arnold*, 3 Sumn. 152; *Lenox v. Wheat*, 2.

The opinion of the court was delivered by WASHINGTON, J.:

This is a bill filed on the equity side of the Circuit Court of the District of Columbia, for the county of Alexandria, by the Marine Insurance Company of Alexandria against Jedediah Leeds, praying for an injunction to a judgment obtained at law in that court against the said company by William Hodgson, for the use of George F. Straas and the said Jedediah Leeds. The judgment was obtained by Hodgson on a policy of insurance, dated the 30th of September, 1799, effected by him with the said company on the brig Hope, in his own name, for George F. Straas and others, of Richmond.

The bill states that in the year 1810 the above judgment was obtained for the use and **381*** benefit of *George F. Straas, and the respondent, Jedediah Leeds. That, previous to the said insurance, the said George F. Straas and Jedediah Leeds, being owners of a vessel called the Sophia, did, through the agency of the said William Hodgson, effect an insurance on the said vessel, the Sophia; for the premium on which, amounting to \$2,754, Hodgson gave his own note. That Straas paid \$929.00 in part of the premium note; and claiming a return of premium to the amount of the residue of the said note, he obtained an injunction in the Court of Chancery of Virginia, which was finally dissolved.

The ground on which that injunction is prayed is, that the balance of the premium due upon the insurance of the Sophia ought to be offset, so far as it goes, against the judgment at law upon the policy of the Hope.

The answer of Leeds denies that he had any interest in the Sophia at the time the insurance mentioned in the bill was effected, or that he was in any manner concerned in that insurance. He states that within a few months after the insurance on the Hope was effected, and long before the judgment at law was obtained, he had acquired by purchase from Straas and a

Mr. Trouin, the other owner of the Hope, all their interest in that vessel, and in the policy of insurance which had been effected upon her. He therefore denies the allegation in the bill that the judgment upon that policy was obtained for the use of Straas, or for that of any other person than himself. The answer refers to his agreement with *the other own- **[*382** ers, which are annexed to the answer as parts thereof.

William Hodgson, who was made a defendant to this bill, states, in his answer, that he received an order in November, 1799, to effect an insurance on the Sophia and her cargo, for account of Straas & Leeds; in conformity with which order he effected the said insurance with the complainants, and gave his own note for the premium. He adds that he always understood from Leeds that he was interested with Straas in the said insurance.

A general replication was filed; but whether to both the answers, or to the answer of Hodgson alone, is not clear; and a *dedimus* was awarded to take depositions. No depositions, however, were taken, and the record states that the cause was set down for hearing on the bill, answer, and exhibits, and was heard on those proceedings. The exhibits relied upon by the defendant below to prove his purchases from the other owners of the Hope of their interest in that vessel, and in the insurance effected on her, were rejected by the Circuit Court. That court decreed a perpetual injunction as to the sum claimed by the complainants; from which decree an appeal was prayed, and allowed, to this court.

The facts relied upon by the appellant, to induce a reversal of this decree, are: 1. That the interest of Straas in the insurance of the Hope was transferred to him, the appellant, for a full consideration, soon after the insurance was effected, and before the judgment at law was obtained. 2. That the appellant had no interest in the Sophia at the time when *the in- **[*383**

Notrebe, Hempst. 251; Hoare v. Johnstone, 2 Keen. 553; 1 Barb. Ch. Pr. 496.

Where there are several co-defendants, who have a common interest, the declaration of one of them is evidence against the others. Griffin v. Pleasant, 1 Fed. Eq. 132.

The admissions of a grantee in his answer, that his grantor, the complainant, had conveyed his property to defraud creditors, nor evidence against the grantor. Hardin v. Baird, 1 Litt. Sel. Cas. 340.

Where defendant referred to another as his agent and as having a more perfect knowledge than himself of the matters, the agent was made a party and his answer was allowed to be read against his principal. Anon., 1 P. Wms. 100. And one defendant may adopt the others answer, and so make it evidence against the former. Mosely v. Armstrong, 3 Mon. 229; Nantz v. McPherson, 7 Mon. 597, 600.

The answer of the obligee is no evidence against his previous assignee, a party in same suit (Fanning v. Pritchett, 6 Mon. 79, 80; Turner v. Holman, 5 Mon. 411); nor the answer of the wife against the husband (The City Bank v. Bangs, 3 Paige, 36); nor the answer of the debtor admitting his insolvency against a co-defendant, his surety. Daniel v. Ballard, 2 Dana. 286. The mere silence of one defendant is, of course, no evidence against his co-defendant. Timberlake v. Cobbs, 2 J. J. Marsh. 136; Blight v. Banks, 6 Mon. 192; Harrison v. Johnson, 3 Litt. 286.

The general rule above stated does not apply where all the defendants are partners in the same transactions; for, in respect to these, the answer of either is evidence against the others. Nor does it apply to cases where the other defendant claims through him whose answer is offered in evidence, as privy in estate. Clark v. Van Rensselyk, 9 Cranch, Wheat. 2.

153, 156; Chapin v. Coleman, 11 Pick. 331; Williams v. Hodgson, 2 Har. & John. 474, 477; Osborne v. U. S. Bk. 9 Wheat. 738, 832; Christie v. Bishop, 1 Barb. Ch. 105, 116; Field v. Holland, 6 Cranch, 8.

But upon a bill by one against his co-partners for an account, the answer of one of the partners will not be evidence against another, unless it appears that the defendants as constituting a partnership *inter se* of the one part were in partnership with the plaintiff of the other part. Chapin v. Coleman, 11 Pick. 331.

The answer of one defendant to a bill in chancery is not evidence for a co-defendant. Lenox v. Notrebe, Hempst. 251.

Admissions of an agent, made without authority, are not evidence against the principal. Robinson v. Morgan, Litt. Sel. Cas. 56.

The declarations of an agent should form part of the *res gestæ* in order to be competent evidence against either party. McClure v. Purcell, 3 A. K. Marsh. 63.

If they are part of the *res gestæ*, or took place while the agent was making the agreement, or otherwise proceeding within the scope and bounds of his authority, they are the declarations of the principal himself, and admissible in evidence. Rawson v. Adams, 17 John. 130; Sherman v. Crosby, 11 John. 70; Shelmaker v. Thomas, 7 Serg. & R. 109; Hood v. Reeve, 3 Carr. & P. 532; Coleman v. Southwick, 9 John. 45, 55; Benjamin v. Smith, 4 Wend. 334; Thalhimer v. Brinkerhoff, 4 Wend. 396; Burlington v. Calais, 1 Verm. 385; Perkins v. Burnet, 2 Root. 30; Mather v. Phelps, 2 Root. 150; Irving v. Mortley, 7 Bing. 543; Webb v. Alexander, 7 Wend. 281; Bk. of U. S. 2 Hill. N. Y. 451, 461, 464; Story on Agency secs. 134, 135.

surance was effected upon her, the premium on which is claimed in this case as an offset against the above judgment; and that the insurance of the Sophia was not made for the account or by the orders of the appellant.

The fact last mentioned must be considered as fully established, because the answer, in which it is asserted, is responsive to a direct allegation contained in the bill, and is not contradicted by any evidence in the cause.

The answer of Hodgson to this bill is not evidence against the appellant. The general rule which prevails in chancery is that the answer of one defendant cannot be used as evidence against his co-defendant; and it is the opinion of the court that this case does not furnish an exception to that rule. The answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless where they are a part of the *res gesta*.

As to the other fact upon which the appellant relies, there is more difficulty. The bill states that the judgment was recovered for the benefit of Straas & Leeds. This is denied in the answer, and thus far we may consider that fact as established in favor of the appellant. The answer goes further, and alleges that the recovery was for the sole benefit of the respondent. But this allegation is not proved, and there is no charge in the bill in relation to that fact which the answer contradicts.

After all, it is very difficult to understand, from this record, by what rules this cause was tried and decided in the Circuit Court. It is **384*** stated in the record *that the cause was set down for hearing on the bill, answer, and exhibits. Now, if this was the real state of the cause, there can be no doubt but that the whole of the answer must be considered as true. But it appears on another part of the record that a general replication was filed, and that a commission was allowed for taking depositions. These entries are totally inconsistent with each other, unless the latter entry should have been made in reference to Hodgson's answer, which it immediately follows.

Whether setting down the cause for hearing on the bill and answer amounted to a waiver of the replication, in case it was put in by both defendants, need not be decided in this case, because it is the opinion of this court that the record exhibits the proceedings in a shape so irregular and equivocal that no final decree can be made which may not be productive of injustice to one or the other of the parties.

The decree of the Circuit Court, therefore, must be reversed, and the cause remanded with directions to that court to allow the parties to amend the pleadings.

Decree reversed.

Cited—10 Pet. 209, 211; 2 Cranch, C. C. 600; 2 Paine, 71; 1 Bald. 495; Deady, 328; 3 Cliff. 542.

385*] *RABORG ET AL. v. PEYTON.*

An action of debt will lie by the payee or indorsee of a bill of exchange, against the acceptor, where it is expressed to be for value received.

Debt will lie by the payee of a note against a maker, where the note is expressed to be for value received.

268

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by *Jones* for the plaintiffs in error, and by *Taylor* for the defendant in error.

STORY, J., delivered the opinion of the court:

This is an action of debt brought against the defendant in error, as acceptor of a bill of exchange by the plaintiffs in error as indorsees. The declaration alleges that the bill was drawn, accepted, and indorsed, for value received. The only question is, whether debt lies in such a case.

The general principle has been very correctly stated by Lord Chief Baron Comyn, that debt lies upon every express contract to pay a sum certain; and he adds, also, that it lies though there be only an implied contract. (Com. Dig. Debt, a. 8, a. 9.) But it has been supposed that this principle does not apply to an action on a bill of exchange, even where the suit is brought by the payee against the acceptor, *and *a fortiori* not where it is brought **[*386]** by the indorsee. It is admitted that in *Hardres*, 485, the court held that debt does not lie by the payee of a bill of exchange against the acceptor. The reasons given for this opinion were, first, that there is no privity of contract between the parties; and, second, that an acceptance is only in the nature of a collateral promise or engagement to pay the debt of another, which does not create a duty. It is very difficult to perceive how it can be correctly affirmed that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another for the use of a third person, it has been settled that such a privity exists that the latter may maintain an action of debt against the bailee. (*Harris v. De Bervoir*, Cro. Jac., 687.) And it is clear that an acceptance is evidence of money had and received by the acceptor for the use of the holder. (*Tallock v. Harris*, 3 T. R., 174; *Vere v. Lewis*, 3 T. R., 182.) It is also evidence of money paid by the holder to the use of the acceptor. (*Ibid*, and *Bailey on Bills*, 164, 3d edition.) A privity of contract, and a duty to pay, would seem, in such case, to be completely established; and wherever the common law raises a duty, debt lies. The other reason would seem not better founded. An acceptance *is **[*387]** not a collateral engagement to pay the debt of another; it is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is, of itself, an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort

Wheat. 2.

to the drawer but upon a failure of due payment of the bill. The engagement of the drawer, therefore, may more properly be termed collateral. Yet it has been held that debt will lie in favor of a payee against the drawer in case of non-payment by the acceptor. (Hard's case, Salk., 23; *Hodges v. Steward*, Skinn., 346; and see *Bishop v. Young*, 2 Bos. & Pull., 78.)

The reasons, then, assigned for the decision in *Hardres* are not satisfactory; and it deserves consideration that it was made at a time when the principles respecting mercantile contracts were not generally understood.

The old doctrine upon this subject has been very considerably shaken in modern times. An *indebitatus assumpsit* will now lie in favor of the payee against the acceptor; and it is generally true that where such an action lies, debt will lie. And a still stronger case is, that an acceptance is good evidence on a count upon an **388*** *instimul compyluscent* *(*Israel v. Douglas*, 1 H. Bl., 239), which can only be upon the footing of a privity of contract.

But the most important case is that of *Bishop v. Young* (2 Bos. & Pull., 78). It was there held, in opposition to what was supposed to have been the doctrine of former cases, that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. That decision was given with measured caution, and the court expressly declined to give any opinion upon any but the case in judgment. The case in *Hardres* was there discussed, and although its reasoning was not impugned, an authoritative weight was not attempted to be given to it. In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and after indorsement, each incurs the same liabilities. And if an action of debt will lie in favor of the payee of a note against the maker, it is not easy to perceive any sound principle upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties as the drawing of a note.

The case has been thus far considered as if the action were brought by the payee against the acceptor. And this certainly presents the strongest view in favor of the argument. But in point of law every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as **389*** the payee. An acceptance is as *much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee. (3 T. R., 172; *Id.*, 184, *Grant v. Vaughan*, 3 Burr., 1515.)

Upon the whole, we do not think that the authority in *Hardres* can be sustained upon principle; and we see no inconvenience in adopting a rule more consonant to the just rights of the parties as recognized in modern times. In so doing, we apply the well-settled doctrine that debt lies in every case where the common law creates a duty for the payment of money, and in every case where there is an express contract for the payment of money. We are therefore of opinion that debt lies upon a bill of exchange by an indorsee of the bill

against the acceptor, when it is expressed to be for value received. The case at bar is somewhat stronger; for the declaration expressly avers that the bill was drawn, indorsed, and accepted for value received, and the demurrer admits the truth of the averment.

This opinion must be certified to the Circuit Court of the District of Columbia.

From the view which has been taken of the case it is unnecessary to consider whether the statute of Virginia applies to it or not.

Certificate accordingly.

Cited—6 Pet. 22.

*[CHANCERY.]

[*390

THE UNION BANK OF GEORGETOWN.

v.
LAIRD.

By the act of incorporation of the Union Bank of Georgetown, ch. 86, sec. 11, the shares of any individual stockholder are transferable only on the books of the bank, according to the rules (conformably to law) established by the president and directors; and all debts due and payable to the bank by a stockholder, must be satisfied before the transfer shall be made, unless the president and directors should direct to the contrary. Held, that no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice.

A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either until the debt is paid; therefore, the bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same.

APPEAL from the Circuit Court for the District of Columbia.

James Smith, on the 19th of March, 1811, drew a bill at sixty days sight, on James Patton, in favor of Andrew Smith, for \$1,800. This bill was accepted by Patton, and was discounted in the Union Bank of Georgetown, at the instance of Andrew Smith, and when it became due, another bill of the same tenor was drawn and accepted by Patton, and discounted for the purpose of paying the preceding acceptance. This last acceptance became due on the 14th and 17th of July, and was protested for

NOTE.—The provision usual in charters, that no transfer of the stock shall be effectual until entered in the books of the corporation, is a regulation for the security of the corporation itself, and of third persons making transfers without notice of any prior equitable transfer. It relates to the transfer of the legal, and not of the equitable title. As between vendor and vendee, a transfer not in conformity to such provisions, passes the equitable title, and divests the vendor of his interest. *Black v. Zacharie*, 3 How. 483; *Bank of Utica v. Smalley*, 2 Cow. 777; *Gilbert v. Manch. Iron Co.*, 11 Wend. 828; *Com. Bk. v. Cartright*, 22 Wend. 362; *Quiner v. Marble Ins. Co.*, 10 Mass. 476; *Sargeant v. Franklin Ins. Co.*, 8 Pick. 90; *Sargeant v. Essex R. Co.*, 9 Pick. 202; *Nesmith v. Wash. Bk.*, 6 Pick. 324; *Black v. Zacharie*, 3 How. 483; *Farm. Bk. v. Maryland*, 6 Gill. 50; *Chamb. Ins. Co. v. Smith*, 11 Penn. st. 120.

Under a provision in a charter of a bank that debts actually due by a stockholder must be paid before he can have his stock transferred, the bank has a right to prevent a transfer, on its books, of the

391] *non-payment; and at the time that it became due, Patton held 50 shares of stock in the Union Bank, which the bank considered liable to the payment of this acceptance, under their act of incorporation.

At this time, also, James Patton had another debt pending in the bank. Being one of the original subscribers to the bank, for the above-mentioned 50 shares of stock, he borrowed of the bank, in January, 1811, the sum of \$1,500, and to enable him to obtain the loan, procured Marsteller and Young, and the defendant, Laird, to become his indorsers. This loan was renewed from time to time, and was continued, without any default of payment, until about the 29th of July, 1811.

On the 26th of March, 1811, Patton obtained from the officers of the bank a certificate of his 50 shares of stock, and on that day delivered it to the defendant, Laird, to secure him, as it was alleged, against his indorsement for Patton.

On the 10th of July, 1811, Patton executed a power of attorney, authorizing the defendant, Laird, to make a transfer of his stock; and on the 22d of August, 1811, he executed a deed of assignment to the defendant, Laird, of his stock; but as this assignment was not made upon the books of the bank, it was not considered a valid assignment, according to the rules of the bank.

Laird, considering himself entitled to the benefit of these shares, under the circumstances, applied to the bank to transfer upon their books the shares for his own benefit. But the bank, upon the ground that the acceptance which **392*]** Patton had failed to pay, *operated as a lien upon those shares, refused to suffer the transfer to be made until that debt was paid.

Laird, some time after this refusal, to wit, on the 22d of February, 1812, paid the \$1,500, for which he was indorser for Patton, reserving, nevertheless, his equitable claim upon the stock, and then instituted this suit in chancery, against the Union Bank, to compel them to suffer the transfer to be made on their books

for his benefit, and to account with him for the intermediate profits. He charged in his bill, that when Patton obtained the certificate of his shares of stock, it was with a view of pledging those shares with him for his indemnification, and that the officers of the bank had a knowledge of this fact. He also alleged that the power of attorney was granted with the same view.

The directors of the bank filed their answer to this bill, and denied any knowledge of the object for which the certificate of shares was obtained; and alleged that they knew nothing of any claim of Laird upon those shares, until after the protest of Patton's acceptance.

The court below made a decree in favor of Laird, that the bank should suffer him to transfer the shares for his own benefit, and have an account for the intermediate profits.

The cause was argued by *Swann* for the appellants, and by *Jones* for the respondent.

STORY, J., delivered the opinion of the court:

*The principal question is, whether, [***393** under the circumstances of this case, Laird, the original plaintiff, has a right to a transfer from the bank of the fifty shares of its capital stock, standing in the name of Patton, without paying the acceptance of Patton; or, in other words, whether Laird has a priority of lien upon these shares. By the 11th section of the act of incorporation (act of 18th February, 1811, ch. 86), it is enacted, "That the shares of the capital stock, at any time owned by any individual stockholder, shall be transferable only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf, by the president and directors; but all debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder, requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary." The certificate, issued

stock of any debtor of the bank; and if it claims more than is due the stockholder must tender what is due, in order to put the bank in the wrong. *Piereson v. Bk. of Wash.*, 3 Cranch, C. C. 363.

The stock of a corporation in Massachusetts is so within the powers of its courts, having all parties before them, that their decree will transfer the title of the stock to a third person. *Sprague v. Cocheco Man. Co.*, 10 Blatchf. 173.

A by-law, requiring transfers of stock to be made on the books, may be waived by a corporation, so that purchaser becomes a stockholder. *Upton v. Burnham*, 3 Biss. 431.

A corporation, organized under a statute which provides that the stock of the company shall be transferable in such manner as shall be prescribed by the by-laws of the company, has power to make a by-law providing that no transfer of stock shall be made upon the books of the company, until after payment of all indebtedness to the corporation from the person in whose name the stock stands on its books. *Prendergast v. Bk. of Stockton*, 2 Sawyer, 108.

In Connecticut, where a clause is found in the charter or by-laws, to the effect that to be valid and effectual, it is held that the transfer of stock must be registered on the company's books; the transfer is invalid and of no effect for any purpose, unless made or registered on such books. *Marl. Man. Co. v. Smith*, 2 Conn. 544; 5 Conn. 246; *Northrop v. Newton*, 3 Conn. 544; *Oxford Co. v. Bunnell*, 8 Conn. 552; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; 20 Conn. 114.

In other states, and in the Supreme Court of the

United States, the rule is held as first above stated in this note. *Chateau Sp. Co. v. Harris*, 20 Mo. 382; *Conant v. Seneca Bk.*, 1 Ohio st. 238; *Sabine v. Bk. of Woodstock*, 21 Vt. 353; *St. Louis Ins. Co. v. Goodfellow*, 9 Mo. 149.

A lien upon shares of a stockholder for debts due from him to the corporation is usually given by statute or act of incorporation to incorporated banking companies, and includes notes discounted, whether due or not, and whether stockholder is liable as principal or indorser. *Utica Bk. v. Small-ey*, 2 Cow. 770; *Rogers v. Huntington Bk.*, 12 Serg. & R. 77; *Grant v. Mech. Bk.*, 15 Serg. & R. 140; *Sewall v. Lancaster Bk.*, 17 Serg. & R. 285; *Donner v. Bk. of Zanesville*, Wright (O.) 477; *McDowell v. Bk. of Wilmington*, 1 Harr. (Del.) 27; *Morgan v. Bk. of N. A.*, 8 Serg. & R. 73; *Plymouth Bk. v. Bk. of Norfolk*, 10 Pick. 454; *Child v. Hud. Bay Co.*, 2 P. Wms. 207; *Cunningham v. Ala. Ins. Co.*, 4 Ala. (N. S.) 652.

An assignee of stock cannot acquire any rights against the corporation superior to those possessed by the assignor. He takes it subject to the equity of the company under its charter and by-laws. *Mech. Bk. v. N. Y. R. Co.*, 13 N. Y. 589; *McCready v. Rumsey*, 6 Duer. 574; *Stebbins v. Fire Ins. Co.*, 3 Paige. 350; *Arnold v. Suffolk Bk.*, 27 Barb. 421; *James v. Woodruff*, 10 Paige. 541; *Reese v. Bk. of Commerce*, 14 Md. 271; *Merrill v. Call.*, 15 Me. 428; *Skowhegan v. Cutler*, 49 Me. 315; *McLean v. Laf. Bk.*, 3 McLean, 587; *St. Louis Ins. Co. v. Goodfellow*, 9 Mo. 149; *McDowell v. Bk. of Wilmington*, 1 Harr. (Del.) 27; *Tuttle v. Walton*, 1 Ga. 43.

See note on this subject in 1 *Potter on Corp.* 342.

Wheat. 2.

to Patton for the 50 shares held by him (which is in the usual form), declares the shares to be "transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate." No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. The president and directors of the bank expressly deny that they have waived, or ever intended to waive, the right of the bank to the lien, for debts due to the bank, by the form of the certificate, and **394*** *that they ever directed any transfer to be made to Patton which should stipulate to the contrary. Under such circumstances, it must be held that the shares are responsible for the debts due to the bank.

The next inquiry is, whether the bank has done anything to deprive itself of the lien upon the shares for the acceptance of Patton, since the same became due, and to let in the equitable title of the plaintiff. The acceptance is not yet paid; and nothing has been done by the bank affecting its rights, unless the subsequent taking of security for the acceptance from Smith, can be construed so to do. Certainly the bank had a right to require additional security from the indorser of the acceptance; and it cannot be perceived upon what principles this can be construed an extinguishment of its lien upon the shares of the acceptor. A creditor may lawfully take and hold several securities for the same debt from his joint debtors; and he cannot be compellable to yield up either until his debt is paid. And in this case, there is no want of equity in holding the shares of Patton, who is the immediate debtor to the bank, liable in the first instance, rather than resorting to the security of an indorser, who is only liable upon the default of the acceptor.

The decree of the Circuit Court must therefore be reversed, and the bill be dismissed.

Decree accordingly.

Cited—1 Pet. 309; 10 Pet. 614, 616; 3 How. 513; 4 Biss. 231; Taney, 331; 1 Sum. 148; 10 Bank. Reg. 105; 13 Bank. Reg. 152; 5 Dill. 76, 79.

395*]

***[PRACTICE.]**

THE UNITED STATES v. BARKER.

A writ of error does not lie to carry to this court a civil cause which has been carried from the District to the Circuit Court by writ of error.

The United States never pay costs.

Baldwin, for the plaintiffs in error, moved to dismiss the writ of error in this case, as having been improvidently allowed, the cause having been carried up from the District to the Circuit Court of New York by writ of error; and according to the former decisions of this court, a writ of error does not lie to carry to this court a civil cause which has been carried from the District to the Circuit Court by writ of error.¹

1.—United States v. Goodwin, 7 Cranch, 108; United States v. Gordon, *Id.* 287; The United States v. Ten Broek, *ante*, p. 248. Wheat. 2.

Ogden, for the defendant, moved for costs

MARSHALL, *Ch. J.* The United States never pay costs.

Writ of error dismissed without costs.

Cited—12 Pet. 144; 14 Pet. 621; 2 Wood. & M. 68.

***[COMMON LAW]**

[*396]

THELUSSON ET AL. v. SMITH.

T. brought a suit against C. in the Circuit Court of Pennsylvania, which was referred to arbitrators; an award was made in favor of T., and a judgment *nisi* entered on the 20th May, 1805; exceptions were filed, overruled, and judgment finally entered on the 15th of May, 1806. On the 22d May, 1805, C. executed a conveyance of all his estate to trustees, for the payment of his debts, at which time he was indebted to the United States, on several duty bonds which became due at different periods subsequent to the 22d May, 1805. Suits were brought on the bonds as they severally became due, and judgments obtained, and executions issued, under which a landed estate belonging to C. was levied upon and sold. T. brought an action against S. (the marshal of the district), who levied the executions, to recover so much of the funds in his hands as would be sufficient to satisfy T.'s judgment. In this suit the jury found a special verdict that C. was insolvent on the 20th May, 1805, but that it was not notoriously known; and the parties agreed that on the 22d May, 1805, he was unable to satisfy all his debts, and that this fact should be considered part of the special verdict.

Held, that the word *insolvency*, mentioned in the duty act of 1790, ch. 35, sec. 45; and repeated in the act of 1797, ch. 74, sec. 5, and of 1799, ch. 128, sec. 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency.

But if before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution, the property is divested out of the debtor, and cannot be made liable to the United States.

A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the law defeats the preference in favor of the United States in the cases specified in the act of 1790, ch. 128, sec. 65.

***ERROR** to the Circuit Court for the **[*397]** District of Pennsylvania.

The plaintiffs in error instituted a suit in the Circuit Court for the District of Pennsylvania against William Crammond, which, by the agreement of the parties, and the order of the court, was referred to arbitrators. An award was made in favor of the plaintiffs, and a judgment *nisi* was entered on the 20th of May, 1805. Exceptions were filed and overruled; and a judgment was finally entered on the 15th of May, 1806. On the 22d of May, 1805, Crammond executed a conveyance of all his estate to trustees, for the payment of his debts, at which time he was indebted to the United States, on several duty bonds, which became due at different periods subsequent to the 22d of May, 1805. Suits were instituted on these bonds as they severally became due, and judg-

NOTE.—See note to Prince v. Bartlett, 8 Cranch, 431.

ments were obtained and executions issued, under which a landed estate belonging to Crammond, called Sedgely, was levied upon and sold.

The plaintiffs, considering this property as being bound by their prior judgment of the 20th of May, 1805, and that they were entitled to be first satisfied out of the money in the hands of the defendant (the marshal of the court), which he had raised under the above executions, issued in the name of the United States, they brought this action to recover so much of those funds as would be sufficient to satisfy their judgment.

Upon the trial of the cause in the Circuit Court, the jury found that Crammond was insolvent on the 20th of May, 1805, but that it was not notoriously known; subject to the opinion of the court upon a state of facts agreed between the parties, whether the plaintiffs were entitled to recover. The parties further agreed in writing that, on the 22d of May, 1805, Mr. Crammond was unable to satisfy all his debts, and that this fact should be considered as part of the special verdict. The other facts referred to by the jury are, in substance, those which have been mentioned. The Circuit Court gave judgment against the plaintiffs below, and the cause was brought by writ of error to this court.

Hopkinson, for the plaintiffs in error. 1. It is now settled that the insolvency of a debtor which is to give a preference to the United States over the other creditors, must be, not a mere inability to pay debts, but a legal insolvency, testified by some act of notoriety. The question is, whether the United States were entitled to a priority of payment, out of this real estate, over a judgment rendered previous to the act of insolvency, with which, and by virtue of which, the right of priority originated and attached. Whatever may be the nature and effect of the priority given by the acts of Congress to the United States, it has been distinctly decided that it is not a lien;¹ and, therefore, it is said, that a conveyance shall not be defeated by it, which would be to give it the effect of a lien. It is clear the legislature did not consider the preference ³⁹⁹ given to the United States to have the force of a lien on the real estate of the debtor, because the act of 1798, ch. 88, sec. 15, expressly gives to the United States a lien on the real estate of supervisors and other revenue officers, from the time of the commencement of the suit against them. Certainly it cannot be imagined the United States intended to have a less security against the delinquency of their revenue officers than in the case of ordinary debtors; on the contrary, it is unquestionable that by the law of 1798 they intended to increase their security against their revenue officers; and yet, if the mere right of priority has the force and effect now contended for, the law of 1798 was not only unnecessary, but has really diminished the security for the payment of moneys collected by and due from these officers. That law limits the responsibility of the real estate to the commencement of the suit; whereas, the responsibility now claimed under the privilege of

preference, has no limit. Should it be answered to this, that under the law of 1798 the United States are made secure even against conveyances and mortgages subsequent to the commencement of their suit, still it shows that the legislature considered a lien on the real estate of the debtor as something of a nature and effect higher and better than the mere priority they before enjoyed; and if it be so, it must hold the same rank in the hands of a citizen, and be considered superior to the priority of the United States; especially when that priority attached after the lien was in full force and operation on the real estate of the debtor. If any argument may be drawn from the reasoning of ⁴⁰⁰ the counsel of the United States in other cases, where the same doctrine was agitated, it will be found, that in the case of *The United States v. Fisher and others*,² it was expressly declared that this priority was not claimed with the creation of the debt, nor while the debtor remained master of his own property; and such is now the admitted law. It follows, then, that in the present case the right of the United States did not come into being until the execution of the assignment on the 22d of May; and unless, therefore, it has a retrospective force and operation, it cannot destroy or disturb a judgment entered on the 20th of May, vesting an important and recorded right in the plaintiffs. Supposing, then, that a mere right of priority of payment could, in any case, overreach a *bona fide* judgment, in relation to the real estate of the debtor, bound by that judgment, when the priority constitutes no lien upon it; still, the question remains, whether a subsequent right acquired by the United States can have a retrospective operation so as to overreach and defeat a prior right vested fully and fairly in a citizen. To permit this, is so contrary to all practice and equity, and to the general policy of the law, that the court will not sanction it, unless bound by the most clear and imperious authority. What, then, is the provision of the act of Congress under which this high and extraordinary privilege is claimed? After the decisions that have taken place on this subject, we are warranted in saying that nothing is given but a priority or preference ⁴⁰¹ of payment to the United States, in case of the insolvency of their debtor; but no lien, general or specific, on any part of his property; nothing which interferes with his control over that property; which prevents his selling it altogether; or pledging it for a debt; or exercising, *bona fide*, any of the usual acts of ownership in relation to it. A man may be a debtor to the United States, and lawfully do all these things to the moment of his legal insolvency; he may do them when he is actually insolvent; that is, unable to pay all his debts. In *The United States v. Fisher*³ this priority is declared not to affect a purchaser. In Wall. Rep., 22, a particular assignee is protected. In *The United States v. Hooe*⁴ a mortgagee in trust, as well as a mortgagee generally. Then, on what principle of law, of justice, or equity, should not a judgment receive the same favor and protec-

2.—2 Cranch, 238.

3.—2 Cranch, 390.

4.—3 Cranch, 90.

1.—United States v. Hooe, 3 Cranch, 90.

tion? 2. In Pennsylvania a judgment has always been considered a higher and better security than a mortgage; inasmuch as it has been supposed to give the same fixed, immovable lien, on all the real estate of the debtor, which a mortgage, which is also but a security for the payment of a debt, gives on a specified part of it. There is no event on which, and no means by which, the mortgagee can turn this conditional into an absolute conveyance. If the money is not paid, he must proceed to obtain a judgment on his mortgage; to take the mortgaged premises in execution; to sell them by the process and officer of the ⁴⁰² court; from whom he must receive ^{*}his debt, interest, and costs, and the surplus belongs to the debtor, as in the sale of any other property taken in execution for the satisfaction of a judgment. On what principle can it be maintained that every act of a debtor over his real estate in favor of a purchaser, or creditor, shall be available against this preference of the United States, except the most solemn of all acts—a public recorded judgment? That this priority is not a lien on the property of the debtor has been expressly decided; and, for this reason, it is not permitted to disturb a purchaser or mortgagee; it is, therefore, something less, in the estimation of the law, than a lien; how, then, can it overthrow the firmest of all liens—a judgment duly rendered? If a debtor, by a particular assignment, should appropriate his real estate to pay a debt, or a number of debts, the United States could not defeat the appropriation by their claim to a preference; and yet when he makes the same appropriation by a judgment, or, what is perhaps stronger, the law does it for him, and he certainly also intends to do it, the appropriation is invalid and ineffectual against the claim of the United States, resting on a priority arising, perhaps, years after the appropriation was thus solemnly made, and on the faith of which the innocent creditor may have trusted his all. Another strange consequence and incongruity grows out of this doctrine, so pregnant with inconvenience and injustice. A judgment has unquestionable preference over a subsequent conveyance, assignment, or mortgage. The priority, then, of the United States, shall ⁴⁰³ ^{*}not affect the conveyance, an assignment, or a mortgage, but it shall destroy that which is greater than them all. It overthrows the stronger security, while it cannot avail against the weaker. Further, when a debtor has secured the debt by a judgment, is it not a sound principle that he cannot impair the security of his creditor by any subsequent act of his own, by any contract or conveyance he may afterwards make? How, then, can he do so by a bond given to the United States, by a contract afterwards made with them? 3. The only distinction that can be drawn between a judgment and a mortgage is, that the latter is said to be a specific; and the former a general lien; or, in other words, the one covers the whole, and the other but a part of the real estate of the debtor. This has always been considered a circumstance to the advantage of the judgment; and it is by a singular course of argument it should be now discovered to be precisely otherwise. In the first place it may be asked, why should either a general or specific

lien or right be overreached by a subsequent right? and why should not the one as well as the other? There is no difference in justice or in law. A general lien at law is just as good and effectual as a specific lien. In equity a general lien is sometimes made to yield to an equity which would not disturb a specific lien; as in the case where one agrees to purchase, and pays money on the contract, he has been permitted to prevail against a judgment, but not against a mortgage. But, in this case, the purchaser must succeed on his equity; for if he has none, ^{*}as if he has paid a de- ⁴⁰⁴fective consideration, he will not prevail against a judgment.¹ Further, the payment, or advance of money, must have been on the specific land, to give the equity to his claim. Have the United States any such equity in this case? They have no equity of any sort; they have advanced nothing; they have trusted nothing on the faith of this land; on the contrary, the plaintiffs have advanced their money on the faith of it: money is often lent and no other security is taken for it than a judgment. But the claim of the United States is placed mainly, if not wholly, on the words of the act of Congress. What, then, is to be found there which recognizes any distinction between the rights of a general and specific lien? There is nothing. The mortgagee has, therefore, been excepted on general principles of law and justice; and the same principles afford an equal protection to the judgment creditor. 4. The acts of Congress state particular occurrences—insolvency for instance—from the happening of which the United States shall have a priority of payment over other creditors, out of the property of the debtor; out of the property which he has at the time of the happening of the fact, which gives the right; at the time of the insolvency, in the present case. This is the origin, the commencement, the creation of the right, even of priority; and there is nothing in any of the acts of Congress to give a retrospective operation to this right, by which it shall ^{*}overreach other rights previously ⁴⁰⁵vested. And as there is nothing in the words of the act to produce this effect, neither is there anything in the legal nature of the priority to do it, inasmuch as the court has decided it is no lien; and that it has no power to disturb a previous conveyance or mortgage. The law enacts that in all cases of insolvency where the estate in the hands of the assignee shall be insufficient to pay all the debts due, the debts due to the United States shall be first satisfied. And any assignee who shall pay any debt due by the insolvent, out of his estate and effects, until the debts due to the United States are satisfied, shall be answerable in his own person and estate. But what, properly and legally speaking, is the estate of the insolvent, in the hands, that is, at the disposal of the assignee? Surely nothing but the interest which remains in him after discharging incumbrances legally imposed upon it. 5. But it is said the assignee shall not pay any debt before that of the United States is satisfied; and that a judgment is a debt, and, therefore, to be postponed. I would rather say a judgment is the security, or means to enforce the payment of a debt, than

1.—1 P. WILL. 277.

that it is the debt. But if it be a debt, it is also something more than a debt; it is a debt accompanied by a lien to secure its payment; and the question is not whether the debt shall be postponed, but whether the lien shall be defeated. So the money secured to be paid by a mortgage is a debt, appearing, and, indeed, created by a bond referred to in the mortgage. The difference between the cases, then, is only **406*** this, *that the one is a debt secured by a judgment binding all the real estate and the other is a debt secured by a mortgage binding a part of that real estate. The supposed distinction between a general and specific lien has no influence on this point in the case; and if a judgment is to be cut out on the effect of the words "any debt," in the act of Congress, I know not what is to save a mortgage. It seems to be obvious that the law, when it speaks of debts to be postponed to the United States, relates only to the case of a mere debt, standing on its own strength and security, and never intended to interfere with any collateral or additional act done in relation to the debt, which gives a new right to the creditor; but that right, whatever it may be, shall have its full and fair legal operation and efficacy. If, then, the debtor has pledged his property, or given a lien upon it, or any part of it, it was never intended to disturb this right. By taking preference of a mere debt, no injustice is done; at least, no rights are destroyed; because the debtor himself might have done the same in favor of any creditor, having it in his power to give preferences; and every creditor knowing he has this power cannot complain if it is exercised. On this construction, therefore, the act of Congress brings no loss upon the creditor but what he knew he was exposed to, and consented to take the chance of, when he trusted his debtor. There is a clear distinction between taking priority of payment of a debt and overthrowing a security, a lien, a pledge, general or specific, given for the payment of the debt.

407*] *Jones, contra.* 1. This case is within the very terms of the 65th section of the act of March 2, 1799, ch. 128, for collection of duties. The debt was due by bond for duties; the debtor was insolvent, as well in fact as in law, according to the legal intendment of insolvency as explained in that section; his assignees, finding the estate in their hands insufficient to pay all the debts, have first satisfied that due to the United States, pursuant to the strict injunctions of the law, and under the peril of being chargeable, in their own persons, with the debt. The term first, in the section, relates simply to the antecedent "all debts." Then the debt due to the United States shall be satisfied first of all debts; without distinction of the quality or dignity of the other debts, whether of record by specialty or simple contract. So the assignees are prohibited from paying any debt (without exception) before that due the United States, at the peril of being personally chargeable. The principle upon which this court, in the case of *The United States v. Hooe*,¹ construed the assignment of property mentioned in another clause of this section, to intend an assignment of all the debt-

or's property, applies more directly and forcibly to give the United States a preference over all debts, without exception; indeed, it can scarcely be called a construction, but a plain reading. The plaintiffs contend that one species of debt—a judgment—still maintains its former dignity and rights unimpaired; that they, as judgment creditors, ought to have been *preferred [**408** to the United States. Before that pretension can be sustained, the plaintiffs must bring their case within some exception of the law, either express or necessarily implied. The former is out of the question; for the directions of the law are unqualified, and without exception. If there be any such implied, it must be so latent, and is to be inferred only from such remote premises, and by so refined and subtle a process of reasoning, as would present a strange anomaly in legislation. Surely there is no defect of congruity or precision imputed by the counsel on the other side to our construction of the law which is, in any degree, comparable to that of leaving so important and prominent an exception from plain and positive terms of enactment, to be discovered only by the "optics keen" of the few gifted intellects capable of deep research and abstruse deductions. As regards the great body of the community, such a mode of legislation would be as unreasonable as that of the Roman despot, who posted his edicts so high that they could not be read, and then punished his subjects for their involuntary disobedience. 2. No exception of one description of creditor, any more than another, is either expressed or implied. 'Tis true that the debt due to the United States can only be satisfied out of the property of the debtor himself, according to the terms of the law; consequently, there is no necessity for any constructive or implied exception from the general terms of the law; in order to save property in the hands of a *bona fide* purchaser from being subjected to *the payment of the vendor's debts, it [**409** is excluded *ex vi termini*, nor could it have been brought within the purview of the law without a substantive and positive provision to that effect. A mortgagee is a purchaser; the estate is divested from the mortgagee, to whom nothing remains but an equity of redemption, and to that equity of redemption must the United States resort for satisfaction. A judgment, on the contrary, operates no divestiture of property till carried into actual execution; and the debtor has the *jus disponendi* as completely after judgment as before, except that the purchaser takes *cum onere*, subject to the general lien created by the prior judgment. That lien vests no specific interest or estate in the creditor; but is nothing more than an outstanding claim (which may or may not be enforced) to have the judgment satisfied out of the estate; let the judgment be, in any manner released or satisfied, and the lien is, *ipso facto*, dissolved; the estate of the vendee is instantly discharged and exonerated from the claim, without any act whatever proceeding from the creditor of the vendor to the vendee. The mortgagee trusts the mortgagee, upon the faith of a contract which specifically vests in him, the estate of the debtor, as a collateral security for the debt; the judgment creditor, on the contrary, stands upon his legal rights, has trusted nothing to the faith of contracts, and has gained nothing by contract; his advan-

1.—3 Cranch, 80.

tage, whatever it be, is gained by sheer coercion upon his debtor, and by mere operation of law. To the mere operation of law, therefore, let him look for his security. The principle of *affirmation* fording *greater protection to rights growing out of *bona fide* contracts than to those acquired by mere operation of law, is not confined to the cases of general and specific liens as differently affected by the principle of relation incident to a state of bankruptcy, or by a prior equity; for it is a settled rule of equity to afford relief as against assignees coming into the legal estate by operation of law; when relief would be refused as against assignees or purchasers under contract for valuable consideration. 3. In order to ascertain the state of insolvency, in the life-time of the debtor, upon which the preference of the United States is to be enforced, three tests are adopted, any one of which is sufficient; and all of which must be presumed equal between themselves: 1st. An assignment of property for the benefit of creditors, at a time when the debtor has not sufficient for the payment of all his debts. 2d. His absconding, concealment, or absence, followed by attachment of his effects; and, 3d. An act of legal bankruptcy committed. This last (inasmuch as the bankrupt law of the United States was not passed till afterwards) is presumed to comprehend, as well acts of legal bankruptcy or insolvency under state laws as under the subsequent act of Congress. Now, it must be presumed that Congress intended all those enumerated instances of insolvency to be equivalent; and to be followed by precisely the same consequences in relation to the rights of the United States. Then, if the debtor had become insolvent under the law of Pennsylvania, ever so long after the rendition of judgment, the prior *[affirmation]* lien would have been overreached *and annulled by relation, and all the creditors reduced to a perfect equality; and such, also, unquestionably would have been the case under the bankrupt law of the United States. In either case, could the preference of the United States over all the creditors, thus reduced by operation of law to perfect equality, admit of doubt? A substantial distinction between the consequences attached to "an act of legal bankruptcy," and those attached to any other of the equivalent acts of insolvency enumerated in the 65th section, is altogether inconceivable. The enumeration among those acts, of attachments against absconding debtors, shows what little regard was had to the strongest of all liens produced by mere process of law, and not arising *ex contractu*, in the nature of a *bona fide* alienation of property. 4. As to the argument that has been so much pressed to prove, that because the preference of the United States does not overreach these conveyances and incumbrances, it is not in the nature of a lien created with the debt *ab initio*; it may be safely admitted (and indeed it is now settled) that it is not, technically speaking, a lien; yet the inference that it is therefore less than a lien is not so obvious. The legislature, when it is contemplated to defeat one lien, is under no necessity to effect the object through the instrumentality of another lien. Nor is there anything absurd or incongruous in making that paramount, which, according to pre-existing rules of positive institution, was inferior. It is perfectly Wheat. 2.

competent for the legislature to exalt the humble, and humble the exalted; and to declare the less to be *greater, when the relative *[affirmation]* magnitudes of the two objects are not from the nature of things, but the mere creatures of law. Then, whatever success may attend the effort to establish a specific difference between a lien, technically so called, and the right of preference claimed by the United States, the law is express that the latter shall prevail to place the United States first in the order of payment of all debts. It may have been deemed adequate to all the purposes of reasonable security, without attaching any specific lien upon the debtor's property, that every person who happens to be charged, either ministerially or under trust, with the administration of the insolvent's effects, is bound, at his peril to regard the established preference in favor of the United States. 5. It is objected that our construction gives the United States a more extensive and coercive remedy against an ordinary debtor for duties than was deemed necessary against defaulting supervisors and other officers of the revenue, upon whose estates the lien commences only with the commencement of the suit, according to the provisions of the act of 1798. This objection would be entirely inconclusive if it were well founded; but, in truth, it has no foundation; for not only is the commencement of suit made equivalent to attachment by the law of 1798, and any alienation whatever of the defaulting officers' estate thenceforth prevented; but that is cumulative on the general preference secured to the United States, by the 5th section of the act of the 8d of March, 1797, ch. 74. 6. The distinction insisted on between a mere debt and a debt accompanied by a lien—between *postponing a debt and defeating a *[affirmation]* lien—is conceived to be utterly unsubstantial. The general lien incidental to a judgment is the means of securing to the judgment creditor a preference over other creditors. Take away his preference, postpone him to another creditor, and all the incidents by which his preference was secured are necessarily destroyed.

Ingersoll, on the same side. 1. The court will not fail to perceive that the question involved in this case arises, not out of the obnoxious act of the 8d of March, 1797, ch. 74, the 5th section of which gives universal and unqualified preference to the government "where any revenue officer or other person becomes indebted to the United States, by bond, or otherwise," but out of the act of the 2d of March, 1799, ch. 128, which affords priority to the government over individual creditors, only in the case of custom-house bonds and duties. Even the constitutionality of the law of 1797 has been questioned, though always maintained; and its policy has been the theme of severe animadversion. But the constitutionality of the law of 1799 has seldom, if ever, been drawn into doubt; and its policy is sufficiently obvious. Government could, if it would, exact payment of duties in money, or in a portion of the article imported, at the time of importation, instead of bonding the duties for future and contingent liquidation. For the accommodation of merchants, the 62d section, at their option, substitutes bonds giving time, on security, for payment, instead of exacting it on the permit to land, and delivery of the goods; for which in-

414*] indulgence *the priority, asserted, with notice to all the world, by the same law, is nothing more than a fair and reasonable equivalent. This priority has been established by law ever since the present government of the United States. The acts of the 31st of July, 1789, ch. 5; of the 4th of August, 1790, ch. 85, sec. 45; of the 2d of March, 1792, sec. 18; and of the 2d of March, 1799, ch. 128, sec. 65, have maintained it in an interrupted series of legislation, uniformly sustained by this court, and by the state courts.¹ 2. The question in the case in controversy is, whether an individual judgment creditor, without execution, and, of course, having nothing in possession, nor by specific lien, is entitled to a preference, priority, and advantage, superior to that "reserved and secured," by the act in question, to the public. The Sedgely estate, in dispute, was taken in execution at the suit, and by the marshal of the United States, before Thelusson could levy his execution. The controversy, therefore, is between a foreign individual creditor, who never had, and never could have, possession of the property, and who is fortified with no particular or specific lien against it, on the one hand; and the United States on the other hand, from whose custody and possession he alleges a superior right to take it, notwithstanding their statutory priority of apparent right, and their legal 415*] *priority of actual possession. The whole effect of the private creditor's judgment, at all events, goes no further than to ascertain his debt, and give him a general, not a specific lien. Upon this judgment there could be no execution till on the *quarto die post*, to wit, on the 24th May; and in that interim, to wit, on the 22d May, the general assignment took effect; intercepted the operation, destroyed all the advantages of the judgment, and created the very case which the law provides for. 3. According to the law of Pennsylvania, a judgment creditor, without execution executed, is entitled to come in only as a simple contract creditor.² And, in fact, a judgment is considered as no more than a debt deprived of all attributes of lien, and merely put in a course of distribution.³ These decisions, then, dispose at once of all the argument that is introduced upon the general doctrine of the dignity of judgments; and serve, moreover, to show the fallacy of many of the ingenious difficulties with which the opposite counsel's view of the subject would embarrass the determination of the Circuit Court. The practice of the law does not conform to the theory he imputes to it. The judgment binds the land—as whose property? As the debtor's. But the mortgage transfers the proprietary interest to the mortgagee; and though, in point of relative rank or dignity, the judgment creditor may conceive himself entitled to the first place, yet 416*] certainly the mortgagee *is much better fortified against the law in question; because, in the one case, the property is still in the original debtor, liable to the future operations of a judgment; whereas, in the other case, the property

has been, in legal contemplation, conveyed away from the original debtor to his creditor, with a clause of defeasance in the event of certain conditions complied with. A particular appropriation of the estate in payment of the debt would not defeat the public preference, unless that appropriation were followed up by a conveyance of the estate, and the actual change of ownership; in which case it would be no longer the property of the public debtor. 4. The law contemplates the three cases of, 1st, death; 2d, insolvency; and, 3d, attachment; to which may, perhaps, be added, a 4th, that of legal bankruptcy; though this is nearly similar to the 3d. Now, in the case of death and insufficiency of assets, there can be no doubt. If Crammond had died on the 21st May, 1805, the United States would clearly have enjoyed the preference secured to them over the plaintiffs. And why not in like manner in the case of insolvency? All the policy and all the hardship that can be imagined for the second case are just as applicable to the first. But because a line, which it is not necessary to contest, has been drawn, in the decisions on this subject, between the cases of popular insolvency, or mere inability to pay debts and meet engagements, and of legal or technical insolvency, or a public acknowledgment of that inability; efforts have been made to extricate insolvency *from the [*417 law, when no reason can be given for it that is not equally applicable to death. The last illustration in this section is the case of legal bankruptcy; and it is well known that, under the bankrupt system, a bankruptcy cuts out a prior judgment on which no execution has been levied; and that the judgment creditor is entitled to no more than his rateable proportion, and mere dividend, in common with other creditors having no security. But the reply is, that we have no bankrupt system. Still, however, a secret act of bankruptcy is within our law; and on the score of hardship, is, at least, as severe a case as any that can be set up. When a mortgagee pays a debt, or it is paid for him, this is not any debt within the law; because it is specifically secured, and in legal contemplation, paid by the transfer of a certain portion of the debtor's real estate, which the creditor holds, as it were, possession of. It is true that in order to recover payment of the money the mortgagee must pursue the forms and process indicated by law for that purpose; but neither the mortgagee nor any other person can prevent his taking possession of the property mortgaged, otherwise than by paying him the money for which it is specifically pledged. The difference between such a lien and that of a mere unexecuted judgment, is perfectly obvious, and, indeed, is most emphatically recognized in the case from Peere Williams cited on the other side. The 65th section of the act of 1799 makes no exceptions. It prohibits the payment of any debt by an assignee, under the penalty of personal accountability. Nor can the court *incorporate [*418 exceptions into the law. But where the property is no longer in the debtor's hands, as in the cases of a mortgage, a *bona fide* sale, or a *fi. fa.* levied, the property is taken out of the debtor's hands; and the court will not permit the public to carry their priority into the possession of an innocent third person. Up to the period of his assignment, Crammond continued in possession of

1.—United States v. Fisher et al., 2 Cranch, 358; United States v. Hooe, 3 Cranch, 73; Harrison v. Sterry, et al., 5 Cranch, 289; Prince v. Bartlett, 8 Cranch, 431; McClean v. Rankin et al., 3 Johns. Rep. 365; Tinker v. Smith, 2 Day's Rep.

2.—Gibbs v. Gibbs, 1 Dall. 373.

3.—Moliere's lessee v. Noe, 4 Dall. 450.

the Sedgely estate. At that period, the Thelussos had no specific power or control over that estate. Unless, therefore, it became from that moment liable to the public preference, what is that preference, and what does it amount to? To nothing more, says the opposite counsel, than a claim upon what is left after satisfying all incumbrances. If so, the law was framed (as it evidently was) with great pains to very little purpose indeed. 5. As to the argument drawn from the supposed admission of counsel *arguendo* in the case of *The United States v. Fisher*, it is true that while the debtor remains master of his property the priority cannot dispossess him on the plea of a popular insolvency, or inability to pay his debts. It is equally true that the priority has no pretensions to be deemed a lien. But it nevertheless may have force enough to operate whenever the insolvency is announced, by intercepting the mere prospective security of a judgment creditor without execution. But this is no retrospective operation. 6. As to the comparative equities, the surety, or assignee, who pays the bond, on the faith of this act of Congress, has at least as much to recommend him on that score as the mere judgment creditor, of the nature of whose debt nothing is known; *and since the various, the decided, and the consistent determinations of different courts, both state and national, in support of this law, there can be no question on which side the hardship preponderates.

Hopkinson, in reply. 1. It is said that the Sedgely estate was taken in execution at the suit of the United States, before Thelusson could levy his execution; who, therefore, never could have possession of the property, and yet endeavors to take it from the custody and possession of the United States. I do not apprehend that this is a question on the right of possession in the property taken in execution; nor is it at all material at whose suit the property was so taken and sold. Neither party ever had a possession, either actual or legal. If the possession, asserted to have been held by the United States, under their execution, gives them a right which cuts out the antecedent judgment, it is needless to resort to the protection and power of the act of Congress to strengthen it; and any other creditor obtaining the same sort of possession would have the same right, and might assume the same preference over antecedent judgments. It does not appear, by the special verdict, when the execution at the suit of the United States was taken out and levied; and, therefore, there is no foundation in the record for saying it was done before Thelusson could levy his execution. The decision of the question must turn on the statutory priority of the United States, and not on their legal priority of actual possession—they never have had any [*420*] such possession. *2. It cannot surely be imagined that the assignment of Crammond, made on the 22d of May, because it happened before the expiration of four days after the date of our judgment, did, therefore, *per se*, interrupt the operation or destroy the advantages of the judgment. If so, then the effect has been produced by virtue of the assignment, and not by the provisions of the act of Congress. The fact, however, is not so; the date of the assignment is material only to fix the period of the insolvency; of the circumstance which gave

right to the preference of the United States, whatever it is; but whether it shall take preference of the judgment is the matter to be decided by the act of Congress, and not by the legal force or operation of the assignment; which, to all the purposes of this argument, is the same whether made three days or thirty days after the judgment. The time when you may issue an execution under a judgment is no limitation of the power of the judgment to bind the real estate; otherwise, a sale made within the four days would be valid and effectual. 8. The case of *Gibbs v. Gibbs*,¹ was that of a judgment creditor without an execution; another judgment creditor with an execution executed; and then a legal bankruptcy, there being at that time a regular bankrupt law in Pennsylvania. The question was between the two judgments. Did the second judgment creditor pretend to take priority by virtue of its execution, or by that "actual possession" which is *set [*421 up in our case? No. The second judgment creditor claimed because the words of the bankrupt law expressly included the case of his opponent, taking away his right, and did not so include or affect his own judgment or right. The question arose under the 80th section of the bankrupt law, which expressly declares "that every creditor, having security for his debt by judgment, &c., whereof there is no execution served and executed upon the lands, goods, and estate of the bankrupt, &c., shall not be relieved for any more than a rateable proportion of their debts," &c. The creditor, therefore, in that case, whose judgment was unexecuted, was expressly excluded; and he whose judgment was executed, was as expressly saved by the terms of the act. The reason given for this construction of the bankrupt law does not apply to our case. It is, that the estate vested in the commissioners, by the act of bankruptcy; but so far is this from being the effect of an act of insolvency by the act of Congress that it has been decided that the right acquired by the United States, by the insolvency, is a mere right of priority of payment, without even creating a lien on the real estate to secure it. The case of *Moliere's leasee v. Noe*,² arose under the intestate laws of Pennsylvania. These laws authorize a sale of the real estate of an intestate, under certain circumstances, by the administrator, by the order and sanction of the Orphans' Court. A house and lot of an intestate had been thus sold. Certain judgments had been obtained against the intestate in his lifetime; *and the question was between [*422 these judgment creditors and the purchaser from the administrator under the order of the Orphans' Court. The decision is made in favor of the latter, on a review of the several laws of the state on the subject, and the clear intention of the legislature. No principle is affirmed at all applicable to our case. The court say that the word "debts," in its most general sense, and as used in those acts of the assembly includes a judgment, and that general words will not be restrained to particular cases unless to avoid absurdity, contradiction or flagrant injustice. They then observe that neither will occur in their case. No inconvenience, "be-

1.—1 Dall. 371.

2.—4 Dall. 450.

cause the lands will sell better for being discharged from liens; and it makes no odds to the judgment creditors by whom they are sold, provided they are sold fairly, and the proceeds faithfully applied." The court then go on to declare that in the application of the proceeds the judgment creditors shall have their preference, and all the benefit of their lien; and that it would be monstrous injustice were it otherwise. This case gives no countenance to the suggestion that in Pennsylvania a judgment is considered as no more than a debt deprived of all attributes of lien, and merely such in the course of distribution. 4. In Pennsylvania it is the constant practice for the mortgagee to keep possession, not only of the land, but of all the deeds and instruments of title; that he sells and disposes of the property, and delivers possession to the purchaser, who holds it, subject, indeed, to the [423*] mortgage as he would do *to a judgment; and in no respect differently; and that a judgment is specific enough in its force and operation to have preference of a subsequent mortgage; which a mere debt by simple contract, or by specialty, would not do. Why, then, shall it not have the same preference over a mere priority of payment arising after its date? 5. The equality to which a bankruptcy reduces a judgment creditor with the other creditors of the bankrupt is greatly relied upon by the defendant; but it is the effect of the positive provision of the statute meeting the case in terms, and founded on the peculiar policy of that system; neither of which is found in the act of Congress now under consideration. It is said there is no difference, in reason, between the effect of a bankruptcy and a legal insolvency; and as the former would destroy the right and lien of a judgment, so should the latter. The answer is obvious. The bankruptcy does it by virtue of the express terms and provisions of the statute; and if the same authority can be found in the case of insolvency, it will stand on the same reason, or rather, the same right. No case has been shown where a judgment creditor has been deprived of his right, his lien, his interest in the land, his preference, by construction; by the use of general terms; and in the case of *Molier's lessee v. Nos* his right of priority of satisfaction out of the proceeds of the estate is expressly recognized, and the contrary doctrine held to be "monstrous injustice."

WASHINGTON, J., delivered the opinion of [424*] the court, and after stating the facts, proceeded as follows:

Two questions were made in the Circuit Court. 1st. At what time a judgment *nisi* on an award of arbitrators, made under an order of court, binds the real estate of the defendant against whom the award is made; whether on the day it is rendered, or on the *quarto die post*, if no exceptions be filed, or on the day when the exceptions, if any are filed, are overruled. 2d. If from the time when the judgment *nisi* is entered; then whether, in this case, the United States are entitled to be paid in preference to the judgment creditor.

278

The first question was not decided by the court below, and is not contested in this court.

In considering the second question, it will be assumed, for the sake of the argument, that the judgment *nisi* binds the real estate of the debtor from the time it is rendered.*

This question did not arise in the cases of *The United States v. Fisher et al.*,¹ or in that of *The United States v. Hooe et al.*² The point decided in those cases was, that a mere state of insolvency or inability in a debtor to the United States to pay all his debts, gives no right of preference to the United States unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors. There can be little doubt but that the word *insolvency*, mentioned in the act of 1790, ch. *35, sec. [425 45, and repeated in the act of 1797, ch. 74, sec. 5, and of 1799, ch. 128, sec. 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency.

In this case, the conveyance of Crammond, on the 22d of May, 1805, was of all his property; at which time he was unable to pay all his debts; it is, therefore, a case precisely within the law and within the principle decided by the above cases.

But the question still remains to be decided whether this right of preference which accrued on the 22d of May can cut out a prior judgment creditor. The law declares "that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied, and if the assignees, &c., shall pay any debt due by the person or estate from whom or for which they are acting, previous to the debts due to the United States from such person or estate being first duly satisfied, they shall become answerable for the same in their own persons and estates." These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States if, in case of insolvency, they pay any debt previous to those due to the United States. The law makes no exception in favor of prior judgment creditors; and no reason has been, or we think can be shown to warrant this court in making one.

*Exceptions there must necessarily [426 be as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is devoted out of the debtor, and cannot be made liable to the United States. A judgment

1.—2 Cranch, 358.

2.—3 Cranch, 73.

gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of Congress defeats this preference in favor of the United States, in the cases specified in the 65th section of the act of 1799.

The judgment of the Circuit Court, therefore, is to be affirmed with costs.

Wheat. 2.

*Judgment affirmed.*¹

1.—The above is the opinion delivered by Washington, J., in the Circuit Court, and which he was directed to deliver as the opinion of this court.

Aff'g—Pet. C. C. 196; See 4 Wheat. 120 (n).

Cited—1 Pet. 441, 442, 451; 14 Bank. Reg. 68; 2 Paine, 257; 4 Wash. 421, 672; 8 Sumn. 352, 355; 4 McLean, 622, 630; 3 Story, 81; 2 Wood. & M. 454; 1 Ware, 169.



APPENDIX.

[NOTE I.]

Additional Note on the Principles and Practice in Prize Causes.

[N the Appendix to the first volume of these Reports (Note II.), a summary sketch was attempted of the practice in prize causes in some of its most important particulars. It has been suggested that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view the following additional sketch is submitted to the learned reader.

As preliminary to the subject it may be observed that the ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli* (*The Two Friends*, 1 Rob., 271, 284); to captures in foreign ports and harbors (*Lindo v. Rodney*, Doug., 618, note); to captures made on land by naval forces and upon surrenders to naval forces either solely or by joint operations with land forces (*Lindo v. Rodney*, Doug., 618, note; *Chinsurah*, 1 Acton, 179); and this, whether the property so captured be goods, ships, or mere choses in action. (*Ib.*) To captures made in rivers, ports, and harbors of 2^d the captor's own country (*W. B. v. Latimer*, 4 Ball., Appendix I; *Le Caux v. Eden*, Doug., 606; *Lindo v. Rodney*, Doug., 618, note); to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces (Ships taken at Genoa, 4 Rob., 388); and to ransoms upon captures at sea generally. (*Anthon v. Fisher*, Doug., 649, note I; *Maisonnaire v. Keating*, 2 Gallis.) But the admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures as prize made on shore without the co-operation of naval forces, whether made in our own or in a foreign territory. (*The Two Friends*, 1 Rob., 271, 284; *The Emulous*, 1 Gallis., 563.) Wherever such a jurisdiction is exercised, it is by virtue of powers derived *aliunde*. And though when the jurisdiction has once attached it may be lost by a hostile recapture, escape, or voluntary discharge (*Hudson v. Guestier*, 4

Cranch, 293), yet it remains notwithstanding the goods are landed, for it does not depend on their local situation after capture; but the court will follow the goods or their proceeds with its process wherever they may be found, or under whatever title acquired. (*Home v. Camden*, 2 H. Bl., 533; 4 Term Rep., 388; *Willis v. Commissioners of Prize*, 5 East, 22; *The Noysewood*, 7 Ves., 594; *The Louis*, 5 Rob., 146; *The Two Friends*, 1 Rob., 271; *The Eliza*, 1 Acton, 336; *Smart v. Wolf*, 3 Term Rep., 223; *The Pomona*, 1 Dodson, 25.) Therefore, where the property is carried into a foreign port, and there delivered upon bail by the captors, the prize court does not lose its jurisdiction, but may proceed to adjudication and enforce the stipulation. (*The Peacock*, 4 Rob., 185.) So, if a prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors or of the claimants. (*The Susanna*, 6 Rob., 48.) So, although the property may be actually lying within a foreign neutral territory, the court may proceed to adjudication. (*Hudson v. Guestier*, 4 Cranch, 293; *The Christopher*, 2 Rob., 209; *The Henrick and Maria*, 4 Rob., 43; *The Comet*, 5 Rob., 285; *The Victoria*, Edwards, 97.) So, although the property has been sold by the captors, or has passed into other hands. (*The Falcon*, 6 Rob., 194; *The Pomona*, 1 Dodson, 25.) But it rests in the sound [*3] discretion of the court whether, when property has been sold or converted by the captors, it will proceed to adjudication in their favor; for it is only in cases where the same has been justifiably or legally converted by the captors that they can claim its aid. The court will withhold that aid where there has been a conversion by the captors without necessity or reasonable cause. (*L'Eole*, 6 Rob., 220; *La Dame Cecile*, 6 Rob., 257; *The Arabella and Madeira*, 2 Gallis.)

When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents.³ It will

1.—Connoîtrement (les juges de l'amirauté) des prises faites en mer, &c. (Ordonnance de 1661, liv. I., tit. 2, de la Compétence, Art. 3.) Cette attribution à l'Amirauté pour les prises, est encore d'aussi ancienne date que celle de l'établissement de sa juridiction. Ordonnance de 1400, art. 4, et suiv. de 1517, art. 3, et suiv. de 1543, art. 20, et de 1584, art. 33; Valin, *ib.*

2.—S'il y a aucun qui rompe coffre, balle ou pippe, ou autre marchandise que nostre dit amiral ne soit présent en sa personne pour luy, il forera sa part du butin et si sera par lui luy amiral puny selon le meffait. (Ordonnance de 1400, Art. 10, Coll. Mar., 79; Ordonnance de 1584, art. 38; *Id.*, 111. Défendons de faire aucune ouverture des coffres, ballots, sacs, pipes, barriques, tonneaux et armoires, de transporter ni vendre aucune marchandises de la prise; et à toutes personnes d'en acheter ou receler, jusqu'à ce que la prise ait été jugée ou qu'il en ait été ordonné par justice; à peine de restitution de quad-

ruple, et de punition corporelle. Ordonnance] de 1661, liv. 3, tit. 9, Des Prises, art. 20. Quatre Juin, 1783, jugement en dernier ressort de l'amirauté de Dunkerque, contre les auteurs du pillage du navire l'Amitié, qui les condamne à la restitution du prix des choses pillées les prive de leur part aux prises, et prononce le banissement enjoint l'un d'eux, avec injonction au capitaine du corsaire capteur, d'être plus circonspect à l'avenir. Code des Prises, tom I., p. 118. Par Guichard.

3.—M. l'amiral et les commissaires connaîtront aussi des partages des prises et de tout ce qui leur est incident, même des liquidations et comptes des dépositaires lorsqu'ils le jugeront à propos, comme aussi des échouements des vaisseaux ennemis qui arriveront pendant la guerre, circonstances et dépendances. Règlement du 23 Avril, 1744, art. 5; 2 Valin, Sur l'Ordonnance, 318.

follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases will decree the parties to pay over the proceeds, with interest, upon the same for the time they have been in their hands. (*Smart v. Wolff*, 3 Term. Rep., 4*] 323; *Home v. Camden*, 2 H. *Bl., 538; 4 Term. Rep., 382; *Jennings v. Carson*, 4 Cranch, 1; *The Two Friends*, 1 Rob., 278; *The Princessa*, 2 Rob., 31; *The Louis*, 6 Rob., 146; *Willis v. Commissioners of Prize*, 5 East, 22; *The Noysonhed*, 7 Ves., 593.) It may also enforce its decrees against persons having the proceeds of prize in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation. (Per Buller, J., in 3 Term Rep., 323; Per Grose, J., in 5 East, 22; *The Pomona*, 1 Dodson, 25; *The Herkimer*, Stewart, 128; S. C., 2 Hall's Am. Law Journ., 133.) And in these cases the court may proceed upon its own authority, *ex officio*, as well as upon the application of parties. (*The Herkimer*, Stewart, 128; S. C., 2 Hall's Am. Law Journ., 133.) Nor is the court *functus officio* after sentence pronounced; for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. (*Home v. Camden*, 2 H. Bl., 538, and cases *ubi supra*.)

The Prize Court has also exclusive jurisdiction as to the question who are the captors, and joint captors, entitled to share in the distribution, and its decree is conclusive upon all parties. (*Home v. Camden*, 2 H. Bl., 538; 4 Term. Rep., 382; *The Herkimer*, Stewart, 128; S. C., 2 Hall's Am. Law Journ., 133; *Duckworth v. Tucker*, 2 Taunton, 7.) It has the same exclusive authority as to the allowance of freight, damages, expenses, and costs, in all cases of captures. (*Le Caux v. Eden*, Doug., 594; *Lindo v. Rodney*, Doug., 613; *Smart v. Wolff*, 3 Term. Rep., 223; *The Copenhagen*, 1 Rob., 289; *The St. Juan Baptista*, 5 Rob., 88; *The Die Frie Damer*, 5 Rob., 357; *The Betsey*, 1 Rob., 98; *Duckworth v. Tucker*, 2 Taunt., 7; *Jennings v. Curcen*, 4 Cranch, 2; *Bingham v. Cabot*, 3 Dall., 19; *The United States v. Peters*, 3 Dall., 121; *Talbot v. Jansen*, 3 Dall., 133; 2 Brown's Civ. and Adm. Law, 208.) And though a mere maritime tort unconnected with capture *jure belli* may be cognizable by a court of common

law, yet it is clearly established that all captures, *jure belli*, and all torts *connected [*5 therewith, are exclusively cognizable in the Prize Court.

And the Prize Court will not only entertain suits for restitution and damages in cases of wrongful capture, and award damages therefor, but it will also allow damages for all personal torts, and that upon a proper case laid before the court as a mere incident to the possession of the principal cause. And in such a case it will not confine itself to the actual wrongdoer, but will apply the rule of *respondent superior*, and decree damages against the owners of the offending privateer. (*Del Col v. Arnold*, 3 Dall., 383; *The Anna Maria*, ante, 327; Bynk. Q. J. Pub. L. 1, ch. 19, Du Ponceau's translation, 147.) And where the captured crew have been grossly ill-treated, the court will award a liberal recompense. (*The St. Juan Baptista*, 5 Rob., 88; *The Die Frie Damer*, 5 Rob., 357; *The Lively*, 1 Gallis., 315.)

As the Prize Court has an unquestionable jurisdiction to apply confiscation by way of penalty for falsity, fraud, and misconduct of citizens as well as of neutrals (*The Johanna Tholen*, 6 Rob., 72; *Onnell v. Vigne*, 15 East., 70), so it may, in like manner, decree a forfeiture of the rights of prize against captors where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. It is a part of the ancient law of the admiralty, independent of any statute, that captors may, by their misconduct, forfeit the rights of prize; and in such cases the property is condemned to the government generally. And this penalty has been frequently enforced, not only where the captors have been guilty of fraud (8 Cranch, 421; *The George*, ante, 278), but also where they have violated the instructions of government relative to bringing in the prize crew, and have proceeded without necessity to dispose of the property before condemnation. (*La Reine des Anges*, Stewart, 9.) So, where the captors have rescued a prize ship from the custody of the marshal after a monition duly served. (*The Cossack*, Stewart, 513.) In short, the court is the constitutional guardian of the public interests in relation to matters of prize; and wherever there is any deviation from the regular course of proceedings, it expects to have a sufficient reason *shown for that de- [*6 viation before it will give the captors any of the ordinary benefits of prizes captured by them.

The usual course of the court is by way of

1.—Et si aucuns des dits preneurs en leur voyage en especial avoient commis faute telle qu'ils fussent atteints d'avoir enfondré aucuns Navires, ou noyé les corps des prisonniers descendus a terre en aucune lointaine coste, pour celer le larcin et malfait, voulons que sans quelque delay, faveur ou déport, nostredit amiral en face faire punition et justice selon le cas. Ordonnance de 1400, art. 7. Si aucuns se trouvent avoir commis faute en leur voyage, soit d'avoir mis a fonds aucun Navire, ou robé des biens d'iceux, ou noyé les corps des Marchands, Maîtres, Conducteurs et autres Personnes desdits navires, ou iceux descendus a terre en aucune lointaine coste, pour celer le larcin et malfait, ou bien quand il adviendrait comme il a fait quelques fois, qu'aucuns d'eux se trouvant les plus forts viendront a rançonner a argent les navires de nos sujets ou d'aucuns nos Amis et Alliez: Voulons que sans quelque delay, faveur ou déport, le dit Amiral en face ou face faire justice et punition, telle que ce soit exemples a tous autres, deues informations

des cas preallablement faites, et selon qu'il sera cy-apres ordonné.—Et pour ce que souventes fois quand une Prise estoit faite sur nos Ennemis, les Preneurs estoient si coustumiers de user de leur volonte pour leur profit, qu'ils se gardoyent l'usage toujours et de toute ancienneté sur ce ordonné et observé, mais sans crainte de justice, comme innobediens et pillieurs, eux estans encore sur mer rompent les coffres, balles, boujettes, malles, tonneaux et autres vaisseaux, pour prendre et piller ce qu'ils peuvent des biens de la prise, en quoy ceux qui ont équipé et mis sur les navires a gros despens sont grandement foulez, dont advient souvent de grandes noises, débats et contentions. Nous prohibons et defendons a tous Chefs, Maîtres, contre Maîtres, Patrons, Quarteriers, Soldats, et Compagnons, de ne faire aucune ouverture des coffres, Balles, &c., ny autres vaisseaux de quelques Prises qu'ils fassent, ny aucunes choses des dits Prises receler, transporter, vendre, ny eechanger, ou autrement aliéner, ains aient a représenter le tout des

monition, and if that process be disobeyed, an 7*] attachment issues against the *parties in contempt. But the court may, in all cases, proceed in the first instance by warrant of arrest of the person or property to compel security to abide its decree.

Having said so much on the subject of prize jurisdiction as seemed necessary to explain the practice of the court, we may now pass to the consideration of the rights and duties of captors in relation to property captured in war.

To enable a vessel to make captures which shall enure to the benefit of the captors, it is necessary that she should have a commission of prize. But non-commissioned vessels of a belligerent nation may not only make captures in their own defense, but may, at all times, capture hostile ships and cargoes, without being deemed by the law of nations to be pirates; though they can have no interest in prizes so captured. (2 Brown's Civ. and Adm. Law, 524; Caseregis, Disc., 24, no. 24; 2 Woodes. Lect., 432; *Consolato del Mare*, ch. 287, 288; 3 Buls., 27; 4 Inst., 152, 154; Zouch. Adm. Jurisd., ch. 4, 101; Com. Dig. Admiralty, E. 3; *The Georgiana*, 1 Dodson, 397; *The Diligentia*, Id., 408; *The Emulous*, 8 Cranch, 181; *The Nereide*, 9 Cranch, 449; *The Dos Hermanos*, ante, 76.)¹ But every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may 8*] also be mulcted *in costs and damages.² If the vessel and cargo, or any part thereof, be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages (opinion of M. Portalis, in the case of *The Statura*, 2 Cranch, 102, note a); but, on the other hand, they may, under circumstances according to the degree of doubt or suspicion thrown upon the case, either from the defects of the papers, the nature of the voyage, or the conduct of the captured crew, be entitled to receive their costs and expenses in bringing in the property for adjudication. It is not within the object of this note to enumerate all the various circumstances which have been adjudged to constitute probable cause for captures. But, in general, it may be observed, that if the ship pretend to be neutral, and has not the usual documents of such ship on board

(*The Anna*, 5 Rob., 382); if the cargo be without any clearance (*Id.*); if the destination be untruly stated; if the papers respecting the ship or cargo be false or colorable, or be suppressed or spoliated; or if the neutrality of the cargo does not distinctly and fully appear (report of Dr. Lee, &c.; Chitty's Law of Nations, Appendix, 303; Wheat. on Capt., Appendix, 320); if the voyage be from or to a blockaded port (*The Frederick Molke*, 1 Rob., 86), or not legal to the parties engaged in the traffic (*The Walsingham Packet*, 2 Rob., 77; *The Hoop*, 1 Rob., 196; *The St. Antonius*, 1 Acton, 113); if the cargo be of an ambiguous character as to contraband (*The Endrught*, 1 Rob., 22; *The Rindge Jacob*, 1 Rob., 89; *The *Jonge* [*9] *Margaretha*, 1 Rob., 189; *The Twaende Broder*, 4 Rob., 33; *The Frau Margaretha*, 6 Rob., 92; *The Ranger*, 6 Rob., 125); and generally if the case be a case of further proof, all or any of those circumstances furnish a probable cause for capture, and justify the captors in bringing in the ship and cargo for adjudication.

Whenever the captors are justified in the capture, they are considered as having a *bona fide* possession, and are not responsible for any subsequent losses or injuries arising to the property from mere accident or casualty, as from stress of weather, recapture by the enemy, shipwreck, &c. (*The Betsey*, 1 Rob., 98; *The Catharine and Anna*, 4 Rob., 89; *The Carolina*, 4 Rob., 256, *Del Col v. Arnold*, 8 Dall., 333.) They are, however, in all cases bound for fair and safe custody; and if the property be lost from want of proper care, they are responsible to the amount of the damage; for subsequent misconduct may forfeit the fair title of a *bona fide* possessor, and make him a trespasser from the beginning. (*The Betsey*, 1 Rob., 93; *The Catharine and Anna*, 4 Rob., 89.) Therefore, if the prize be lost by the misconduct of the prize-master, or from neglecting to take a pilot, or to put on board a proper prize crew, the court will decree restitution in value against the captors. (*The Der Mohr*, 3 Rob., 129; *The Speculation*, 2 Rob., 293; *The William*, 6 Rob., 316; *Del Col v. Arnold*, 8 Dall., 333; *Wilcocks v. Union Ins. Co.*, 2 Binney, 574.) But although, in general, irregularity of conduct in captors makes them liable for damages, yet in case of a *bona fide* possession the irregularity to bind them must be such as produces irreparable loss, as, for instance, such as may prevent restitution from an enemy who recaptures the property. (*The Betsey*, 1 Rob., 98.) And in cases of gross misconduct the court will hold the commission of the captors forfeited. (*The Marianne*, 5

dites Prises, ensemble les Personnes conduisant le navire, au dit Amiral, ou Vice-Amiral, le plus tôt que faire se pourra, pour en estre fait et disposé selon qu'il appartiendra, et comme contiennent nos présentes ordonnances, et ce sur peine de confiscation de corps et des biens. Ordonnance de 1684, art. 35, 37.

1.—Aucun ne pourra armer un vaisseau en guerre sans commission de l'amiral. Ordonnance de 1681, liv. 3, tit. 5, Des Prises, art. 1. Il est tellement vrai, qu'il n'y a que ceux qui ont commission de l'amiral qui sont en droit de faire à leur profit des prises sur l'ennemi, que si le capitaine d'un vaisseau marchand a été attaqué en mer par un vaisseau ennemi dont il s'est rendu maître dans le combat, la prise qu'il a faite du vaisseau ennemi ne lui appartient pas, mais appartient à l'amiral, qui est à cet égard aux droits du roi; l'amiral a coutume d'en gratifier

pour le tout ou pour partie celui qui a fait la prise, sans tirer à conséquence. Pothier, de Propriété, No. 93; Valin, Sur l'Ordonnance, *ubi supra*.

2.—Lesdits preneurs empeschans aucuns marchands, navire ou marchandise sans cause raisonnable, ou qu'ils ne soyent nos adversaires, nostre dit amiral sera deuement restituer le dommage, et ne permettra plus l'usage qu'ont à ce contre raison tenue loeux preneurs, en quoy ils ont fait et donne de grands dommages à aucuns de nos allies par feinte, ou faussee couleur qu'ils mettoient de non cognoistre s'ils estoient nos adversaires, ou non, qui est chose bien damnable, contre raison et justice, que homme sous telle couleur deust porter dommage, ou destourbler. Ordonnance de 1600, art. 8. See the opinion of M. Portalis, in the case of *The Pigou* (2 Cranch, 98, note a).

Rob., 9.) But if the injured parties lie by for a great length of time, the court will not issue a monition to the captors to proceed to adjudication, even when misconduct is laid as the ground of the application. (*The Purissima Conception*, 6 Rob., 45.)

When a ship is captured it is the duty of the captors to send her into some convenient port [10*] for adjudication. (*The Huldah*, 3 Rob., 285; *The Madonna del Burso*, 4 Rob., 169; *The St. Juan Baptista*, 5 Rob., 33; *The Wüthelmsberg*, 5 Rob., 143; *The Elaebe*, 5 Rob., 173; *The Lively*, 1 Gallis., 315.)¹ And a convenient port is such a port as the ship may ride in with safety without unloading her cargo. (*The Washington*, 6 Rob., 275; *The Principe*, Edwards, 70.) And the captors are bound to put on board the captured ship a sufficient prize crew to navigate the vessel into such a port, unless the captured crew consent to navigate her (which in general they are not bound to do); but if they consent they cannot afterwards impute any fault to the captors. (*Wilcocks v. Union Ins. Co.*, 2 Binney, 574; *The Resolution*, 6 Rob., 13; *The Pennsylvania*, 1 Acton, 33; *The Alexander*, 1 Gallis., 532; *S. C.* 8 Cranch, 169.) And in case of the capture of a neutral ship the crew ought not to be handcuffed or put in irons, unless in extreme cases; for if unnecessarily done the prize court will decree damages to the injured parties. (*The St. Juan Baptista*, 5 Rob., 33; *The Die Fire Damer*, 5 Rob., 357.) Captors are not bound to explain the cause of capture, but it is highly proper so to do, as the master may explain it away. (*The Juffrow Maria Schroeder*, 3 Rob., 147.) They may chase under false colors, but the maritime law does not permit them to fire under false [11*] colors. (*The Peacock*, 4 Rob., 185.)² *They have no right to make any spoliation or damage to the captured ship, or to embezzle or convert the property, or to break bulk, or to remove any of the property from the ship, unless in cases of necessity, or where obvious reasons of policy, or the urgency of the occasion, justify them in so doing. (*The Concordia*, 2 Rob., 102; *L'Eole*, 6 Rob., 220; *The Washington*, 6 Rob., 275; Clerk's Praxis, 163; *Del Col v. Arnold*, 3 Dall., 333.) And in every case of a removal of property from a captured ship the court expects to be satisfied as to the propriety of the removal before it will proceed to adjudication. But if any of the captured property be shown to be missing, without any default on their part, as where it is lost by robbery or burglary after unlivery, they are not responsible for the loss. (*The Maria*, 4 Rob., 348; *The Rendsberg*, 6 Rob., 142.) And if captors, acting *bona fide*, and for the benefit of the parties, under peculiar circumstances, land or even sell the prize goods,

this irregularity, if not injurious to the parties, will not be held to deprive them of the effects of a lawful possession. (*The Princessa*, 2 Rob., 81.)

If the capture is made without probable cause, the captors are liable for damages, costs, and expenses to the claimants. (Sir W. Scott and Sir J. Nichol's letter to Mr. Jay, Wheat. on Capt., Appendix, 312; opinion of M. Portalis, in the case of *The Pigeon*, 1 Cranch, 101, note a; *Del Col v. Arnold*, 3 Dall., 333; *The Charming Betsey*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Cranch, 458; *The Triton*, 4 Rob., 78; *Camden v. Hone*, 4 Term Rep., 385; *Fallsjeff v. Elphinstone*, 5 Brown's Parl. Cas., 843; Clerk's Praxis, 162; *The Lively*, 1 Gallis. 315.)³ And if the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them. (*The Corrier Maritimo*, 1 Rob., 287; *The Madonna del Burso*, 4 Rob., 169; *The Peacock*, 4 Rob., 185; **The Anna Catherine*, 6 Rob., 10.) So, [*12 also, if the captors agree to restitution, but unreasonably delay it, demurrage will be allowed against them. (*The Zee Star*, 4 Rob., 71.) After an acquittal, a second seizure may be made by other captors, but it is at the peril of damages and costs, in case of failure. (*The Mercurius*, 1 Rob., 80.) And although a spoliation of papers be made, yet, if it be produced by the misconduct of captors, as by firing under false colors, it will not protect them from damages and costs. (*The Peacock*, 4 Rob., 135.) Nor is it an objection in the prize court against awarding damages and costs that the ship is not navigated by a proper proportion of seamen of her own country, according to its navigation laws; for that is an irregularity which must be referred to another branch of the admiralty jurisdiction. (*The Nemesis*, 1 Edw., 50.)

As to the time within which a suit may be brought in the admiralty, for damages for an illegal capture, it may be observed, that as the statute of limitations does not apply to prize causes, there is no time during the existence of the prize commission in which captors may not be legally called on to proceed to adjudication for the purpose of awarding damages against them. (*The Mentor*, 1 Rob., 179; *The Huldah*, 3 Rob., 235.) But the court will extend, by equity, the principles of the statute of limitations to prize causes; and, therefore, it will not, after a great lapse of time, compel the captors to proceed to adjudication, or entertain a suit for damages for a supposed illegal capture. (*The Susanna*, 6 Rob., 48.)

1.—Enjoignons aux capitaines qui auront fait quelque prise, de l'amener ou envoyer, avec les prisonniers, au port où ils auront armé a peine de perteuill leur droits et d'amende contraire; si ce n'est qu'il fusent forces par la tempête ou par les ennemis, de relâcher en quelque autre port, auquel cas ils seront tenus d'en donner incessamment. Avis aux intéressés à l'armement. L'Ordonnance de 1681, liv. 3, tit. 9; Des Prises, art. 7. See also the Ordinance of 1684, art. 43; Coll. Mar. 113.

2.—Sa Majesté a ordonné, et ordonne, que tous les capitaines commandans ses vaisseaux ou ceux armés en course par ses sujets seront tenus d'arborer pavillon français avant de tirer le coup d'assurance ou de semence. Défenses très-expresses

leur sont faites de tirer sous pavillon étranger. à peine d'être privés, eux et leur armateurs, de tous le revenu de la prise, qui sera confisqué au profit de Sa Majesté si le vaisseau est jugé ennemi; et en cas que la vaisseau soit jugé neutre, les capitaines et armateurs seront condamnés aux dépens, dommages et intérêts des propriétaires Ordonnance de 17 Mars, 1696.

3.—Si la prise étoit évidemment mauvaïse, de maniere, qu'il n'y eut rien qui fut capable d'excuser le corsaire; nul doute alors que la main-levée n'en fut ordonnée, non-seulement avec exemption de tous frais; mais encore avec tous dépens, dommages et intérêts contre l'armateur. 2 Valin, Sur l'Ordonnance, 236.

Wheat. 2.

In respect to the measure of damages, where the vessel and cargo are actually lost, it is usual to allow the actual value of the property. (*Del Col v. Arnold*, 3 Dall., 333; *Maley v. Shattuck*, 3 Cranch, 458; *The Anna Maria*, ante, 327.) And where a prize had been illegally condemned by a vice-admiralty court, erected by the commanders in the West Indies, under a misapprehension that they possessed an authority to erect such courts, and afterwards restitution in value was decreed by the High Court of Admiralty in England, the court allowed the invoice value, 10 per cent. profit, and freight, as well where the ship and cargo belonged to the same persons as where they were separately owned. (*The Lucy*, 3 Rob., 208.) Indeed, what items may properly form [13] a part of the damages, depends upon the nature and circumstances of the case; and for guides to direct his judgment, the learned reader is referred to the following cases: *LeCuir v. Eden*, Doug., 594, 596; *Talbot v. Janson*, 3 Dall., 133, 170; *Cotton v. Wallace*, 3 Dall., 302, 304; *The Charming Betsey*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Cranch, 458; *The Narcissus*, 4 Rob., 20; *The Zee Star*, 4 Rob., 71; *The Corrier Maritime*, 1 Rob., 287; *The St. Juan Baptista*, 5 Rob., 33; *The Die Fire Damer*, 5 Rob., 357; *The Anna Catharina*, 6 Rob., 10; *The Driver*, 5 Rob., 145; *The Lively*, 1 Gallis., 815; *The Anna Maria*, ante, 327. Where damages and costs are allowed, if, after they are assessed, payment is delayed, the court will allow interest upon the principal sum from the time of assessment, although it includes interest as well as principal. (*The Driver*, 5 Rob., 145.)

As to the mode of assessing damages, it is usual for the court to refer the subject to commissioners, to make inquiry and return a regular report to the court of the several items and amount of damages. But in their report they should state the principles upon which they proceed in making allowances, where the items do not explain themselves, and not report a gross sum without specification or explanation. (*The Charming Betsey*, 2 Cranch, 64; *The Lively*, 1 Gallis., 815.)

In respect to the persons who are liable for costs and damages, it may be observed that the general rule, in respect to public ships, is, that the actual wrong-doer, and he alone, is responsible. (*The Mentor*, 1 Rob., 179.) It is not meant by this that the crew of the capturing

ship are responsible for the seizure made in obedience to the commands of their superior; for by the prize law, the act of the commander is binding upon the interests of all under him, and he alone is responsible for damages and costs. (*The Diligentia*, 1 Dodson, 404.) The meaning of the rule is, that the person actually ordering the seizure is liable for the damages, and not his superior in command (who has not concurred in the particular act), simply from the fact that the seizer is acting within the scope of his general orders. (*The Mentor*, 1 Rob., 179.) Therefore, a suit cannot be maintained against an admiral upon a station, who is not privy to the act of seizure. (*Ib.* 179.) Nor a commodore, who commands the *squadron, but gives no orders for the [*14 capture. (*The Eleanor*, ante, 346.) In short, the actual wrong-doer is the person to answer in judgment, and to him responsibility is attached by the court. He may have other persons responsible over to him, and that responsibility may be enforced; as, for instance, if a captain make a wrongful seizure under the express orders of his admiral, that admiral may be made answerable in the damages occasioned to the captain by the improper act. But it is the constant and invariable practice of the prize court to have the actual wrong-doer the party before the court; and the propriety of the practice is manifest, because, if the court was once to open the door to complaints founded on remote and consequential responsibility, it would be difficult to say where it is to stop. (*The Mentor*, 1 Rob., 179.) The principles applicable to this class of cases are fully developed in the opinion in the case of *The Eleanor* (ante, 346), to which the reader is respectfully referred.

In case of private armed vessels, the owners, as well as the master, are responsible for the damages and costs occasioned by illegal captures, and this to the extent of the actual loss and injury, even if it exceeds the amount of the bond usually given, upon the taking out of commissions for privateers. (Bynk. Q. J. Pub., l. 1, ch. 19, Duponceau's ed., p. 147; *Talbot v. Three Brigs*, 1 Dall., 95; S. C. 1 Hall's Am. Law Journ., 140; *The Die Fire Damer*, 5 Rob., 357; *The Der Mohr*, 3 Rob., 129; 2 Brown's Civ. and Adm. Law, 140, *Del Col v. Arnold*, 3 Dall., 333; *The Anna Maria*, ante, p. 327.) But the sureties to the *bond are respon- [*15 sible only to the extent of the sum in which they

1.—Pothier holds, that the owner of the privateer may entirely discharge himself from the responsibility beyond the amount of the penalty in his bond, by abandoning the vessel to the injured party. De Propriété, No. 92. But Valin decides, that the prize law controls, in this respect, the provision of the municipal law of France, by which the owners of merchant vessels are discharged from their responsibility, by abandoning the ship and freight, in like manner as they are by the British statute, 9 Geo. II., ch. 15. "En conformité des dits Règlemens de 1704 et 1744 (giving costs and damages to neutrals wrongfully seized), il faut donc tenir aujourd'hui sans égard à la disposition de l'art. 3 du titre des propriétaires, &c., et du présent article, en tant qu'il limite le cautionnement à la somme de 15,000 liv. que l'armateur répondra indéfiniment de tous les dommages et intérêts résultans des délits et déprédations des gens de son corsaire, et des prises irrégulières par eux faites; sans pouvoir même s'en défendre, en payant la somme de 15,000 liv. pour laquelle il aura donné caution, et en déclarant en même temps qu'il abandonne outre cela son navire avec tous ses agrès, apparaux et autres dépendan-

ces, relativement à l'art. 2 du même titre des propriétaires, &c., dont la disposition n'est plus applicable en matière d'armement en course, que celle de l'art. 3, attendu ces mêmes réglemens qui forme une décision particulière à cet égard." Sur l'Ordonnance, liv. 3, tit. 9, des Prises, art. 2. Such appears to have been the former law of France, but it was changed by the new commercial code. "Les propriétaires des navires équipés en guerre, ne seront toutefois responsables des délits et déprédations commis en mer, par les gens de guerre qui sont sur leur navires, ou par les équipages que jusqu'à concurrence de la somme pour laquelle ils auront donné caution, à moins qu'ils n'en soient participants ou complices." Code de Commerce, art. 217. But as our laws not only contain no such provision, but have not even adopted the British statute, by which the owners are discharged in ordinary cases by abandoning the vessel and freight to the injured party, there can be no doubt that the responsibility of the owners of privateers is not limited, either to the penalty of the bond or the value of the vessel.

are bound. (Du Ponceau's Bynk., p. 149; 2 Valin, Sur l'Ordonnance, 238.) And if a person appear in behalf of the captain of a private ship of war, and gives security in his own name, with sureties, instead of the captain, he is liable in the same manner as the captain, as a principal in the stipulation. (*King v. Ferguson*, 1 Ewd., 84.) And a part owner of a private armed ship is not exempted from being a party to a suit, on a monition to bring in the prize proceeds and proceed to adjudication, in consequence of having made compensation for his share to the claimant, and received a release from him; for the claimant has a right to the answer of all parties, even supposing that the decree ought not to be enforced against such part owner. (*The Karasan*, 5 Rob., 291.) And in a court of the law of nations a person may be held a part owner of a privateer, although [16*] his name has never been inserted in the bill of sale or the ship's register. (*The Nostra Signora de los Dolores*; 1 Dodson, 290.)

Where the captors, from any cause whatsoever, as from loss of the property, or from fraud or negligence, omit to bring the case before the court for adjudication, the claimant may apply to the court for a monition to the captors to proceed forthwith to adjudication (*The William*, 4 Rob., 214); and upon their neglect so to do after service and return of the monition, the court will, if a proper case is laid before it, proceed to award restitution with damages and costs. (*The Huldah*, 3 Rob., 235; *The Susanna*, 6 Rob., 48.) It is the usual practice for a party to give in his claim in the first instance, before calling upon the captors to proceed to adjudication; but it will not necessarily vitiate the process, if there has been no claim. If it should, in any manner, come to the knowledge of the court that a seizure had been made in the nature of prize, and that no proceedings had been instituted, it would be the duty of the court to direct proceedings to be commenced. (*The William*, 4 Rob., 214.) The same object is often effected by the claimants by an original suit for restitution, on a petition setting forth all the facts, and praying for a decree of restitution either *in rem* or in value with damages. (*Del Col v. Arnold*, 3 Dall., 338; *Maley v. Shattuck*, 8 Cranch, 458; *Jennings v. Carson*, 4 Cranch, 2; *The Anna Maria*, ante, p. 327; *The Eleanor*, ante, p. 347.) Whether the proceeding be in the one form or the other, the rights of all parties remain the same. The burden of the neutrality of the property rests on the claimants, and when that is shown, the existence of probable cause of capture is to be established by the other side; and each party has a right to the answer of the other, upon all proper interrogatories supported by oath. (*Maley v. Shattuck*, 8 Cranch, 458.)

[17*] As soon as the captors have brought the property in for adjudication, and the preparatory examinations are taken, the captors, and if they neglect or refuse, the claimants, apply to the proper court for adjudication. In either case the property is immediately taken into the custody of the court; for in all proceedings *in rem* the court has a right to the custody of the thing in controversy; and as soon as libeled, it

is always deemed in the custody of the law. (*Jennings v. Carson*, 4 Cranch, 2; *Home v. Camden*, 2 H. Bl., 588.) In the United States, a warrant immediately goes to the marshal to take possession of the property; and he is bound to keep it *salva et areta custodia*; and if any loss happens by his negligence, he is responsible for it to the court. In England, though the property is now usually put into the hands of the captors, yet it still remains, in contemplation of law, in the custody of the public. Formerly it actually did remain in its custody, as is still the case in other foreign countries. It is merely for the convenience of the captors that the English admiralty permits them to take possession of the property. But it must be remembered that it is so held by them as agents of the court, and not in right of property; and therefore, their possession may be devested by the act of the court, either *ex officio* or on the application of the parties interested, showing good cause for taking it out of their hands. (Per Sir W. Scott, *arguendo*, in *Smart v. Wolff*, 3 Term Rep., 323, 329; *The Herkimer*, Stewart, 128, S. C., 2 Hall's Am. Law Journ., 188.) And the property still remains in the custody of the court, notwithstanding an unlivery and deposit in public warehouses. (*The Maria*, 4 Rob., 348.) In fact, in England, where the property is so unlivered, if it has been captured by a public or private commissioned vessel, it is, *de facto*, under the joint locks of the Government and the captors, although in the legal possession of the marshal under the tenor of his writ for unlivery; and if captured by a non-commissioned vessel, it is a *droit*, where the king, in his office of admiralty being the captor, it is under his locks alone. (*The Rendberg*, 6 Rob., 142, 174.) In the United States, the marshal holds the custody at all times for the court; and the latter is the guardian of the public rights and revenue, as well as of the rights of the captors *and claimants in all cases of prize. It [*18 is, indeed, usual and proper for the collector of the customs to keep an officer on board for the protection of the revenue, until the duties are duly secured, which the captors may secure, if they please; but since it cannot be ascertained until a decree of condemnation whether the property be good prize or not, many cases may occur in which it would be highly inconvenient for them to adopt this course. If the property be restored specifically, and exported from the country by the claimants, it is held not liable to duties; and if sold under an interlocutory order of sale, it is the duty of the court to reserve out of the proceeds the amount of duties which then attach upon it, and direct them to be paid over to the collector. (*The Concord*, 9 Cranch, 387; *The Neriede*, ante, vol. 1, p. 171.) It is true that the prize act of last war (act of the 26th June, 1812, ch. 107, sec. 14) seems to contemplate that the duties may be paid or secured in prize cases, in the same manner as goods ordinarily imported. But this clause is in terms applied only to goods of British growth, produce, or manufacture, or imported from British ports; and is, at all events, inapplicable to cases where it cannot be ascertained whether the goods are imported or not, until after a judicial decision. And the subsequent act of the 27th January, 1813, ch. 155, manifestly con-

templates that the payment of the duties is, in cases of condemnation, to be made by the marshal, out of the proceeds of prize sales. And it has been repeatedly held in the Circuit Court for the first circuit, that no forfeiture accrued for not securing the duties upon prize goods before condemnation; and that the court might, at any time, direct an unlivery and sale; and upon such sale, would deduct the amount of duties, and direct them to be paid to the collector.

It has already been stated that when the marshal has possession of the property he is bound for safe and fair custody; and if any loss be sustained, it is at least his duty to be prepared to show that it was not lost by any default of his. (*The Hoop*, 4 Rob., 145.) If, therefore, property be pillaged while under his care, the court will hold him responsible for its value, if it arose from his negligence. If, indeed, upon an application to enforce their responsibility, he by his answer deny any negligence and loose custody, the court may, perhaps, think it no more than a legal and proper confidence in its own officer to throw the burden of proof of culpable negligence or fraud on the other party. (*The Rendsberg*, 6 Rob., 142, 157.) And where the property is lost while actually under the locks of the government, the marshal will not be liable, although he may still be considered as constructively having the legal custody. (*Id.*)

In prize causes it is not usual to file any special allegation of the particular circumstances on which the captors found their title to condemnation. The libel is, and always ought to be, the mere general allegation of prize, such as is used in undoubted cases of hostile property. The act of bringing the vessel in, and proceeding against her, allege her generally to be a subject of prize rights, and the captors are not called upon to state, at the commencement of the suit, the particular grounds on which they contend she is so. They have a right to institute the inquiry, and take the chance of the benefit of any fact that may be produced in the course of that inquiry. (*The Adeline*, 9 Cranch, 244; *The Fortuna*, 1 Dodson, 81.) This is a great advantage on the side of the captors, but is controlled by their liability to costs and damages, if the inquiry produce nothing; and is fully balanced by the advantage given to the claimant in this species of proceeding, that no evidence shall be admitted against him but such as proceeds from himself, from his own documents, and from his own witnesses, the captors not being permitted, except in cases marked by peculiar circumstances, to furnish any evidence whatever. (*The Fortuna*, 1 Dodson, 81.) Considerations of this nature render it very important for proctors to adhere, with the greatest care, to the established form; and it is a great irregularity, equally evincing want of skill and judgment, to deviate from it.

Upon filing the libel the usual practice is immediately to issue a monition citing all persons who are interested to appear at a given day, and show cause why the property should not be condemned as prize; and this process, in the 20*] United States, *usually includes a war-

rant to take possession of the property. But where the prize has been first seized in port, a monition issues, in the first instance, to bring in the papers if they are in the possession of a subject or citizen. (*The Conquerer*, 2 Rob., 303.) The usual monition is directed to the marshal, and in England is served by posting up a copy at the Royal Exchange, in the city of London. In former times, fourteen days were allowed between the service of the monition and the day of hearing the cause; but in most of the later prize acts in England twenty days are allowed after the execution of the monition. (Robinson's Coll. Mar., 89, note; Mariott's Formulary, 187.) In the United States the return day of the monition depends upon the discretion of the district judge; but it is usually twenty days at least after the issuing of the process; and it is served usually by posting up a copy on the mast of the prize vessel, and at such other public places as the judge may direct; and also by publication in the newspapers printed in or near the principal place or port of the district into which the prize is brought. This proceeding by monition and service by public notice is borrowed from the Roman law, by which, when it became impracticable to serve the party with a personal citation, recourse was had to this method, which is called a citation *per edictum*. (Dig. Lib. 5, tit. 1, sec. 63; Robinson's Coll. Mar., 88, note.)

At the return day of the process, if no claim be at that time or previously interposed, and upon proclamation made no person appear to claim, the default is entered on the record; and the court will then proceed to examine the evidence, and if proof of enemy's property clearly appear, it will immediately decree condemnation; if the case appear doubtful it will postpone a decision. It is not now usual to condemn goods for want of a claim till a year and a day has elapsed after the service of the process, except in cases where there is a strong presumption and reasonable evidence to show that the property belongs to an enemy. (Rob. Coll. Mar., 89; *The Harrison*, *ante, vol. I, p. 298; *The Staat Embden*, 1 Rob., 26, 29.) And if no claim be interposed within that period, the property is condemned of course, and the question of former ownership is precluded forever, the owner being deemed in law to have abandoned it. (*The Staat Embden*, 1 Rob., 26, 29; *The Henrick and Maria*, 4 Rob., 43, 44; *The Harrison*, ante, vol. I, p. 298; Rob. Coll. Mar., 89, note; *The Avery*, 2 Gallis.)

If at or before the return day of the process a claim is interposed, the cause is then to be heard in its proper order upon the ship's papers and the preparatory examinations. Accompanying every claim must be an affidavit which is called the test affidavit, and which regularly should state that the property at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; and if there be any special circumstances in the case these should be added. (*The Adeline*, 9 Cranch, 244; *vide The Sally*, 3 Rob., 300, note.) In respect to the manner of interposing claims, and the rules by which their admission or rejection are governed, it does not

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seem necessary to do much more than refer the reader to what is said on that subject in the appendix to the preceding volume (*ante*, p. 500), and the case of *The Adeline* (9 Cranch, 244, 286). It may, however, be added, that a party to be entitled to assert a claim in the prize court must be the general owner of the property; for a person who has a mere lien on the property for a debt due, whether liquidated or unliquidated, is not so entitled. (*The Eenroom*, 2 Rob., 1, 5; *The Tobago*, 5 Rob., 218; *The Frances, Thompson's claim*, 8 Cranch, 335, *Id.*; *Irelin's claim*, 8 Cranch, 418; *The Marianna*, 6 Rob., 24.) And the same rule has been applied to a mortgage where the mortgagee is left in possession. (*Bolch v. Darrel*, Bee., 74.) The rule that a claimant is not admitted to claim, who is engaged in a traffic prohibited by the municipal laws of the country, is applied only to citizens or subjects, and not to foreign neutral proprietors. (*The Recovery*, 6 Rob., 341.) But to citizens or subjects the rule equally applies, whether the transaction is between original contractors or under a sub-contract. (*The Cornelius and Maria*, 5 Rob., 28.) And an inactive or sleeping partner cannot receive restitution in a transaction in which he *could not be lawfully engaged as a sole trader. (*The Franklin*, 6 Rob., 127, 131.) If enemy's property be fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former. (*The St. Nicholas, ante*, Vol. I, p. 481.)

An appearance by a proctor for the claimants, duly entered, cures all defects of process, such as the want of a monition or of due notice. (*Penhallow v. Doane*, 3 Dall., 54.) And even assuming that one partner has no authority to appoint a proctor for all the partners, yet a general appearance for all by a proctor is good and legally binding. (*Hills v. Romm*, 3 Dall., 231.) In cases of captures by government ships the proceedings in England are exclusively carried on by the officers of the government, and no other persons can interfere to support or pursue a suit, where they do not consent. (*The Elisebe*, 5 Rob., 173.) Whether the same exclusive authority exists in the United States has never been made the subject of question in the Supreme Court.¹

23*] *It has been already stated in the former note, that the cause is to be heard at the first hearing upon the ship's papers and the preparatory examinations, and that the *onus probandi*

rests on the claimant. (And see *The Rosalie*, 2 Rob., 348; *The Countess of Lauderdale*, 4 Rob., 288.) If upon such hearing the cause appear doubtful, and the parties have not forfeited their title to farther proof, it is then in the discretion of the court to allow farther proof, either to the claimants alone or to the captors as well as the claimants. The manner in which the preparatory examinations are taken, and the cases in which farther proof is allowed or denied, have been briefly stated in the former note, and the standing interrogatories on which these examinations are taken will be found in a subsequent note to this volume. (*Infra*, note 3.) It may not, however, be useless to glance at a few particulars which are either omitted or not distinctly stated in the former note. Although the ship's papers found on board are proper evidence, yet they are so only when properly verified; for papers by themselves prove nothing, and are a mere dead letter if they are not supported by the oaths of persons in a situation to give them validity. (*The Juno*, 2 Rob., 120, 122.)² And even upon the original hearing, papers found on board another captured ship may be invoked into the cause, and used by the captors. But if the papers are taken from a vessel not so captured and carried in, they can only be used upon an order for farther proof. (*The Romeo*, 6 Rob., 351; *The Maria*, 1 Rob., 340.) But the authenticity of papers thus invoked must be verified by affidavit, and otherwise, to the satisfaction of the court. (*The Romeo, Ib.*) So, also, the depositions of the claimant in a former case, in which he was *owner and master, were permitted [*24 to be invoked by the captors to prove his domicile. (*The Vriendschap*, 4 Rob., 166.) But where nothing appears in the original evidence, which lays a foundation for prosecuting the inquiry farther, it must be under very particular circumstances indeed that the court will be induced to admit extraneous evidence. (*The Sarah*, 3 Rob., 330.) If the instructions found on board of a prize are transmitted from the department of state for foreign affairs to the prize court, they are considered as sufficiently authenticated as having been found on board, without further proof to that effect. (*The Maria*, 1 Rob., 340.) A person skilled in nautical affairs may be called to examine the log-book of the captured ship, and to give his opinion as to the verity of the statement in respect to destination, &c., from the courses, winds, &c. (*The Edward*, 4 Rob., 68.)

The examinations of the prize crew are to be taken in the manner which has been already alluded to; but if the prize be carried into a foreign port where there is no commission, their affidavits taken in such port will be ad-

1.—In England it is also held that the power of the crown to direct the release of property seized as prize, before adjudication, and against the will of the captors, is not taken away by any grant of the prize conferred in the order of council, the proclamation, or the prize act. *The Elisebe*, 5 Rob. 155. And in France the captors cannot, after the prize is brought in for adjudication, terminate the proceedings by a private arrangement with the claimants. Such an arrangement, to be valid, must be communicated to the procureur general, and approved by the court; because the rights and interests of the state, of the officers and crew of the capturing vessel, and of the subjects of neutral

powers, might be compromised by such an arrangement. See the opinion of M. Portails on this question, (*Code des Prises*, Par Guichard, tom. 2, p. 533.) He distinguishes this case from that of ransoms, which are regulated by peculiar laws, but never favored; and he cites, in support of his opinion, several ancient *arrêts* of council and rescripts of the admiral.

2.—*Il y a plus, et parceque les pieces en forme trouvées à bord peuvent encore avoir été concertées en fraude, il a été ordonné par Arrêt du Conseil du 28 Octobre, 1692, que les dépositions contraires des gens de l'équipage pris, priveraient à ces pieces.* Valin, sur l'Ordonnance, Liv. 3, tit. 9, Des Prises, art. 6.

mitted in evidence. (*The Peacock*, 4 Rob., 185; *The Arabella and Madeira*, 2 Gallis.)

In the prize court, as in every other judicial tribunal, there are certain presumptions which legally affect the parties, and are considered as of general application. Possession is presumptive evidence of property. (*Miller v. The Resolution*, 2 Dall., 19.) If there be a total defect of evidence to establish the proprietary interest, it is presumed to belong to an enemy. (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay; *Ch'i supra*; *The Magnus*, 1 Rob., 81.) So, goods found in an enemy's ship are presumed to belong to the enemy, unless a distinct neutral character and documentary proof accompany them. *Res in hostium navibus presumuntur esse hostium donec contrarium probetur.* (*Locutus*, lib. 2, ch. 4, n. 11; *Grotius de Jur. Bel. et Pac.* lib. 8, ch. 6, sec. 6; *Bynk. Q. J. Pub.* lib. 1, ch. 13.) And in cases where the property falls within the general character of contraband, if the claimant would avail himself of the favorable distinction that it is the produce of his own country, the onus of establishing [25*] that fact is on him. (*The Twoes Juffrouen*, *4 Rob., 242.) *Prima facie* a merchant is taken to be acting for himself, and upon his own account; but if a person is not a merchant, that may give a qualified character to his acts. (*The Jonge Pieter*, 4 Rob., 79.) If in the ship's papers property in a voyage from an enemy's port be described "for neutral account," this is such a general mode as points to no designation whatever; and under such a description no person can say that the cargo belongs to him, or can entitle himself to the possession of it as his property. In such a case farther proof is indispensable. (*The Jonge Pieter*, 4 Rob., 79.) Where a ship has been captured and carried into an enemy's port, and is afterwards found in possession of a neutral, the presumption is, that there has been a regular condemnation, and the proof of the contrary rests on the party claiming the property against the neutral possessor. (*The Countess of Lauderdale*, 4 Rob., 283.) Where a treaty expressly provides for the removal of persons who happen to be settled in a ceded port, the burthen of proof rests on the other party to show that they did not intend to remove, for the presumption is already to be taken in their favor. (*The Diana*, 5 Rob., 60.) Where the master of a captured ship is not fairly discredited, his testimony as to destination is generally conclusive on that point. (*The Carolina*, 8 Rob., 75; *The Conventientia*, 4 Rob., 200.) So his testimony of the ill-treatment of his crew, if uncontradicted. (*The Die Fire Damer*, 5 Rob., 357.) Where the voyage is from the port of one enemy to the port of another enemy, and farther proof is required, the double correspondence of the shipper and consignee should be produced; for there is a double interest to be rebutted; but if the voyage be to a neutral port, the correspondence with the shipper is all that is usually required. (*The Freede*, 5 Rob., 281.)

In respect to the persons who may be witnesses in prize causes, it is very clear that an alien enemy, as such, is not in general disabled to be a witness (*The Fulcon*, 6 Rob., 194; and, *Wheat*, 2. U. S., Book 4.

indeed, in ordinary cases the prize crew, whether national, neutral or hostile, are the necessary witnesses in the cause. *(*The Henrick* [*26 and *Maria*, 4 Rob., 43.) And upon farther proof ordered, the attestations of the claimant and his clerks, and the correspondence between him and his agents are admissible evidence, and proper proofs of property. (*The Adelaide*, 3 Rob., 281.) And upon farther proof, the affidavits of the captors, even without a release, are good evidence of facts within their own knowledge. (*The Maria*, 1 Rob., 840; *The Resolution*, 6 Rob., 18; *The Sully*, 1 Gallis., 401.) But except under peculiar circumstances, the affidavits of captors are not received in our prize courts. (*The Henrick and Maria*, 4 Rob., 57, note a; *The Grotius*, 9 Cranch, 368; *The Sully*, 1 Gallis., 401; *The Haubet*, 6 Rob., 54. *The Glierktigheit*, 6 Rob., 58, note a; *The Charlotte Caroline*, 1 Dodson, 192, 199.) Upon allegations of joint capture, the affidavits of any of the joint captors are not received, unless they are discharged of all interest by a release, for in such questions the general rules of law as to competency prevail. And where a witness declares that he expects to share from the bounty of the joint captors, he is competent; but it is otherwise if he says that he thinks himself entitled in law. (*The Dree Gebroeders*, 5 Rob., 339, 343, note a; *The Anna Catharina*, 6 Rob., 269.) And the log-book of asserted joint captors is inadmissible evidence, since it goes to establish their interest. (*Le Niemen*, 1 Dodson, 9.) Where farther proof is ordered, affidavits taken in foreign countries, before notaries public, whose attestations are properly verified, are in general proper evidence. But in the Supreme Court of the United States it is by a rule of the court required that all such evidence should be taken under a commission from the court. (*The London Packet*, ante, p. 371.) And this practice is certainly more conformable to the general purposes of justice, and less liable to abuse than any other. It seems, however, to be a general rule of the prize court not to issue any commission to be executed in the enemy's country. (*The Magnus*, 1 Rob., 81; *The Diana*, 2 Gallis.)

The questions which are most ordinarily discussed in prize courts at the hearing of [*27 the cause, respect the national character of the property; and this depends sometimes upon the habits and trade of the ship, upon the nature of the voyage or of the cargo, or upon the legal or illegal conduct of the parties themselves; but ordinarily it depends upon the national domicile of the asserted proprietor, or upon the nature of the title which he asserts over the property. In all these cases where the property is condemned, it is by fiction, or rather by intendment of law, deemed the property of enemies; that is, of persons who are so to be considered in the particular transaction, and is condemned *eo nomine*. (*The Elabe*, 5 Rob., 178; *The Nelly*, 1 Rob., 219; note to *The Hoop*; *The Alexander*, 8 Cranch, 169; *The Julia*, 8 Cranch, 181; *The Thomas Gibbons*, 8 Cranch, 421; *The St. Lawrence*, 1 Gallis., 532; *The Joseph*, 1 Gallis., 545.) It is, besides, the pur-

pose of this note to discuss these topics at large with all the distinctions which belong to them. Indeed, such a discussion would of itself require a very considerable treatise. It may, however, be of some use to give a rapid sketch of the leading principles which regulate the decisions of prize courts on some of these subjects.

In respect to the question who are to be considered enemies or not, the general principle is, that every person is to be considered as belonging to that country where he has his domicile, whatever may be his native or adopted country. (*The Vigilantia*, 1 Rob., 1; *The Endraught*, 1 Rob., 19; *The Sarah Christina*, 1 Rob., 237; *The Indian Chief*, 3 Rob., 23; *The President*, 5 Rob., 277; *The Neptunus*, 6 Rob., 403; *The Venus*, 9 Cranch, 253; *The Frances*, Gillespie's claim, 1 Gallis., 614; *The Mary and Susan*, Richardson's claim, ante, vol. 1, p. 46, S. C. p. 55; note f; *M'Connel v. Hector*, 3 Bos. & Pull., 113; Bynk. Q. J. Pub., ch. 8; *Duponceau's* edit., p. 19, 25.) And the masters and crews of ships are deemed to possess 28*) the national character of the ships to which they belong during the time of their employment. (*The Endraught*, 1 Rob., 21; *The Bernon*, 1 Rob., 101; vide *The Embden*, 1 Rob., 17; *The Frederick*, 5 Rob., 8; *The Ann*, 1 Dodson, 221.) And even if a person goes into a belligerent country originally for temporary purposes, he will not preserve his neutral character, if he remain there several years, paying taxes, &c. (*The Harmony*, 2 Rob., 322; *The Embden*, 1 Rob., 17.) And a neutral consul, resident and trading in a belligerent country, is, as to his mercantile character, deemed a belligerent of that country. (*The Indian Chief*, 3 Rob., 22; *The Josephine*, 4 Rob., 25.) And the same rule applies to the subject of one belligerent country, resident in the country of its enemy, and carrying on trade there. (*The Citto*, 3 Rob., 38; *M'Connel v. Hector*, 3 Bos. & Pull., 113.) But a character acquired by mere domicile ceases upon removal from the country. (*The Indian Chief*, 3 Rob., 12.) The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native than to impress the national character on one who is originally of another country. (*La Virginie*, 5 Rob., 98.) And in his favor, a party is deemed to have changed his domicile and his native character reverts as soon as he puts himself in *intinere* to return to his native country *animo revertendi*. (*The Indian Chief*, 3 Rob., 12; *The St. Lawrence*, 1 Gallis., 467.)

In general, a neutral merchant trading in the ordinary manner with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. (*The Anna Catharina*, 4 Rob., 107, 121.) But it is otherwise if he be not en-

gaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy; for then it is in effect a hostile trade. (*The Anna Catharina*, 4 Rob., 107, 121.) So if the agent carry on a trade from the hostile country, which is not clearly neutral. (*Id.*) And if a person be a partner in a house of trade in the enemy's country, *he is, as to the [*29 concerns and trade of that house, deemed an enemy, and his share is liable to confiscation, as such, notwithstanding his own residence is in a neutral country; for the domicile of the house is considered in this respect as the domicile of the partners. (*The Vigilantia*, 1 Rob., 1, 14, 19; *The Susa*, 2 Rob., 255; *The Indiana*, 3 Rob., 44; *The Portland*, 3 Rob., 41; *The Vriendchap*, 4 Rob., 166; *The Jonge Klassina*, 5 Rob., 297; *The Antonia Johanna*, ante, Vol. 1, p. 159; *The St. Jose Indiano*, 2 Gallis.) But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. (*Id.* and *The Frances*, 1 Gallis., 618; S. C., 8 Cranch, 348.) However, where a neutral is engaged, in peace, in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of war, confiscated; but if he continues in the house after knowledge of the war, it is liable, as above stated, to confiscation. (*The Vigilantia*, 1 Rob., 1, 14, 15; *The Suma*, 2 Rob., 251, 255.) It is a settled principle that traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual. (*Id.* *The Suma*, 2 Rob., 251, 255, *The Vriendchap*, 4 Rob., 166.) And if a neutral be engaged in the enemy's navigation, it not only affects the particular vessel in which he is employed, but all other vessels belonging to him, that have no distinct national character impressed upon them. (*The Vriendchap*, 4 Rob., 166.)

Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character. (*The Vigilantia*, 1 Rob., 1, 19, 26; *The Vroo Anna Catharina*, 5 Rob., 161; *The Success*, 1 Dodson, 181.) So, even if purchased by a neutral, if they are habitually engaged in the trade of the enemy's country (*The Vigilantia*, 1 Rob., 1, 19, 26; *The Planter's Wench*, 5 Rob., 22); even though there be no sea-port in the territory of the neutral. (*Id.* But in general, and unless under special circumstances, the national character of ships depends on the residence of the owner. (*Id.* *The Magnus*, 1 Rob., 31.) When, however, it is said that the flag and pass is conclusive on the character of the ship, the *meaning is this, that the party [*30 who takes the benefit of them is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations. But they do not bind other parties as against him; other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of a prize court to pull off this mask and exhibit the vessel so disguised in

1.—On n'aura aucun egard aux passe ports accordees par les princes neutres ou allies, tant aux proprietaires qu'aux maitres des navires sujets des etats ennemis, s'ils n'ont ete naturalises, et n'ont transfere leur domicile dans les etats des dits princes avant la declaration de la presente guerre: Ne pourront pareillement les dits proprietaires et maitres des navires ou sujets des etats ennemis, qui auront obtenu les dites lettres de naturalite, jouir de leur effet, si depuis qu'elles ont ete obtenues ils sont retournees dans les etats ennemis pour y continuer leur commerce. Reglement du 21 Octobre, 1744, art. 11; Dec. 26 juillet, 1778, art. 6.

her true character of an enemy's vessel. (*The Fortuna*, 1 Dodson, 87; *The Success*, *Id.*, 181.) Ships and cargoes engaged in the privileged and peculiar trade of a nation, under a special contract, and the sanction of the government, are considered as affected by the character of the nation, and if it be hostile, the trade is stamped with the same character. (*The Princessa*, 3 Rob., 49; *The Anna Catharina*, 4 Rob., 197; *The Rendsborg*, 4 Rob., 121; *The Vrouw Anna Catharina*, 5 Rob., 161; *The Commercen*, ante, Vol. I, p. 382; *Vide* 5 Rob., 5, note a.) And the produce of an estate situated in a hostile colony is so impressed with the character of the soil that although the owner of the estate be resident in a neutral country, his interest in the produce is deemed enemy's property. (*The Phoenix*, 5 Rob., 20; *The Vrouw Anna Catharina*, 5 Rob., 161; *The Dree Gebroeders*, 4 Rob., 282; *Bentzon's claim*, 9 Cranch, 191.)

In respect to the transfers of enemies' ships during war, it is certain that purchases of them by neutrals is not, in general, illegal; but such purchases are liable to great suspicion, and if good proof be not given of their validity, by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of the neutral claim (*The Bernon*, 1 Rob., 102; *The Sechs Gedschwiern*, 4 Rob., 100); and if the purchase be made by an agent, his letters of procuration must be produced and proved. (*The Argo*, 1 Rob., 158.) And if, after such [31*] transfer, the ship *be employed habitually in the enemy's trade or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. (*The Jemmy*, 4 Rob., 31; *The Omnibus*, 6 Rob., 71.) But the right of purchase, by neutrals, extends only to merchant ships of enemies (*The Minerva*, 6 Rob., 896, 899); for the purchase of ships of war belonging to enemies, is held to be invalid. (*The Minerva*, 6 Rob., 896.) And a sale of a merchant ship, made by an enemy to a neutral, during war, must be an absolute, unconditional sale. (*The Packet de Bilbao*, 1 Rob., 133; *The Noydt Gedecht*, 1 Rob., 137, note a.) Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. (*The Sechs Gedschwiern*, 4 Rob., 100.)

In respect to proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered. It is a general rule that during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. (*The Dankbaar African*, 1 Rob., 107; *The Herstdelder*, 1 Rob., 114.) This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed even in favor of owners who become subjects by capitulation after the ship-

ment and before the capture. (*Id.*) But if the ship sails before hostilities, when there is a decided state of amity between the two countries, and before the capture, the owner again becomes a friend, and at the time of the capture, and also at the time of adjudication, he is in a capacity to claim; the prize courts will then give him the benefit of the principle, that the national character cannot be altered *in transitu*, and will restore to him. (*Id.*) The same distinction is applied to purchases made by neutrals, of property *in transitu*; if purchased during a state of war existing, or imminent and impending danger *of war, the con- [32 tract is held invalid, and the property is deemed to continue as it was at the time of shipment, until the actual delivery. It is otherwise, however, if the contract be made during a state of peace, and without contemplation of war; for, under such circumstances the prize courts will recognize the contract, and enforce the title acquired under it. (*The Vrouw Margaretha*, 1 Rob., 386; *The Jan Frederick*, 5 Rob., 128.) And property is still considered *in transitu* if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port, and the ship is there changed. (*The Carl Walter*, 4 Rob., 207.) The reason why courts of admiralty have established this rule as to transfers *in transitu* during a state of war, or expected war, is asserted to be, that if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. (*The Vrouw Margaretha*, 1 Rob., 386.)

The same public policy has established the rule of the prize courts, that property going, during war, to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. (*The Sally*, 3 Rob., 800, note a.) And all contracts of purchase effected on the part of the belligerent, where the payment is executory and contingent on delivery at an ulterior port, at the risk of the neutral vendor or shipper, are considered as contracts in fraud of the prize law, and the goods, if captured *in transitu*, are condemned as the absolute property of the enemy. (*The Atlas*, 3 Rob., 299; *The Anna Catharina*, 4 Rob., 107, 113, note.) But when the contract is made in time of peace, and without any contemplation of war, no such rule exists. (*Id.*) But the rule is applied where such a contract is originally made between allies in the war, if a party to it becomes neutral after the contract, and before the execution of it, and the shipment is made afterwards. (*The Anna Catharina*, 4 Rob., 107, 112.) A contract by a neutral with a privileged company of the enemy, with a view to the transportation of the whole produce of a colony, or of the company itself, if made during war, or in contemplation of war, is pronounced illegal, and the property is liable to *condemnation as hostile property. (*The* [33 *Rendsborg*, 4 Rob., 121; *The Jan Frederick*, 5 Rob., 128.) But if a neutral, during peace, and without contemplation of war, purchase goods in a colony from a regular privileged company there, and it is agreed that they shall be transported and sold in the mother country by the company's agents for the benefit of the

1.—Que tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originairement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte d'actes, et si cette vente ne se trouve à bord, et n'est soutenue d'un pouvoir authentique donné par le premier propriétaire, lorsqu'il ne vend pas lui-même. Règlement du 17 Février, 1804. Du 12 Mai, 1806.

neutral, the contract is good, and the property remains neutral during its transit, notwithstanding an intervening war of the mother country. (*The Vrouw Anna Catharina*, 5 Rob., 161.)

In ordinary shipments of goods, unaffected by the foregoing principles, the question of proprietary interest often turns on minute circumstances and distinctions, the general principle being that if they are going for account of the shipper, or subject to his order or control, the property is not divested *in transitu*. If there be any condition annexed to the delivery of the goods to the consignee, the proprietary interest remains in the shipper, notwithstanding the goods are sent in pursuance of the orders of the consignee. Thus, if a merchant in H send goods to A in another country, by order of B and on account of B, but with directions not to deliver them unless satisfaction could be given for the payment, the property is not divested from the shipper, but remains *in transitu*. (Cited in *The Aurora*, 4 Rob., 319.) The same principle applies where goods are shipped to the orders of the shippers, but to be delivered by their agents to the consignee upon the agents being satisfied for the payment. (*The Aurora*, 4 Rob., 218; *The Merrimack*, Kimmel & Albert's claim, 8 Cranch, 317; see *The Marianna*, 6 Rob., 24.) So even if the goods are stated in the invoice to belong to the claimants; yet if these papers are inclosed to the consignee as agents to the shippers, and are to be delivered to the claimants only upon conditions in the discretion of the agent, the property remains in the shippers. (*The Merrimack*, 8 Cranch, 317.) But if the goods are consigned to an agent of the shippers, but the invoice, &c., show them to be for the account of the claimants, and the invoice, &c., are, by the shippers, sent directly to the claimants, the possession of these documents gives them a title, and establishes the intention of the shipper to vest the property in the claimants at the time of the shipment. (*The Merrimack*, 34*) Messrs. *Wilkins' claim, 8 Cranch, 317.) So if the goods are shipped to the consignee unconditionally for the use of the claimants. (*Id.* Messrs. M'Kean & Woodland's claim, 8 Cranch, 317.) But if the goods are consigned to the agent of the shippers, and there are discretionary orders given, but no direction for an absolute delivery to the claimants, the property remains in the shippers. (*The St. Jozé Indiano*, Lizaurs' claim, 2 Gallis, S. C. ante, Vol. I., p. 208.) In all these cases the goods are supposed to have been purchased in pursuance of the orders of the claimants; for if they are sent by the shippers without orders, or contrary to, or different from orders, either in quantity or kind, the proprietary interest remains in the shipper during the transit, notwithstanding they are sent by direct consignment to the consignee. (*The Venus*, 8 Cranch, 258; *The Frances*, Dunham & Randolph's claim, 1 Gallis., 445; S. C., 8 Cranch, 354, 9 Cranch, 183; *The Frances*, French's claim, 8 Cranch, 359.)

It is certainly competent for an agent abroad, who purchases goods in pursuance of orders, to vest the proprietary interest in his principal, immediately on the purchase. This is the case when he purchases exclusively on the credit of the principal, or makes an absolute appropriation and designation of the property for his

principal. But where he sells his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in such goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. (*The St. Jozé Indiano*, 2 Gallis, S. C. ante, Vol. I., p. 208.) But such delivery or appropriation to the use of his correspondent need not be by a direct act, but it may constructively arise from the circumstances of the case, even where the shipper has made an intermediate assignment of the goods. (*The Mary and Susan*, ante, Vol. I., p. 25.)

In all these cases the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu* in cases of insolvency), or has parted with the possession and all authority over it. For if an enemy's shipper consign goods or money to his correspondent at H., for the purpose of answering drafts of his correspondent in A., without any letter of advice or document making it the absolute property of such correspondent, or putting it out of his own control, it still remains the property of the shipper, for he may at any time countermand the order, or give the goods or money a new direction. In substance it is the same transaction as if a person send a sum of money to his private banker, directing him to hold it subject to the order of A.; in which case, if on the next day, and before any such order had been given, or even the fact of lodgment known to the other party, he had changed his purpose, and directed a conversion of the money to another object, it is clear that the bankers could not resist with effect. (*The Josephine*, 4 Rob., 25.)

In respect to questions of illegal trade, little is necessary to be said in addition to the observations and cases cited in the former volume. It is a fundamental principle of prize law that all trade with the enemy is prohibited to all persons, whether natives, naturalized citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation. (*The Vigilantia*, 1 Rob., 1, 14, 26; *The Hoop*, 1 Rob., 196; *Potts v. Bell*, 8 T. R., 548; *The Rapid*, 8 Cranch, 155; S. C. 1 Gallis., 295; *The Alexander*, 8 Cranch, 169; S. C. 1 Gallis., 582; *The Joseph*, 8 Cranch, 451; S. C. 1 Gallis., 545.) *The same penalty [*36] is applied to subjects of allies in the war, trading with the common enemy. (*The Nayade*, 4

1.—Au surplus, l'intention de l'ordonnance, en exigeant quela police contienne, le nom et le domicile de celui qui se fait assurer—les effets sur lesquels l'assurance sera faite—le nom du navire, du lieu ou les marchandises seront chargées, et déchargées, est encore de connoître en temps de guerre, si malgré l'interdiction de commerce qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on feroit passer aux ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés: car tout cela, étant défendu, comme préjudiciable à l'Etat, seroit sujet a confiscation, et a être déclaré de bonne prise, étant trouvé, soit sur les navires de la nation, soit sur ceux des amis et alliés, comme il sera observé sur le tit. des Prises. Valin, sur l'Ordonnance, Liv. 3, tit. 6; Des Assurances, art. 3; Id. tit. 9; Des Prises, art. 7.

613, 616; *Goss v. Wuthers*, 2 *Flad Oyen*, 1 Rob., 134; *The Santa*, 29; *The Fanny and Elmira*, 1 *Clydon*, 1 Dodson, 105; *L'Actif*, 10. If such sentence of condemnation, it is a sufficient title to a vessel, *Instant Conception*, 6 Rob., 45; 1 Edw., 97; and would also have operated to condemnation of the property had not stepped in, and, as respects, revived the *jus postliminii* of owner, on payment of salvage. As respects of British subjects, a condemnation by an incompetent court is a mere nullity. (*The Cosmopolite*, 3 Rob., 333.) A seizure by an enemy's consul in a neutral port is deemed invalid. (*The Flad Oyen*, 1 Rob., 134; though, as respects of other parties, the British court will not inquire into the sufficiency of the seizure. (*The Cosmopolite*, 3 Rob., 333.) A condemnation of a prize by an enemy's consul in a neutral port, by a regular authority in the hostile country, is valid. (*The Henrick and Maria*, 4 Rob., 207; *The Victoria*, 3 Rob., 207; *The Guester*, 4 Cranch, 298; *The Arabella and Maria*, 281; *The Arabella and Maria*, 281.) A condemnation originally defective, being acquired under the incompetency of the court, is cured by the valid decree of an competent court. (*The Falcon*, 6 Rob., 184.) A condemnation, being acquired under the incompetency of the court, is cured by the valid decree of an competent court, which has the effect of all titles of possession arising from the court. (*The Schooner Sophie*, 6 Rob., 138.) A party has purchased a captured ship, and a valid title, but which was not noted, the court on decreeing restitution to the original owner will allow the party a compensation beyond the ordinary rate for ordinary repairs. (*The Kier*, 1 Rob., 96; *The Perseverance*, 2 Rob., 207; *Vostra de Conceicao*, 5 Rob., 294.) A ship has been captured and carried to a hostile port, and is afterwards sold, a presumption arises that she has been regularly condemned, and the proof rests on the claimant, and not on the owner. (*The Countess of Lauderdale*, 4

United States cases of recapture have been the subject of several legislative provisions, so far as they apply, supersede all discussion on the principles of general law. The Act of Congress of the 3d March, 1800, ch. 12, § 1, directs, that in cases of recapture of goods belonging to persons under the protection of the United States, and not having been previously adjudged by competent authority to be forfeited, the goods be restored on payment of the value if recaptured within one-sixth if recaptured after one-sixth if the recaptured goods have been set forth and sold, and such capture, or recapture, then the value. If the goods be recaptured by the government and sold, then the value one-sixth if recaptured within one-twelfth if recaptured after one-twelfth if recaptured by the government, then the value.

salvage to be one moiety if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel by the express words of the act; but in respect to private ships, the rate of salvage (by some probable omission in the act) is the same on the cargo whether the vessel be armed or unarmed. (*The Adeline*, 9 Cranch, 244.)

What constitutes a setting forth as a vessel of war within the act has not been settled by any adjudications in the United States; but the same question has been decided by the British prize courts, in cases arising under a similar clause in the British prize acts, which, indeed, seems recognized as a part of their common law of prize. (*The Ceylon*, 1 Dodson, 105, 119.) And it has been there settled that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the prize act. (*The Horatio*, 6 Rob., 320.) But a commission of war is decisive if there be guns on board. (*The Nostra Signora del Rosario*, 3 Rob., 10; *The Ceylon*, 1 *Dodson, 105.) [*44 And where the vessel has, after the capture, been fitted out as a privateer, it is conclusive against her, although when recaptured she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further; but considered the title of the former owner forever extinguished. (*L'Actif*, 1 Dodson, 185.) Where it appeared that the vessel had been engaged in the military service of the enemy under the appointment of the minister of marine, it was held a sufficient proof of a setting forth as a vessel of war. (*The Santa Brigada*, 3 Rob., 56.) So, where she is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ her, although she be not regularly commissioned. (*The Ceylon*, 1 Dodson, 105.) But the mere employment in the military service of the enemy is not a sufficient setting forth for war; but if there be a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as a commander of a squadron. (*The Georgiana*, 1 Dodson, 397.) The valuation of the property, when restored under its acts respecting recapture, is to be made upon its value at the place of restitution, and not of recapture. (*The Progress*, 1 Edw., 210, 222.)

In respect to recaptures of the ships and cargoes of allies or co-belligerents, from the hands of a common enemy, the general rule is to apply the principle of reciprocity; and if they, under like circumstances, restore on salvage, or condemn generally, to deal out to them the same measure of reciprocal justice. (*The Santa Rosa*, 1 Rob., 50.) If there should exist a country having no rule on the subject, then the capturing country applies its own rule as to its own subjects to the case, and rests on the assumption that the same rule will be adminis-

39*] is *personally answerable, and for which the owner must look to him for indemnification. (*The Elæbe*, 5 Rob., 173, 175.) Whether a like principle ought not to be applied to the owner of the cargo in cases where the ship originally sails on the voyage under an enemy's license has not been decided. The point was made in the Supreme Court in a recent case; but knowledge being brought home to the actual agent of the owners of the cargo, it became unnecessary to decide the more general principle. (*The Hiram*, ante, Vol. I., p. 440.) There are many other cases in which the act of the master will bind the owner of the cargo as well as the ship; such are resistance of the right of search, suppressing or fraudulently destroying the ship's papers, rescue by the neutral crew after capture, &c. (*The Elæbe*, 5 Rob., 173; *The Dispatch*, 3 Rob., 279; *The Nereide*, 9 Cranch, 388, 451.) But though the act of a neutral master in resisting search binds both ship and cargo, yet it has been solemnly settled by the Supreme Court that the resistance of a belligerent master does not bind a neutral shipment, unless the proprietor has co-operated in the resistance. (*The Nereide*, 9 Cranch, 388.) In a very recent case, however, Sir W. Scott has asserted the contrary doctrine. (*The Fanny*, 1 Dodson, 443.) But the act of the agent or consignee of the cargo, whether he be the master or not, is conclusive upon the owner of the cargo. (*The Vrouw Judith*, 1 Rob., 150.) And the act of a general agent of the cargo in covering the enemy's property in the same shipment with his principal's property affects the whole with condemnation, although the principal had no knowledge of the illegal act. (*The St. Nicholas*, ante, Vol. I., p. 417; *The Phoenix Ins. Co. v. Pratt*, 2 Binney, 308.) And the same principle is applied in the case of simulated papers; for the carrying of simulated papers is an efficient cause of condemnation. (*Oncell v. Vigne*, 15 East, 70.) But in peculiar circumstances the act of an agent of the cargo will be liberally construed in favor of his principal. As if the agent be a belligerent, and has received orders to purchase goods before the war or before a blockade, his acts in making the shipment during a blockade are not binding on his principal, unless he had had an opportunity to countermand the orders, and neglected it; for the agent in such cases may have a personal interest in 40*] exporting *the goods. (*The Neptunus*, 1 Rob., 173; cases cited in *The Hoop*, 1 Rob., 196; *The Dankbaarheid*, 1 Dodson, 183.) But the act of the master will not bind even the owner of the ship unless it be in cases within the scope of his ordinary authority. If, therefore, the master of a non-commissioned merchant ship make a capture, the owner is not responsible in damages, if it turn out to be illegal. (Bynk. Q. J. Pub., lib. 1, ch. 19; Du Ponceau's ed., p. 147, 153.)

It frequently turns out, on examination of the claims and evidence in the prize court, that the case is a mere case of recapture; and questions arise, whether the original belligerent owner is entitled to restitution or not, and if so entitled, what is the compensation to be allowed by way of salvage? Bynkershoek asserts, that by the general maritime law, if, after

capture, the ship and cargo be carried *infra præsidia*, of the enemy, or of his ally, or of a neutral, the title of the original belligerent proprietor is completely gone, and is not revived by a recapture. (Q. J. Pub. L. 1. ch. 5., Du Ponceau's ed., p. 36.) And in this he stands supported by learned authorities. (*The Ceylon*, 1 Dodson, 105; *L'Actif*, 1 Dodson, 185; but see Martens on Recaptures, ch. 3, p. 107.) In most of the states of Europe municipal regulations have been made which settle the rights of their own subjects. (Bynk. *ubi supra*; Valin, *des prises*, ch. 6, p. 84; Azuni, part 2, ch. 4; Martens on Recaptures, ch. 3, sec. 2, p. 146; *The Adeline*, 9 Cranch, 244, 288.) And in *England the right of postliminy is by [*41 statute as between subjects preserved forever, except where the vessel, after capture, has been fitted out by the enemy for war; so that the original owner may, in all other cases, claim restitution upon the payment of a stipulated salvage. (Horne's Compend., ch. 4, p. 34; Marshall on Ins., b. 1, ch. 12, s. 8; *The Sedulous*, 1 Dodson, 253.) In cases, however, not governed by municipal regulations, although all nations agree that to change the property by capture a firm and secure possession is necessary, yet the practice of nations is so various that it seems difficult to collect a general rule, as to what constitutes such firm and secure possession, which might properly be asserted to be the law of nations. (*The Santa Cruz*, 1 Rob., 49; *L'Actif*, 1 Dodson, 185; *The Ceylon*, 1 Dodson, 105.) The rule of bringing *infra præsidia*, or, in proper cases, the rule of pernoctation, or twenty-four hours' possession, seems generally recognized by the most eminent jurists on the continent of Europe (*The Ceylon*, 1 Dodson, 105; *L'Actif*, 1 Dodson, 185. See the *Santa Cruz*, 1 Rob., 50.)¹ and it appears to have been anciently the doctrine of the British law. (*Id.*) According, however, to the present law in Great Britain, property captured is not deemed to be changed so as to bar the owner in favor of a vendee or recaptor, till there has been a sentence of condemnation; and therefore, until that period, the title of the original owner is not devested, and he is entitled to *restitution in the hands [*42 of whoever he may find the property. (*Le Cauc*

1.—Si aucun Navire de nos Sujets pris par nos Ennemis, a été entre leurs mains jusques a vingt-quatre heures, et après, qu'il soit recous et repris par aucuns de nos Sujets, la prise sera déclarée bonne: mais si ladite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le Navire de guerre qui l'aura recous et repris, le tiers. Ordonnance de 1564, art. 61. Emerigon, Des Assurances, tom. 1, p. 466. Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leurs mains pendant vingt-quatre heures, la prise en sera bonne et si elle est faite avant les vingt-quatre heures, il sera restitué au propriétaire avec tout ce qui étoit dedans, la réserve du tiers qui sera donné au navire qui aura fait la recousse. Ordonnance de 1681, Liv. 3., tit. 9; Des Prises, art. 7; *Id.* Ordonnance du 15 Juin, 1779; Emerigon, *ubi supra*.

2.—Quoiqu'il en soit, ce délai de vingt-quatre heures adopté par ladite ordonnance de 1564 et par celle-ci, passé lequel la prise par recousse est bonne et exclut la réclamation du propriétaire du vaisseau pris et repris, ne peut être regardé que comme un sage règlement, puisqu'il est du droit commun de l'Europe, comme Loccenius l'atteste, de Jure maritimo, lib. 2, cap. 4, n. 8. fol. 157, 162, et 163: où il dit que c'est l'usage observé en France, en Espagne, en Hollande, et chez les autres nations commerçantes parmer. Valin, sur l'Ordonnance, Liv. 3, tit. 9, Des Prises, art. 8.

v. *Eden*, Doug. 613. 616; *Goss v. Withers*, 2 Burr, 694; *The Flad Oyen*, 1 Rob., 134; *The Santa Cruz*, 1 Rob., 49; *The Fanny and Elmira*, 1 Edw., 117; *The Ceylon*, 1 Dodson, 105; *L'Actif*, 1 Dodson, 185.) If such sentence of condemnation is passed, it is a sufficient title to a vendee (*The Purissima Conception*, 6 Rob., 45; *The Victoria*, 1 Edw., 97); and would also have entitled a recaptor to condemnation of the property, if the statute had not stepped in, and, as to British subjects, revived the *jus postliminii* of the original owner, on payment of salvage. As to the interests of British subjects, a condemnation by an incompetent court is a mere nullity (*The Flad Oyen*, 1 Rob., 134); though, as to the interests of other parties, the British prize courts will not inquire into the sufficiency of the sentence. (*The Cosmopolite*, 3 Rob., 333.) A condemnation by an enemy's consul in a neutral port is deemed invalid. (*The Flad Oyen*, 1 Rob., 134.) But a condemnation of a prize ship, while lying in a neutral port, by a regular court of admiralty in the hostile country, is clearly valid. (*The Henrick and Maria*, 4 Rob., 43; *The Christopher*, 2 Rob., 207; *The Victoria*, 1 Edw., 97; *Hudson v. Guestier*, 4 Cranch, 298; S. C., 6 Cranch, 281; *The Arabella and Madeira*, 2 Gallis.) A condemnation originally defective from the incompetency of the court, may be made good by the valid decree of an appellate court. (*The Fulcon*, 6 Rob., 194.) And a title originally defective, being acquired under the sentence of an incompetent court, is cured by an intervening peace, which has the effect of quieting all titles of possession arising from the war. (*The Schooner Sophie*, 6 Rob., 138.) Where a party has purchased a captured ship, under an invalid title, but which was not notoriously bad, the court on decreeing restitution to the original owner will allow the party for any amelioration beyond the ordinary repairs, but not for ordinary repairs. (*The Kierlight*, 3 Rob., 96; *The Perseverance*, 2 Rob., 239; *The Nostra de Conceicao*, 5 Rob., 294.) And where a ship has been captured and carried into a hostile port, and is afterwards sold to a neutral, a presumption arises that she has ⁴³been regularly condemned,* and the proof of the contrary rests on the claimant, and not the purchaser. (*The Countess of Lauderdale*, 4 Rob., 283.)

In the United States cases of recapture have been the object of several legislative provisions, which, as far as they apply, supersede all discussions upon the principles of general law. The act of Congress of the 3d March, 1800, ch. 14, (new edit., ch. 168,) directs, that in cases of recaptures of vessels or goods belonging to persons resident within, or under the protection of the United States, the same not having been condemned as prize by competent authority before the recapture, shall be restored on payment of salvage, of one-eighth of the value if recaptured by a public ship, and one-sixth if recaptured by a private ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel belong to the government and be unarmed, the salvage is to be one-sixth if recaptured by a private ship, and one-twelfth if recaptured by a public ship; if armed, then the Wheat. 2.

salvage to be one moiety if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel by the express words of the act; but in respect to private ships, the rate of salvage (by some probable omission in the act) is the same on the cargo whether the vessel be armed or unarmed. (*The Adeline*, 9 Cranch, 244.)

What constitutes a setting forth as a vessel of war within the act has not been settled by any adjudications in the United States; but the same question has been decided by the British prize courts, in cases arising under a similar clause in the British prize acts, which, indeed, seems recognized as a part of their common law of prize. (*The Ceylon*, 1 Dodson, 105, 119.) And it has been there settled that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the prize act. (*The Horatio*, 6 Rob., 320.) But a commission of war is decisive if there be guns on board. (*The Nostra Signora del Rosario*, 3 Rob., 10; *The Ceylon*, 1 *Dodson, 105.) [*44] And where the vessel has, after the capture, been fitted out as a privateer, it is conclusive against her, although when recaptured she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further; but considered the title of the former owner forever extinguished. (*L'Actif*, 1 Dodson, 185.) Where it appeared that the vessel had been engaged in the military service of the enemy under the appointment of the minister of marine, it was held a sufficient proof of a setting forth as a vessel of war. (*The Santa Brigada*, 3 Rob., 56.) So, where she is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ her, although she be not regularly commissioned. (*The Ceylon*, 1 Dodson, 105.) But the mere employment in the military service of the enemy is not a sufficient setting forth for war; but if there be a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as a commander of a squadron. (*The Georgiana*, 1 Dodson, 397.) The valuation of the property, when restored under the acts respecting recapture, is to be made upon its value at the place of restitution, and not of recapture. (*The Progress*, 1 Edw., 210, 222.)

In respect to recaptures of the ships and cargoes of allies or co-belligerents, from the hands of a common enemy, the general rule is to apply the principle of reciprocity; and if they, under like circumstances, restore on salvage, or condemn generally, to deal out to them the same measure of reciprocal justice. (*The Santa Cruz*, 1 Rob., 50.) If there should exist a country having no rule on the subject, then the recapturing country applies its own rule as to its own subjects to the case, and rests on the presumption that the same rule will be admin-

1.—Vide Vallin, Sur l'Ordonnance, tom. 2, p. 262.

istered in the future practice of the other party. (*The Santa Cruz*, 1 Rob., 50; *The San Francisco*, 1 Edw., 179.) The act *of Congress of the 3d March, 1800, ch. 14, adopts the same regulation. (*The Adeline*, 9 Cranch, 244.)

Salvage is not, in general, allowed on the recapture of neutral property, unless there be danger of condemnation or such unjustifiable conduct on the part of the government of the captors as to bring the property into jeopardy. (*The War Onskan*, 2 Rob., 299; *The Eleonora Catharina*, 4 Rob., 156; *The Carlotta*, 5 Rob., 54; *The Huntress*, 6 Rob., 104; *The Acteon*, 1 Edw., 254; *The Sansom*, 6 Rob., 410; *Talbot v. Seeman*, 4 Dall., 34; 8. C. 1 Cranch, 1.) But even if in such a case of recapture the recaptors have entitled themselves to salvage, they may forfeit the claim by the irregularity of their conduct. (*The Barbara*, 3 Rob., 171.)

It is no objection to an allowance of salvage on a recapture that it was made by a non-commissioned vessel; for no letters of *marque* are necessary for this purpose, nor is a recapture at all made under the authority of prize. It is the duty of every citizen to assist his fellow-citizens in war, and to retake their property out of the possession of the enemy; and no commission is necessary to give a person so employed a title to the reward, which the law allots to that meritorious act of duty. (*The Helen*, 3 Rob., 224.) And if a convoying ship actually recapture one of her convoy, which has been previously captured by the enemy, it entitles her to salvage. (*The Wight*, 6 Rob., 315.) But a mere rescue of a ship associated in the same common enterprise gives no right to salvage. (*The Belle*, 1 Edw., 66.)

To entitle a party to salvage, as upon a recapture, there must have been an actual or constructive capture; for military salvage will not be allowed in any cases where the property has not been actually rescued from the enemy. (*The Franklin*, 4 Rob., 147.) But it is not necessary that the enemy should have *actual possession; it is sufficient if the property is completely under the dominion of the enemy. (*The Edward and Mary*, 3 Rob., 805; *The Pensamento Felix*, 1 Edw., 116.) If, however, a vessel be captured going in distress into an en-

emy's port, and is thereby saved, it is merely a case of civil and not of military salvage. (*The Franklin*, 4 Rob., 147.) But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor. (*The Edward and Mary*, 3 Rob., 805.)

Where a hostile ship is captured, and afterwards is recaptured by the enemy, and is again recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last captors are entitled to all the rights of prize, for, by the first recapture, the whole right of the original captors is devastated. (*The Polly*, 4 Rob., 217, note a; *The Astrea*, ante, Vol. I., p. 125.) And where the original captors have abandoned their prize, and she is subsequently captured by other persons, the latter are solely entitled to the property. (*The Lord Nelson*, 1 Edw., 79; *The Diligentia*, 1 Dodson, 404.) But if the abandonment be involuntary and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived. (*The Mary*, ante, p. 123.) And where the enemy has captured a ship, and afterwards deserted her, and she is then recaptured, it is not to be considered as a case of derelict, for the original owner never had the *animus derelinquendi*; and, therefore, she is to be restored on payment of salvage; but as it is not strictly a recapture within the prize act, the rate of salvage is discretionary. (*The John and Jane*, 4 Rob., 216; *The Gage*, 6 Rob., 273; [*47] *The Lord Nelson*, 1 Edw., 79.) But if the abandonment by the enemy be produced by the terror of hostile force, it is a recapture within the terms of the prize act. (*The Gage*, 6 Rob., 273.) Where the captors abandon their prize, and she is afterwards brought into port by neutral salvors, it has been held that the neutral court has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for by the capture, the captors acquired such a right of property as no neutral nation could justly impugn or destroy, and consequently, the proceeds (after deducting salvage) belong to the original captors; and neutral

1.—Sa Majesté a jugé pendant la dernière guerre, que la reprise du navire neutre, faite par un corsaire Français (lorsque le navire n'était pas chargé de marchandises prohibées, ni dans le cas d'être confisqué par l'ennemi), était nulle. Code des Prises, ed. 1784, tom. 2. See also the opinion of M. Portalis, in the case of *The Statira*, 1 Cranch, 102, note a.

2.—Veut et entend Sa Majesté que les prises des navires ennemis faites par ses vaisseaux ou par ceux de ses sujets armés en course, recousses par les ennemis, et ensuite reprises sur eux, appartiennent en entier au dernier preneur. Arrest du Conseil d'Etat du 5 Novembre, 1748; Valin, Sur l'Ordonnance, tom. 2, p. 257, 258, 259; Traité des Prises, ch. 6, sec. 1; Pothier, De Propriété, No. 99.

3.—Si le navire, sans être recous et abandonné par les ennemis, ou si par tempête ou autre cas fortuit, il revient en la possession de nos sujets, avant qu'il ait été conduit dans aucun port ennemi, il sera rendu au propriétaire qui le réclamait dans l'an et jour, quoiqu'il ait été plus de vingt-quatre heures entre les mains des ennemis. Ordonnance de 1681, liv. 8, tit. 3, des Prises, art. 9. Pothier is of the opinion that these words, *avant qu'il soit entre dans aucun port ennemi*, are to be understood not as re-

stricting the right of restitution on payment of salvage to the particular case mentioned of a vessel which is abandoned by the enemy before being carried into port, which case is mentioned merely as an example of what ordinarily happens, *parce que c'est le cas ordinaire auquel un vaisseau échappé à l'ennemi qui l'a pris, ne pouvant plus guère lui échapper lorsqu'il a été conduit dans ses ports*. De Propriété, No. 99. But Valin holds that the terms of the ordinance are to be literally construed, and that the right of the original proprietor is completely devested by the carrying into an enemy's port. Sur l'Ordonnance, *Id.* He is also of the opinion that this species of salvage is to be annulized to the case of shipwreck, and that the recaptors are entitled to one-third of the value of the property saved. *Id.* But Azuni contends that the rate of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy by military force, or to the recovery of goods lost by shipwreck. Part 2, ch. 4, sec. 8. Emerigon is also opposed to Valin on this subject, and cites, in support of his own doctrine, the Consolato del Mare, ch. 287, and Targa, ch. 46, n. 10. Emerigon, Des Assurances, tom. 1, p. 504, 505.

48*] nations *ought not to inquire into the validity of a capture, as between belligerents. (*The Mary Ford*, 3 Dall., 188.) But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled as salvors, but after deducting salvage, the remaining proceeds will be decreed to the original owner. (*The Adventure*, 8 Cranch, 227; S. C. ante, Vol. I. p. 128, note f.) And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely devested by a hostile recapture, escape, or voluntary discharge of the captured vessel. (*Hudson v. Guestier*, 4 Cranch, 293; S. C. 6 Cranch, 281; *The Diligentia*, 1 Dodson, 404.) And the same principle seems applicable to a hostile rescue; but if the rescue be made by a neutral crew of a neutral ship, it may be doubtful how far such an illegal act, which involves the penalty of confiscation, would be held in the courts of the captor's country, to divest his original right in case of a subsequent recapture.

As to recaptors, though their right to salvage is extinguished by a subsequent hostile recapture and regular sentence of condemnation, carried into execution, divesting the owners of their property, yet, if the vessel be restored upon such recapture, and resumes her voyage, either by an acquittal in court or a release of the sovereign power, the recaptors are reintegrated in their right of salvage. (*The Charlotte Caroline*, Dodson, 192.) And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause. (*The Blendenhall*, 1 Dodson, 414.)

In all cases of salvage, where the rate is not fixed by positive law, it is in the discretion of the court, as well upon recaptures as in other cases. (*Talbot v. Seeman*, 1 Cranch, 1; *The Apollo*, 3 Rob., 308; Bynk. Q. J. Pub., lib. 1, ch. 5; Du Ponceau's ed., p. 38, 41, 42.) And where, upon a recapture, the parties have entitled themselves to a military salvage under the prize acts, the court may also award them, in addition, a civil salvage, if they have subsequently rendered services by *succoring the vessel in distress from perils of the seas. (*The Louisa*, 1 Dodson, 817.)

In the construction of the British prize acts (and similar questions may arise under our own acts respecting recaptures), it has been held that a revenue cutter, having a letter of marque, is to be deemed a private ship of war, and entitled to a salvage of one-sixth. (*The Helen*, 3 Rob., 224; *The Sedulous*, 1 Dodson, 253.) But the British revenue cutters belonging to private individuals, although fitted out, manned, and armed at the expense of the government, it may be thought doubtful whether this authority applies in the United States, where the revenue cutters are generally built and owned, as well as equipped, manned and armed by the government. But a store-ship, armed at the public expense, and commanded by commissioned officers, is clearly to be deemed a public armed ship. (*The Sedulous*, 1 Dodson, 253.)

In the progress of the cause an unlivery of the cargo often becomes necessary either to ascertain its nature and quality (*The Liverpool* Wheat, 2.

Packet, 1 Gallis., 518; Marriott's Form, 229; *The Carl Waller*, 4 Rob., 207; *The Richmond*, 5 Rob., 325; *The Jonge Margaretha*, 1 Rob., 189; *The Oster Risoer*, 4 Rob., 199); or more effectually to preserve it from injury and pillage (Marriott's Form, 323;) or because the ship stands in a predicament altogether distinct from that of the cargo. (*The Hoffnung*, 6 Rob., 231; *The Prosper*, Edw., 72; Marriott's Form, 224.) In all these, and other proper cases, the prize court will, upon proper application, decree an unlivery. Upon ordering an unlivery, a warrant or commission of unlivery is directed to some competent person, and usually to the marshal to unlade the cargo, and to make a true and perfect inventory thereof. (Marriott's Form, 224.) At the same time a warrant or commission of appraisement is usually directed to some competent persons, who are to reduce into writing a true and perfect inventory of the cargo, and upon oath to appraise the same according to its true value. In England, this commission is sometimes *directed to a person who is [*50 authorized to choose and swear the appraisers and himself. (Marriott's Form, 227.) But in the United States the general practice is for the courts to appoint the appraisers in the first instance. And where it becomes necessary or proper to unlade the cargo for inspection of its nature or quality, a commission of inspection is issued, directed to some competent persons in like manner to return an inventory thereof, with a certificate of the particulars, names, descriptions, and sortments of the goods, together with their several marks and numbers, and the nature, use, quantities and qualities thereof. (Marriott's Form, 229.) The court may also, in its discretion, order the ship or cargo, or both, to be removed to another place or port; for having the custody of the thing, it is bound to use all reasonable precautions to preserve it, and to consult the best interests of all parties; and in such case a commission of removal is issued, which is usually directed to the marshal; but the court may direct it to any other person. (Marriott's Form, 234; *The Rendsborg*, 6 Rob., 142; *The Sacra Familia*, 5 Rob., 360.)

An unlivery of the cargo is considered as done for the benefit of all parties, and, therefore, the expense is generally borne by the party ultimately prevailing. If the captors apply for an unlivery, and the property is condemned, the expense falls on the captors; but if restitution be awarded, the court, in its discretion, usually makes the expense a charge on the cargo. (*The Industrie*, 5 Rob., 88.)

1.—S'il est nécessaire avant le jugement de la prise de tirer les marchandises du vaisseau, pour en empêcher le dépérissement, il en sera fait inventaire en présence de notre Procureur et des parties intéressées, qui le signeront si elles peuvent signer, pour ensuite être mises sous la garde d'une personne solvable, ou dans des magasins fermés à trois clefs différentes, dont l'une sera délivrée aux armateurs, l'autre au Receveur de l'Amiral, et la troisième aux réclamateurs, si aucun se présente, sinon à notre Procureur. L'Ordonnance de 1867, liv. 3, tit. 9, des Prises, art. 27.

2.—Qu'à l'avenir, tous les frais faits tant pour la conservation ou la vente des marchandises des prises, dans le cas où elle sera permise, que pour la subsistance du maître et autres officiers marins ou matelots qui y seront restés, seront pris sur le bâtiment, et payés par le réclamateur qui en aura obtenu la main-levée, lorsqu'il en sera remise en possession. Arrêt du Conseil du 23 Décembre, 1765.

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pose of this note to discuss these topics at large with all the distinctions which belong to them. Indeed, such a discussion would of itself require a very considerable treatise. It may, however, be of some use to give a rapid sketch of the leading principles which regulate the decisions of prize courts on some of these subjects.

In respect to the question who are to be considered enemies or not, the general principle is, that every person is to be considered as belonging to that country where he has his domicile, whatever may be his native or adopted country. (*The Vigilantia*, 1 Rob., 1; *The Endraught*, 1 Rob., 19; *The Sarah Christina*, 1 Rob., 237; *The Indian Chief*, 3 Rob., 23; *The President*, 5 Rob., 277; *The Neptunus*, 6 Rob., 408; *The Venus*, 9 Cranch, 253; *The Frances*, Gillespie's claim, 1 Gallis., 614; *The Mary and Susan*, Richardson's claim, ante, vol. 1, p. 46, S. C. p. 55; note f; *M'Connel v. Hector*, 8 Bos. & Pull., 113; Bynk. Q. J. Pub., ch. 3; *Duponceau's* edit., p. 19, 25.) And the masters and crews of ships are deemed to possess 28*) the national character of the ships to which they belong during the time of their employment. (*The Endraught*, 1 Rob., 21; *The Bernon*, 1 Rob., 101; vide *The Embden*, 1 Rob., 17; *The Frederick*, 5 Rob., 8; *The Ann*, 1 Dodson, 221.) And even if a person goes into a belligerent country originally for temporary purposes, he will not preserve his neutral character, if he remain there several years, paying taxes, &c. (*The Harmony*, 2 Rob., 322; *The Embden*, 1 Rob., 17.) And a neutral consul, resident and trading in a belligerent country, is, as to his mercantile character, deemed a belligerent of that country. (*The Indian Chief*, 3 Rob., 22; *The Josephine*, 4 Rob., 25.) And the same rule applies to the subject of one belligerent country, resident in the country of its enemy, and carrying on trade there. (*The Citta*, 3 Rob., 38; *M'Connel v. Hector*, 3 Bos. & Pull., 113.) But a character acquired by mere domicile ceases upon removal from the country. (*The Indian Chief*, 3 Rob., 12.) The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native than to impress the national character on one who is originally of another country. (*La Virginie*, 5 Rob., 98.) And in his favor, a party is deemed to have changed his domicile and his native character reverts as soon as he puts himself *in itinere* to return to his native country *animo revertendi*. (*The Indian Chief*, 3 Rob., 12; *The St. Lawrence*, 1 Gallis., 467.)

In general, a neutral merchant trading in the ordinary manner with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. (*The Anna Catharina*, 4 Rob., 107, 121.) But it is otherwise if he be not en-

gaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy; for then it is in effect a hostile trade. (*The Anna Catharina*, 4 Rob., 107, 121.) So if the agent carry on a trade from the hostile country, which is not clearly neutral. (*Ib.*) And if a person be a partner in a house of trade in the enemy's country, *he is, as to the [*29 concerns and trade of that house, deemed an enemy, and his share is liable to confiscation, as such, notwithstanding his own residence is in a neutral country; for the domicile of the house is considered in this respect as the domicile of the partners. (*The Vigilantia*, 1 Rob., 1, 14, 19; *The Susa*, 2 Rob., 255; *The Indiana*, 3 Rob., 44; *The Portland*, 3 Rob., 41; *The Vriendchap*, 4 Rob., 166; *The Jonge Klassina*, 5 Rob., 297; *The Antonia Johanna*, ante, Vol. 1, p. 159; *The St. Jose Indiano*, 2 Gallis.) But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. (*Ib.* and *The Frances*, 1 Gallis., 618; S. C., 8 Cranch, 348.) However, where a neutral is engaged, in peace, in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of war, confiscated; but if he continues in the house after knowledge of the war, it is liable, as above stated, to confiscation. (*The Vigilantia*, 1 Rob., 1, 14, 15; *The Susa*, 2 Rob., 251, 255.) It is a settled principle that traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual. (*Ib.* *The Susa*, 2 Rob., 251, 255; *The Vriendchap*, 4 Rob., 166.) And if a neutral be engaged in the enemy's navigation, it not only affects the particular vessel in which he is employed, but all other vessels belonging to him, that have no distinct national character impressed upon them. (*The Vriendchap*, 4 Rob., 166.)

Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character. (*The Vigilantia*, 1 Rob., 1, 19, 26; *The Vrouw Anna Catharina*, 5 Rob., 161; *The Success*, 1 Dodson, 181.) So, even if purchased by a neutral, if they are habitually engaged in the trade of the enemy's country (*The Vigilantia*, 1 Rob., 1, 19, 26; *The Planter's Wench*, 5 Rob., 22); even though there be no sea-port in the territory of the neutral. (*Ib.* But in general, and unless under special circumstances, the national character of ships depends on the residence of the owner. (*Ib.* *The Magnus*, 1 Rob., 31.) When, however, it is said that the flag and pass is conclusive on the character of the ship, the *meaning is this, that the party [*30 who takes the benefit of them is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations. But they do not bind other parties as against him; other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of a prize court to pull off this mask and exhibit the vessel so disguised in

1.—On n'aura aucun egard aux passe ports accordees par les princes neutres ou allies, tant aux proprietaires qu'aux maitres des navires sujets des etats ennemis, s'ils n'ont ete naturalisees, et n'ont transfere leur domicile dans les etats des dits princes avant la declaration de la presente guerre: Ne pourront pareillement les dits proprietaires et maitres des navires ou sujets des etats ennemis, qui auront obtenu les dites lettres de naturalite, jouir de leur effet, si depuis qu'elles ont ete obtenues ils sont retournees dans les etats ennemis pour y continuer leur commerce. Reglement du 21 Octobre, 1744, art. 11; Dec. 26 juillet, 1778, art. 6.

her true character of an enemy's vessel. (*The Fortuna*, 1 Dodson, 87; *The Success*, *Id.*, 131.) Ships and cargoes engaged in the privileged and peculiar trade of a nation, under a special contract, and the sanction of the government, are considered as affected by the character of the nation, and if it be hostile, the trade is stamped with the same character. (*The Princessa*, 3 Rob., 49; *The Anna Catharina*, 4 Rob., 197; *The Rendsborg*, 4 Rob., 121; *The Vrouw Anna Catharina*, 5 Rob., 161; *The Commerce*, ante, Vol. I, p. 382; *Vide* 5 Rob., 5, note a.) And the produce of an estate situated in a hostile colony is so impressed with the character of the soil that although the owner of the estate be resident in a neutral country, his interest in the produce is deemed enemy's property. (*The Phoenix*, 5 Rob., 20; *The Vrouw Anna Catharina*, 5 Rob., 161; *The Dree Gebroeders*, 4 Rob., 232; *Bentzon's claim*, 9 Cranch, 191.)

In respect to the transfers of enemies' ships during war, it is certain that purchases of them by neutrals is not, in general, illegal; but such purchases are liable to great suspicion, and if good proof be not given of their validity, by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of the neutral claim (*The Bernon*, 1 Rob., 102; *The Sechs Gedeswistern*, 4 Rob., 100); and if the purchase be made by an agent, his letters of procuration must be produced and proved. (*The Argo*, 1 Rob., 158.) And if, after such [31*] transfer, the ship *be employed habitually in the enemy's trade or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. (*The Jenny*, 4 Rob., 31; *The Omnibus*, 6 Rob., 71.) But the right of purchase, by neutrals, extends only to merchant ships of enemies (*The Minerva*, 6 Rob., 396, 399); for the purchase of ships of war belonging to enemies, is held to be invalid. (*The Minerva*, 6 Rob., 396.) And a sale of a merchant ship, made by an enemy to a neutral, during war, must be an absolute, unconditional sale. (*The Packet de Bilbao*, 1 Rob., 133; *The Noyds Gedecht*, 1 Rob., 137, note a.) Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. (*The Sechs Gedeswistern*, 4 Rob., 100.)

In respect to proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered. It is a general rule that during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. (*The Dankbaar Africaan*, 1 Rob., 107; *The Heratelder*, 1 Rob., 114.) This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed even in favor of owners who become subjects by capitulation after the ship-

ment and before the capture. (*Id.*) But if the ship sails before hostilities, when there is a decided state of amity between the two countries, and before the capture, the owner again becomes a friend, and at the time of the capture, and also at the time of adjudication, he is in a capacity to claim; the prize courts will then give him the benefit of the principle, that the national character cannot be altered *in transitu*, and will restore to him. (*Id.*) The same distinction is applied to purchases made by neutrals, of property *in transitu*; if purchased during a state of war existing, or imminent and impending danger *of war, the con- [*32 tract is held invalid, and the property is deemed to continue as it was at the time of shipment, until the actual delivery. It is otherwise, however, if the contract be made during a state of peace, and without contemplation of war; for, under such circumstances the prize courts will recognize the contract, and enforce the title acquired under it. (*The Vrouw Margaretha*, 1 Rob., 336; *The Jan Frederick*, 5 Rob., 128.) And property is still considered *in transitu* if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port, and the ship is there changed. (*The Carl Walter*, 4 Rob., 207.) The reason why courts of admiralty have established this rule as to transfers *in transitu* during a state of war, or expected war, is asserted to be, that if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. (*The Vrouw Margaretha*, 1 Rob., 336.)

The same public policy has established the rule of the prize courts, that property going, during war, to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. (*The Sally*, 3 Rob., 300, note a.) And all contracts of purchase effected on the part of the belligerent, where the payment is executory and contingent on delivery at an ulterior port, at the risk of the neutral vendor or shipper, are considered as contracts in fraud of the prize law, and the goods, if captured *in transitu*, are condemned as the absolute property of the enemy. (*The Atlas*, 3 Rob., 299; *The Anna Catharina*, 4 Rob., 107, 113, note.) But when the contract is made in time of peace, and without any contemplation of war, no such rule exists. (*Id.*) But the rule is applied where such a contract is originally made between allies in the war, if a party to it becomes neutral after the contract, and before the execution of it, and the shipment is made afterwards. (*The Anna Catharina*, 4 Rob., 107, 112.) A contract by a neutral with a privileged company of the enemy, with a view to the transportation of the whole produce of a colony, or of the company itself, if made during war, or in contemplation of war, is pronounced illegal, and the property is liable to *condemnation as hostile property. (*The* [*33 *Rendsborg*, 4 Rob., 121; *The Jan Frederick*, 5 Rob., 128.) But if a neutral, during peace, and without contemplation of war, purchase goods in a colony from a regular privileged company there, and it is agreed that they shall be transported and sold in the mother country by the company's agents for the benefit of the

1.—Que tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originellement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte d'actes, et si cette vente ne se trouve à bord, et n'est soutenue d'un pouvoir authentique donné par le premier propriétaire, lorsqu'il ne vend pas lui-même. Règlement du 17 Février, 1694. Du 12 Mai, 1696.

neutral, the contract is good, and the property remains neutral during its transit, notwithstanding an intervening war of the mother country. (*The Vrouw Anna Catharina*, 5 Rob., 161.)

In ordinary shipments of goods, unaffected by the foregoing principles, the question of proprietary interest often turns on minute circumstances and distinctions, the general principle being that if they are going for account of the shipper, or subject to his order or control, the property is not divested *in transitu*. If there be any condition annexed to the delivery of the goods to the consignee, the proprietary interest remains in the shipper, notwithstanding the goods are sent in pursuance of the orders of the consignee. Thus, if a merchant in H send goods to A in another country, by order of B and on account of B, but with directions not to deliver them unless satisfaction could be given for the payment, the property is not divested from the shipper, but remains his *in transitu*. (Cited in *The Aurora*, 4 Rob., 319.) The same principle applies where goods are shipped to the orders of the shippers, but to be delivered by their agents to the consignee upon the agents being satisfied for the payment. (*The Aurora*, 4 Rob., 218; *The Merrimack*, Kimmel & Albert's claim, 8 Cranch, 317; see *The Marianna*, 6 Rob., 24.) So even if the goods are stated in the invoice to belong to the claimants; yet if these papers are inclosed to the consignee as agents to the shippers, and are to be delivered to the claimants only upon conditions in the discretion of the agent, the property remains in the shippers. (*The Merrimack*, 8 Cranch, 317.) But if the goods are consigned to an agent of the shippers, but the invoice, &c., show them to be for the account of the claimants, and the invoice, &c., are, by the shippers, sent directly to the claimants, the possession of these documents gives them a title, and establishes the intention of the shipper to vest the property in the claimants at the time of the shipment. (*The Merrimack*, 34*) Messrs. *Wilkins' claim, 8 Cranch, 317.) So if the goods are shipped to the consignee unconditionally for the use of the claimants. (*Id.* Messrs. M'Kean & Woodland's claim, 8 Cranch, 317.) But if the goods are consigned to the agent of the shippers, and there are discretionary orders given, but no direction for an absolute delivery to the claimants, the property remains in the shippers. (*The St. Joze Indiano*, Lizaur's claim, 2 Gallis., S. C. ante, Vol. I., p. 208.) In all these cases the goods are supposed to have been purchased in pursuance of the orders of the claimants; for if they are sent by the shippers without orders, or contrary to, or different from orders, either in quantity or kind, the proprietary interest remains in the shipper during the transit, notwithstanding they are sent by direct consignment to the consignee. (*The Venus*, 8 Cranch, 253; *The Frances*, Dunham & Randolph's claim, 1 Gallis., 445; S. C., 8 Cranch, 354, 9 Cranch, 183; *The Frances*, French's claim, 8 Cranch, 359.)

It is certainly competent for an agent abroad, who purchases goods in pursuance of orders, to vest the proprietary interest in his principal, immediately on the purchase. This is the case when he purchases exclusively on the credit of the principal, or makes an absolute appropriation and designation of the property for his

principal. But where he sells his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in such goods vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. (*The St. Joze Indiano*, 2 Gallis., S. C. ante, Vol. I., p. 208.) But such delivery or appropriation to the use of his correspondent need not be by a direct act, but it may constructively arise from the circumstances of the case, even where the shipper has made an intermediate assignment of the goods. (*The Mary and Susan*, ante, Vol. I., p. 25.)

In all these cases the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu* in cases of insolvency), or has parted with the possession and all authority over it. For if an [*35 enemy's shipper consign goods or money to his correspondent at H., for the purpose of answering drafts of his correspondent in A., without any letter of advice or document making it the absolute property of such correspondent, or putting it out of his own control, it still remains the property of the shipper, for he may at any time countermand the order, or give the goods or money a new direction. In substance it is the same transaction as if a person send a sum of money to his private banker, directing him to hold it subject to the order of A.; in which case, if on the next day, and before any such order had been given, or even the fact of lodgment known to the other party, he had changed his purpose, and directed a conversion of the money to another object, it is clear that the bankers could not resist with effect. (*The Josephine*, 4 Rob., 25.)

In respect to questions of illegal trade, little is necessary to be said in addition to the observations and cases cited in the former volume. It is a fundamental principle of prize law that all trade with the enemy is prohibited to all persons, whether natives, naturalized citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation. (*The Vigilantia*, 1 Rob., 1, 14, 26; *The Hoop*, 1 Rob., 196; *Potts v. Bell*, 8 T. R., 548; *The Rapid*, 8 Cranch, 155; S. C. 1 Gallis., 295; *The Alexander*, 8 Cranch, 169; S. C. 1 Gallis., 532; *The Joseph*, 8 Cranch, 451; S. C. 1 Gallis., 545.) *The same penalty [*36 is applied to subjects of allies in the war, trading with the common enemy. (*The Nayade*, 4

1.—Au surplus, l'intention de l'ordonnance, en exigeant que la police contienne, le nom et le domicile de celui qui se fait assurer—les effets sur lesquels l'assurance sera faite—le nom du navire, du lieu ou les marchandises seront chargées, et déchargées, est encore de connaître en temps de guerre, si malgré l'interdiction de commerce qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on feroit passer aux ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés: car tout cela étant défendu, comme préjudiciable à l'Etat, seroit sujet à confiscation, et à être déclaré de bonne prise, étant trouvé, soit sur les navires de la nation, soit sur ceux des amis et alliés, comme il sera observé sur le tit. des Prises. Valin, sur l'Ordonnance, Liv. 3, tit. 6; Des Assurances, art. 3; Id., tit. 9; Des Prises, art. 1.

Rob., 251; *The Neptunus*, 6 Rob., 403; Bynk. Q. J. Pub. Ch. 10; Du Ponceau's edit., p. 81.) But a citizen of a belligerent country, domiciled in a neutral country, may lawfully trade with the enemy of his native country (*The Danaos*, 4 Rob., 255, note), with the exception of the case of trade in articles contraband of war. (*The Neptunus*, 6 Rob., 403; *The Ann*, 1 Dodson, 221.) And if the party intends to trade with the enemy, but during the voyage the port becomes neutral, the penalty is saved, for there must be the act as well as the intention. (*The Abby*, 5 Rob., 251.) And even assuming that after the knowledge of a war, a citizen domiciled in the enemy's country may lawfully withdraw his property without a license from his government which has been denied (*The Mary*, 1 Gallis., 620), at all events, it must be done in a reasonable time, and ten months after the war is too late, and the party will then be deemed engaged in a trade with the enemy. (*The St. Lawrence*, 1 Gallis., 467; S. C. 9 Cranch, 120.) And if a vessel take on board a cargo from an enemy's ship, under the pretense that it is ransomed, it is an illegal traffic. Even admitting the ransoming of captured property to be legal, it cannot be admitted to be made at any distance of time, and by any new voyages undertaken for this special purpose. (*The Lord Wellington*, 2 Gallis., 103.) And sailing under the enemy's license is deemed, *per se*, an efficient cause of condemnation. (*The Julia*, 1 Gallis., 594; S. C., 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 8 Cranch, 444; S. C. ante, Vol. I., p. 440. *The Ariadne*, ante, Vol. II., p. 143.)

These observations on the subject of proprietary interests may be concluded with the remark that to entitle the claimant to sustain his claim in the prize court the property must be proved to be neutral at all periods from the time of shipment, without intermission, to the arrival and subsequent sale in the port of the enemy. (*The Atlas*, 3 Rob., 299; *The Sally*, 4 Rob., note a.) And if it be hostile at the time of shipment, it is (as has been already stated) a universal rule to condemn it, although 37* the owner has become a friend or subject. (*The Boedes Lust*, 5 Rob., 233.)

In this connection we might treat of the principles of international law respecting blockade, contraband of war (*vide ante*, vol. 1, p. 38-9, note i, p. 394, note m), engagements in the coasting and colonial trade of an enemy (*vide ante*, vol. 1, p. 507, Appendix, note 3), the right of search, the effect of resistance or rescue of neutral ships, and the circumstances of unneutral conduct, which are visited with a forfeiture of the ship or cargo, or both. These topics would lead us into a very enlarged inquiry, incompatible with the object of this summary sketch; but they deserve the attention of all students of the law of prize, and it is to be hoped that some eminent jurist will, hereafter, examine them with a diligence and learning proportioned to their importance. It may, however, be useful here to consider how far the illegal acts of the master bind the interests of the owner of the ship or cargo.

It is a general principle that the act of the Wheat, 2.

master at all events binds the owner of the ship, as much as if the act were committed by himself. (*The Vrouw Judith*, 1 Rob. 150.) If, therefore, the master deviate into a blockaded port, the owner is bound by the act, and is not permitted to aver his ignorance of the act, or that the master acted against his orders. (*The Adonis*, 5 Rob., 256.) And the same principle is applied to the case of carrying goods contraband of war. (*The Imina*, 3 Rob., 167.) But Grotius (*De J. B. et P.*, lib. 3, ch. 6, sec. 6), Loccenius (*De Jur. Mar.*, lib. 2, ch. 4, no. 12), Pothier (*De Propriété*, no. 103), and Bynkershoek (*Q. J. Pub.*, lib. 1, ch. 12, p. 97, Du Ponceau's Ed.), all contend for a favorable distinction where the owner is ignorant of the fact of unlawful goods being on board. They are, however, contradicted by Valin (*Sur l'Ord.*, tom. 2, p. 253), and Emerigon (*Des Assurances*, tom. 1, p. 449), whose doctrine is followed in the practice of prize courts. The law, indeed, is established that the principal is answerable for the acts of his agent (and the master *is the [38 accredited agent of the ship-owner), not only civilly but penalty to the amount of the property entrusted to his care. (*The Mars*, 6 Rob., 79, 87.) It would be impossible for a court of prize to affect the proprietor in any other way; and, whatever the hardship may be, it is very much softened by recollecting that if he has sustained any injury by the fraudulent and unauthorized acts of his agent he will be entitled to his remedy against him. (*The Mars*, 6 Rob., 79, 87.) But the act of the master does not, in general, bind the owner of the cargo, unless he be owner of the ship, or consunt of the intended violation of law, or the master be his agent. (*The Vrouw Judith*, 1 Rob., 150; *The Imina*, 3 Rob., 169; *The Rosalie and Betty*, 2 Rob., 343, 351; *The Alexander*, 4 Rob., 93; *The Elbebe*, 5 Rob., 173.) In cases of blockade the deviation into the blockaded port is presumed to be in the service of the cargo, and, therefore, the owner is bound by it, unless where there was no notice of the blockade at the time the ship sailed. (*The Alexander*, 4 Rob., 93; *The Shepherdess*, 5 Rob., 256.) And if the master at the time of sailing put his ship under convoy, whose instructions he is presumed to know, the act is illegal, and binds both the ship and cargo. (*The Elbebe*, 5 Rob., 173.) It is not considered like the case of an unforeseen emergency happening to a ship at sea, where the fact itself proves the owners to be ignorant and innocent, and where the court has held that being proved innocent by the very circumstances of the case, the owners of the cargo should not be bound by the mere principle of law, which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done antecedently to the voyage, and must, therefore, be presumed to be done on communication with the owners, and with their consent; the effect of this presumption is such that it cannot be permitted to be averred against, inasmuch as all the evidence must come from the suspected parties themselves, without a possibility of meeting it, however prepared. The court, therefore, applies the strict principle of law, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, and that if he has exceeded his authority it is barratry, for which he

ante, Vol. I, p. 159.) And in like manner to allow him his expenses. (*The Hoop*, 1 Rob., 196; *The Bremen Flugge*, 4 Rob., 90; *The Der Mohr*, 4 Rob., 314; *Smart v. Wolff*, 3 T. Rep., 323; Vattel, liv. 3, ch. 7, sec. 115; *The Consolato del Mare*, ch. 273; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*; *The Copenhagen*, 1 Rob., 289; *The Anna Catharina*, 6 Rob., 10; *Katharina Elizabeth*, Acton, 309; *The Fortuna*, Edw., 56.) The freight allowed is not, however, necessarily the rate agreed on by the parties, if it be inflated by extraordinary circumstances; but a reasonable freight only will, in such cases, be allowed. (*The Trilling Riget*, 5 Rob., 82.) And where the goods have been once unladen by order of court, the whole freight for the voyage is due, and the owner of the goods, even in case of restitution, cannot demand the ship to reload them, and carry them to the original port of destination; for by the separation the ship is exonerated. (*The Hoffnung*, 6 Rob., 291; *The Prosper*, Edw., 72.) But it would be otherwise if there had been no unlivery. (*The Copenhagen*, 1 Rob., 289.) And the neutral will be allowed his freight where he carries the goods of one belligerent to its enemy, for though such a trade be illegal as to the subjects, it is not so as to neutrals. (*The Hoop*, 1 Rob., 196, 219.) So on a voyage from the port of one enemy to the port of another enemy. (*The Wilhelmina*, 2 Rob., 210, note.) But if the neutral has conducted himself fraudulently or unfairly, or in violation of belligerent rights, he will not be allowed freight or expenses, and in flagrant cases, will be visited with confiscation, even of the ship itself. And he is never allowed freight where he has used false papers (*The Atlas*, 3 Rob., 299, 304, note; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*); nor upon the carriage of contraband goods (*Id.* Bynk. Q. J. Pub., Duponceau's ed., 81; *The Sarah Christina*, 1 Rob., 237; *The Mercurius*, 1 Rob., 288; *The Emanuel*, 1 Rob., 286; *The Neptunus*, 3 Rob., 108; *The Neutralitet*, 3 Rob., 295; *The Oster Rivoer*, 4 Rob., 199; *The Commercen*, ante, Vol. I, p. 383); nor where there has been a spoilation of papers (*The Rising Sun*, 2 Rob., 55*) 104; *The Madonna *del Burro*, 4 Rob., 169, 183); nor where the cause of capture was the ship and not the cargo. (*The Fortuna*, 1 Edw., 56.) But where part of the goods are condemned as contraband and part restored, after unlivery of the cargo, freight may be decreed as a charge upon the part restored. (*The Oster Rivoer*, 4 Rob., 199.) If the goods are unlivered under a hostile embargo upon neutral ships, they are discharged of the lien of the freight; and if freight be decreed, it can only be against the original consignees or freighters, and not against a prior purchaser, who has received them on bail. (*The Theresa Bonita*, 4 Rob., 236.)

When a decree is made that the freight shall be a charge on the cargo, application must be made to the court for the sale of so much as is necessary for this purpose. (*The Vrouw Margaretha*, 4 Rob., 304, note.) In general, where a ship and cargo are restored, with a decree that the freight shall be a charge on the cargo, if the proceeds of the cargo are not sufficient to pay the freight, the captors are not responsible for the deficiency. (*The Haabet*, 4 Rob., 302.)

Wheat, 2.

But although the capture be right, yet if afterwards the cargo is lost by the negligence of the captors, and the freight be decreed a charge on the cargo, the captors are responsible to pay it. (*The Der Mohr*, 4 Rob., 314.) Where the freight of the neutral and the expenses of the captors are both decreed to be a charge on the cargo, and the proceeds are insufficient to discharge both, priority of payment of the freight is, in ordinary cases, allowed by the court, as a lien that takes place of all others. (*The Bremen Flugge*, 4 Rob., 90.)

In the next place, as to the allowance of freight to the captors. This may happen when the ship is hostile, and the cargo, or a part thereof, is neutral. The general rule is, that if neutral goods are found on board of a hostile ship, the captors are not entitled to freight therefor, unless they carry the goods to the port of destination. (Bynk. Q. J. Pub. 1, 1, ch. 13; Du Ponceau's ed. p. 105; *The Diana*, 5 Rob., 67; *The Fortuna*, 1 Edw., 56.) And the rule is applied notwithstanding there may have been a sale of the goods beneficial to the owners. (*The Vrouw Anna Catharina*, 6 Rob., 269; *The Fortuna*, 1 Edw., 56.) But there are exceptions to the rule itself; for if the captors bring *the cargo to the country where [*56] the claimants ultimately designed to send it, but were compelled to take a circuitous route under existing circumstances, the captors are entitled to freight, notwithstanding the ship was actually destined to another country, there to land it. (*The Diana*, 5 Rob., 67.) So, if brought to the same country, but not to the port of actual destination. (*The Vrouw Henrietta*, 5 Rob., 75, note. But see *The Wilhelmina Eleonora*, 3 Rob., 284.) So, where the goods are brought to the country where the proceeds were ultimately destined, and would have been brought directly, but for a prohibition of municipal law. (*The Ann Green*, 1 Gallis., 274.) Where freight is decreed to the captors, it will be paid by the court out of the cargo or its proceeds, if yet remaining in the admiralty. (*The Fortuna*, 4 Rob., 278.) And under particular circumstances, application may be made to the court to decree the sale of so much of the cargo as may be necessary to be sold for the discharge of freight. (4 Rob., 304, note.) And where freight is allowed to the captors, if they have done any damage to the cargo, the amount may be deducted by way of set-off or compensation. (*The Fortuna*, 4 Rob., 278.)

As to the allowance of costs and expenses. In cases where further proof is directed, costs and expenses are never allowed to the claimant. (*The Einigheden*, 1 Rob., 323.) Nor where the neutrality of the property does not appear by the papers on board and the preparatory evidence (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*; opinion of M. Portalis in *The Statira*, 2 Cranch, 102, note a); nor where papers are spoliated or thrown overboard, unless the act be produced by the captors' misconduct, as by firing under false colors (*The Peacock*, 4 Rob., 185); nor where the master or crew, upon the preparatory examinations, grossly prevaricate (*Id.*); nor where any part of the cargo is condemned (*The William*, 6 Rob., 816);

nor where the ship comes from a blockaded port (*The Frederick Malke*, 1 Rob., 36; *The Betsey*, 1 Rob., 98; *The Vrouw Judith*, 1 Rob., 150), nor if the ship be restored by consent, 57*) *without reserving the question of costs and expenses. (*The Maria Poelona*, 6 Rob., 236.) But in all these cases it is in the discretion of the court to allow the captors their costs and expenses. (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*.) And, in general, wherever the captors are justified in the capture, their costs and expenses are decreed to them by the court in case of restitution of property. (*The Imina*, 3 Rob., 167; *The Principe*, 1 Edw., 70.) Therefore, they are allowed where the original destination was to a blockaded port, although changed on hearing of the blockade (*The Imina*, 3 Rob., 167); where ships, even of our own country, are captured sailing under false papers (*The Sarah*, 3 Rob., 390); where the nature of the cargo is ambiguous as to contraband (*The Tweende Brodre*, 4 Rob., 33; *The Gute Gesellschaft Michael*, 4 Rob., 94; *The Christina Maria*, 4 Rob., 160); and generally, in all cases of false papers (*The Nostra Signora de Piedade Nova Aurora*, 6 Rob., 41); and in all cases where further proof is required. (See *The Frances*, 1 Gallis., 445; *The Apollo*, 4 Rob., 158; *The Mary*, 9 Cranch, 126.) In cases where the captors' expenses are allowed, the expenses intended are such as are necessarily incurred in consequence of the act of capture. (*The Catharine and Anna*, 4 Rob., 39.) Such are the expenses of the captors' agent. (*The Asia Grande*, Edw., 45.) But not insurance made by the captors (*The Catharine and Anna*, 4 Rob., 39); nor expenses of transmitting a cargo from a colony to the mother country. (*The Narcissus*, 4 Rob., 17.) And property restored to the claimant is not to be charged with any expenses for agency, or for taking care of it, unless made a charge by the court. (*The Asia Grande*, 1 Edw., 45.) And the expense of an unlivery or delivery of the property which is restored is to be borne by the captors or releasing party, and not by the property, unless it is so directed by the court. (*The Rendborg*, 6 Rob., 142.) In general, where the property is condemned, the expenses of unlivery and warehousing, &c., fall on the captors (*The Industrie*, 5 Rob., 88); and where it is restored, the court will apportion them in its discretion, on the captors and on the cargo. (*The Industrie*, 5 Rob., 88.)

58*) *In the cases of neutral ships, it is usual to allow the master his adventure and personal expenses, if his conduct has been fair and unimpeachable. (*The Culyppo*, 2 Rob., 298; *The Anna Catharina*, 6 Rob., 10.) But where the master and crew prevaricate in their evidence, their adventures are never restored (*The Anna Catharina*, 4 Rob., 120); nor where the ship is engaged in a fraudulent trade. (*The Christiansberg*, 6 Rob., 876.)

Claims of joint capture are often interposed in prize causes; and though it is not usual for joint captors to assert their interest until after a

final decree of condemnation (Per Croke, J., in *The Herkimer*, 2 Hall's Law Journ. 133, 146; S. C. Stewart, 128, 144; *Home v. Camden*, 2 H. Bl., 539), yet, as it may be asserted with legal propriety at any stage of the cause, it may be as well here to examine the doctrines which have been applied to this subject.

In respect to privateers, it is a general principle that no right to share as joint captors accrues merely by being in sight at the time when the prize is captured. There must be actual intimidation, or actual or constructive assistance. (Bynk. Q. J. Pub. lib. 1, ch. 18., and a learned note of Mr. Duponceau, in his translation, p. 144; *Talbot v. Three Brigs*, 1 Hall's Law Journ. 266; S. C. 1 Dall, 95; Martens on Capt. sec. 32, p. 91; *The Santa Brigada*, 3 Rob., 52; *The Forsighed*, 311; *L'Amitie*, 6 Rob., 261.) And the same principle is applied to *captures in sight of fortresses, and [*59 of land forces, and armies, for they do not share, unless there be actual co-operation. (Bynk. Q. J. Pub., lib. 1, ch. 18., *Duponceau's ed.*, p. 146; *The Dordrecht*, 2 Rob., 55.) And in such cases, the assistance ought to be material in order to entitle the parties to share as joint captors. (*The Dordrecht*, 2 Rob., 65.) The reason of this rule in relation to privateers is, that the being in sight is not sufficient with respect to them to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war from views of private advantage only. They are not bound to put their commissions in use on every discovery of an enemy. And, therefore, the court does not presume in their favor, from the mere circumstance of their being in sight, that they were there with a design of contributing assistance, and engaging in the contest. There must be as to them the *animus capiendi* demonstrated by some overt act; by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been entertained. (*L'Amitie*, 6 Rob., 261; *La Flore*, 5 Rob., 268.) Formerly the principle of constructive assistance was carried a great way; but the later inclination of courts has been rather to restrain than to extend the rule. (*The Vryheid*, 2 Rob., 16; *The Odin*, 4 Rob., 318; *La Furieuse*, Stewart, 177.) And where no actual assistance is alleged, the presumption of law leans in favor of the actual captors. (*The Robert*, 3 Rob., 194.) But even with respect to privateers, it is not necessary that a joint chaser should actually board a prize; it will be enough if there is the *animus persequendi* sufficiently indicated by the conduct of the vessel. The act of chasing, therefore, if continued for any length of time, and not abandoned at the time of capture, will be sufficient to found a title of joint capture. (*L'Amitie*, 6 Rob., 261.) But if the chase be discontinued, it is otherwise. (Ib. *The*

1.—Aucun ne pourra être admis au partage d'un vaisseau pris sur les ennemis, s'il n'a contribué à l'arrêter, ou contracté société avec celui qui s'en est rendu maître. II. Celui qui prétend partager un vaisseau, ne sera point sensé avoir contribué à l'arrêter, s'il n'a combattu, ou s'il n'a fait tel effort, qu'en intimidant l'ennemi par sa présence, ou en lui coupant chemin, et l'empêchant de s'échapper, il l'ait obligé à se rendre, sans qu'il lui suffise d'avoir été en vue, et d'avoir donné chasse, lorsqu'il été inutile. Règlement du 27 sera prouvé que cette chasse aura Janv. 1706.

Wheat. 2.

Waaksamheid, 3 Rob., 1.) And if a ship has actually engaged another, and been beaten off, and yet remains in sight about the enemy, with 60*) an evident intention *of persisting in the contest, and another vessel then comes up and makes the capture, the first is entitled to share in the capture. (*La Virginie*, 5 Rob., 124.)

Public policy has introduced a different rule as to public ships of war; and all such ships being in sight are deemed to be constructively assisting, and, therefore, entitled to share in the capture. (*The Dordrecht*, 2 Rob., 55; *The Robert*, 3 Rob., 194; *The Foreigner*, 3 Rob., 311; *La Flore*, 5 Rob., 268; *The Bellona*, Edw., 63; *The Furieuse*, Stewart, 177; *The Sparkler*, 1 Dodson, 359.)¹ The reason of this distinction is, that public ships are under a constant obligation to attack the enemy wherever seen; and, therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised that they are there *animus capiendi*. In the case of privateers, the same obligation does not exist; the law, therefore, does not give them the benefit of the same presumption (*La Flore*, 5 Rob., 268.) Where the actual captor is a public armed ship, the rule is additionally supported by the obvious policy of promoting harmony in the service. But the rule equally applies where the actual captor is a privateer (*La Flore*, 5 Rob., 268); though the privateer in the converse case is not entitled to share, from merely being in sight. (*The Santa Brigada*, 3 Rob., 52.) There are exceptions, however, to the rule, where the circumstances of the case repel the presumption of the *animus capiendi*; such is the case where a public ship is in sight, but steering an opposite or different course in 61*) consistent with the notion of an intent *to capture. (*The Robert*, 3 Rob., 194; *The Dree Gebroeders*, 5 Rob. 339.) But the mere sailing on a different course is not sufficient to defeat a title of joint capture; for it is not necessary that the two ships should pursue the enemy in the same line. If one vessel sail in one direction, and the other in a different direction, with the purpose of capturing, that difference of course would not defeat a unity of purpose, nor destroy the claim of joint capture. (*Le Niemen*, 1 Dodson, 9.) But if the ship, claiming as joint captor, has changed her course, and discontinued the chase before the capture, the claim is defeated, unless this conduct be occasioned by the fraud or misconduct of the capturing ship; for then the court will let in the claim with a view to punish the fraud or misconduct. (*The Waaksamheid*, 3 Rob., 1; *The Robert*, 3 Rob., 194; *La Virginie*, 5 Rob., 124; *The Dree Gebroeders*, 5 Rob., 339.) So, if the persons claiming as joint captors, have reconnoitred the prize,

and abandoned all design of capture, they are not entitled to share. (*The Lord Middleton*, 4 Rob., 153; *The Dree Gebroeders*, 5 Rob., 339; *L'Amitié*, 6 Rob., 261.)

But even with regard to public ships, cases of constructive assistance in joint capture are not to be extended, and, therefore, the court requires that the ship should be actually in sight. (*The Vryheid*, 2 Rob., 16; *The Odin*, 4 Rob., 318; *The Furieuse*, Stewart, 177.) Therefore, being in sight a day or two before the capture is not sufficient. It must be at the commencement of the engagement, or chase, or during its continuance. (*The Vryheid*, 2 Rob., 16.) And being in sight when the enemy was first descried, and being detached before the chase or preparations therefor, is not sufficient. (*The Vryheid*, 2 Rob., 16.) But it would be otherwise if detached in sight of the enemy at the moment of the chase, and under preparation for chase; for there must be some actual contribution of endeavor as well as of general intention. (*The Vryheid*, 2 Rob., 16.) And it would seem to be very doubtful whether the prize being seen from the mast head would bring the case within the rule of being in sight. (*The Robert*, 3 Rob., 194.) And a like rule is applied to the capitulation of an island; for to entitle a public ship to share in the capture she must not be detached upon another service, *but must be actually in sight at the [*62 time. (*The Island of Trinidad*, 5 Rob., 92.) And no antecedent or subsequent services in the expedition will help the case where the party would not otherwise be entitled to share. (*Buenos Ayres*, 1 Dodson, 28.) In respect also to a joint chase, if both ships are in chase without any common co-operation, except such as the two parties acting separately, with a common object in view, might produce, and during the chase night comes on, and the enemy is lost sight of, and the ships still are in pursuit, but one of them cruising merely in search, and from conjecture adopts an erroneous course, and in consequence thereof the prize is captured either by the other or by a third ship on the next day, out of sight, the ship so erroneously cruising is not entitled to share as a joint captor, for it is a discontinuance of the chase to change a course upon conjecture. (*Le Niemen*, 1 Dodson, 9; *The Financier*, 1 Dodson, 61.) Nor will it vary the case that the position or course run by such ship had the effect of throwing the prize into the hands of the other ship, by inducing the prize to alter her own course. (*Ib.*) It would, indeed, be an extravagant position to admit that every fleet or ship which, either by accident or design, diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, should be considered as a joint captor. (*Le Niemen*, 1 Dodson, 9.) It is certainly true that darkness preventing sight will not universally exclude from a right to share; nor can the rule be laid down universally the other way; for there may not in every case be evidence to show the proximity to the scene of action. Where it can be shown that the asserted joint captor was in sight when the darkness came on, and that it continued steering the same course, by which it was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to demonstration that the ships would have seen, and

1—Si plusieurs vaisseaux ont part à une même prise, et par vaisseaux preneurs sont entendus ceux qui se seront trouvés ensemble et à vue de la prise lorsqu'elle aura été faite, ou faisant partie d'une même escadre, le montant de ce qui reviendra à chaque vaisseau, frégat et autre bâtiment de Sa Majesté, sera constaté sur la proportion du nombre de leur canons en batterie et de leur calibre, à commencer par celui de quatre livres et au dessus, et du nombre d'équipage à bord de chaque vaisseau; et cette proportion ainsi établie, la répartition de ce qui reviendra à chaque vaisseau, sera faite sur le pied qui est prescrit dans l'article précédent. Ordonnance du Roi, concernant les prises faites par les vaisseaux, frégates et autres bâtiments de S. M. du 15 Juin, 1757.

been seen by each other, at the time of capture, if darkness had not intervened; and, in such case it ought to be let in to the benefit of joint capture. (*The Union*, 1 Dodson, 346.) But if the chase is lost sight of in the night, and the capture is afterwards made at such a distance that the asserted joint captor would not at the time of capture have been in sight even if it **63*** had been day, the claim of joint capture cannot be sustained. Indeed, Sir W. Scott has declared that where a ship is lost sight of, in the night, the pursuit of that ship cannot properly be denominated a chase; it is a conjectural pursuit only; it is a feeling about in the dark, a search and inquiry, but no chase. (*The Financier*, 1 Dodson, 61.) And where a ship is herself only a constructive captor, it is not a sufficient ground to let in another ship that she had joined in a previous chase with the constructive captor, and lost sight of the prize in the night. (*The Financier*, 1 Dodson, 61.) Therefore, in a case where one or two joint chasers were ordered to pick up the boats of the other, and in consequence of the delay occasioned by her obedience to those orders she lost sight of the prize, which was in the meantime captured by a third ship coming up in the presence of the other, it was held that the ship so out of sight was not entitled to share. (*The Financier*, 1 Dodson, 61.) A revenue cutter, though having a letter of marque, is not considered in England as a public ship of war entitled to the benefit of the rule of constructive assistance from being in sight. (*The Bellona*, 1 Edw., 68.) A conveying ship, notwithstanding her special employment, may be entitled as a joint captor, if by chase or intimidation she aid in the capture, when it does not interfere with convoy duty. (*The Waakaamheid*, 3 Rob., 1; *La Furie*, 3 Rob., 9.) In captures made by boats it is a general rule that the ships to which they belong are entitled to share. (*The Anna Maria*, 3 Rob., 211; *The Odin*, 4 Rob., 318.) But if a boat be detached from the ship to which she belongs, and attached to another, the ship only shares to which she is attached at that time; for she must be taken at that time, and in those operations to be acting under the authority and for the benefit of such ship only. (*The Melomine*, 5 Rob., 41.) But constructive assistance by boats will not entitle the ships to which they belong to share in the prize, though actual capture by the boats would be sufficient for this purpose; for they are a part of the force of the ship. And in cases of mere constructive assistance the right of participation must be in proportion to the intimidation caused, and cannot go beyond the force actually seen by the enemy. (*La Belle Coquette*, 1 Dodson, 18; *The 64** *Odin*, 4 Rob., 318; *The Nancy*, 4 Rob., 327, note a.) And it is extremely questionable whether a boat of a ship of war could support a title to share on the mere principle of being in sight. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of the friend, from a ship of war being seen or in sight, applies very weakly to the case of a boat, an object that attracts very little notice upon the water, and whose character even if discerned by either of the parties may be totally unknown to both. (*The Odin*, 4 Rob., 318.) Nor will the fact that the

ship to which the boat belongs is in sight lying at anchor in a harbor, entitle the ship to share. (*The Odin*, 4 Rob., 318; *The Nancy*, 4 Rob., 327, note a; *La Belle Coquette*, 1 Dodson, 18.)

In respect to captures made by ships which are associated in the same service, or are engaged in a joint enterprise under the orders of the same superior officer, it is a general rule that they are entitled to share in each other's prizes, made while in such service or joint enterprise. (*The Forsigheid*, 3 Rob., 311; *The Guillaume Tell*, Edw., 6; *The Empress*, 1 Dodson, 368.) Therefore, if one ship of a squadron takes a prize in the night, unknown to the rest, it will entitle the whole fleet to share, although, possibly, the capture may have been made at a distance out of sight of most of the ships of war, even if it had been noonday, for the fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident; and what is done by one, continuing to compose in fact a part of the fleet, enures to the benefit of all. (*The Forsigheid*, 3 Rob., 311, S. C. Edw., 124.) Where a fleet is employed in a blockade, the service is considered as joint, and all the ships are entitled to share in all captures, although all the ships have not joined in the chase, and the capture has been made after the chase, at a great distance from the blockaded port. (*The Guillaume Tell*, Edw., 6; *The Forsigheid*, Edw., 124.) But if a part of the fleet be detached on a separate service, or if the capture be not within the purposes for which they were associated, then the rest of the fleet, not actually or constructively assisting in the capture, are not entitled to share. (*The Forsigheid*, 3 Rob., 311; *The Nordsten*, cited in the *Forsigheid*, Edw., [**65** 124, 127; S. C. 1 Acton, 128; *The Island of Trinidad*, 5 Rob., 92; *The Stella del Norte*, 5 Rob., 349.) And this rule applies to all detachments for some distinct and separate purpose, which, though possibly connected with the main service, carries the detached ships out of the scene of the common operations for the time. (*The Forsigheid*, 3 Rob., 311.) But if they are only sent to look out, and they preserve their connection with the fleet, and maintain their dependence upon it, and keep within signal distance, this is not a detached service. It is more like stretching one of the arms of the fleet without dissolving, in any manner, the connection between them and the main body. (*The Forsigheid*, 3 Rob., 311.) In respect to transports, mere association in service is not sufficient to entitle them to share as constructive joint captors; but for this purpose they must actually acquire a military character, and must be employed in military operations, and there must be an *animus capiendi*, while so employed. (*The Cape of Good Hope*, 2 Rob., 274.) It is not sufficient that the enemy may have been intimidated by their presence. Mere intimidation may be produced without any co-operation having been given or intended. If a frigate were going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but no one would say that such terror would entitle them to share. Though the fact of terror were ever so strongly proved, there would not be that co-operation which the law requires to en-

Wheat. 2.

title non-commissioned vessels to be considered as joint captors. (*Ib.*) But if non-commissioned ships chase, *animo capiendi*, they are entitled to share if the capture be made by their contribution in this service. (*The Three Geusters*, and *Le Franc*, cited 2 Rob., 284, 285, notes a, b.)

As to conjunct operations by land and naval forces, how far the former are permitted to share in prizes made by the latter, where no express provision is made by statute, depends upon the circumstances of the case. A mere general co-operation in the same general objects would not be sufficient. (*The Stella del Norte*, 5 Rob., 349.) But an actual co-operation in the [66*] particular *capture is clearly sufficient. (*Ib. The Dordrecht*, 2 Rob., 55.)

If the fleet of an ally and our own fleet serve together under our commander, who detaches the squadron of the ally, the latter is not entitled to share in captures subsequently made. But if an ally actually co-operates in effecting a capture, he is entitled to share as a joint captor; but the question whether he is a joint captor or not, is a question of which courts of common law have no jurisdiction, and which belongs exclusively to the admiralty. (*Duckworth v. Tucker*, 2 Taunt., 7.)

As to the manner in which claims of joint capture are to be asserted. It has been already stated that it is usual not to file such claims before a decree of condemnation; but if they are not filed before a decree ascertaining who are the captors, and who are entitled to share, and especially after a distribution decreed, it is too late to assert the right. (See *The Stella del Norte*, 5 Rob., 349; *Duckworth v. Tucker*, 2 Taunt., 7; *Horne v. Camden*, 2 H. Bl., 533.) But if the sentence below be suspended by an appeal, it seems that a joint claim may be interposed upon the appeal. (*Horne v. Camden*, 2 H. Bl., 533; *The Nostra Signora de los Dolores*, 1 Acton, 262; *The Soci  t  *, 9 Cranch, 209.) It is, however, best to interpose such claims at an earlier stage of the proceedings, and before any decree of condemnation has passed in any court.

A question of joint capture is never permitted to be settled by affidavits. It must be brought forward by a regular allegation, containing a statement of the facts; and if the allegation contain such facts as, if proved, may entitle the parties to share, the court direct it to be admitted and filed; and, thereupon, the actual captors are entitled to file a counter allegation; and the cause is then regularly to be sustained by proofs to be taken and established as in other causes, that is to say, by documentary proofs, and the depositions of competent witnesses. (*The Urania*, 5 Rob., 148; *La Virginie*, 5 Rob., 124.) If, indeed, upon the statement made in the original allegation, the claim cannot, in point of law, be sustained, the court will not inquire into the facts, but reject the application *in limine*. (*The Waaksanheid*, 3 Rob., 1.) The [67*] case, however, must be very clear, *where this course is adopted. When the claim of joint capture is admitted to proof, the *onus probandi* lies on the asserted joint captor. (*The Union*, 1 Dodson, 346; *The John*, 1 Dodson, 363.) The single evidence of witnesses on board of the claiming ship, though they release their right, is never deemed sufficient to establish the fact of joint capture; it must be corroborated by Wheat. 2.

evidence *aliunde*, or it will be rejected. (*The Fadrelandet*, 5 Rob., 120; *La Flore*, 5 Rob., 268; *The John*, 1 Dodson, 68.) If, at the moment of capture, the capturing ship admits the fact of joint capture, it is conclusive, unless there be some circumstance invalidating the admission. (*The San Jove*, 6 Rob., 244.) And if the asserted joint captors expressly renounce all claim to the prize at the time of capture, their claim is entirely waived, though, from subsequent circumstances, they may be disposed to assert it. (*The William and Mary*, 4 Rob., 381.)

In case of joint captures by public ships, the rule as to the proportion in which they are to share is established generally by statute. This is fixed in the United States by the act of the 22d April, 1800, ch. 33, which provides that the capturing ships shall share "according to the number of men and guns on board each ship in sight." In respect to privateers, no statute regulation exists; and by the general rule of the prize law, they are to share in proportion to their relative strength. (Bynk. Q. J. Pub., lib. 1, ch. 18, Du Ponceau's ed., p. 164.) This relative strength is, by the law of Great Britain and the United States, ascertained by the number of men on board of such ship assisting in the capture. (*Roberts v. Hartley*, Doug., 311; *The Despatch*, 2 Gallis, 1.) Such, too, is the rule where an ally co-operates in the capture. (*Duckworth v. Tucker*, 2 Taunt., 7.) And the same rule seems applicable to the case of a joint capture by a public ship and a private ship of war; and this, whether the latter be commissioned or not. (*The Three Geusters*, 2 Rob., 284; *Le Franc*, 2 Rob., 285.)

*Upon the hearing of the proofs, if the [68 case does not require or admit further proof, the court proceeds to pronounce a sentence of acquittal or condemnation, as the justice of the case requires. And it may proceed to make its decree as well after as before the death of the parties; for in proceedings *in rem* the suit does not abate by the death or absence of all or any of the parties named in the proceedings. (*Penhallon v. Doane*, 3 Dall., 54, 86, 117; *The Falcon*, 6 Rob., 194, 199.) It may be proper in many cases, where all the parties on either side are dead, not to proceed to make a decree *in rem* without serving a monition upon the representatives of the deceased party to appear and pursue or defend his rights. And where the decree is *in personam* the court will generally require that the representative should be duly cited to appear to protect his interests, so far as they may be affected by the decree. (*Vide The Nostra Signora de los Dolores*, 1 Dodson, 290.) It is, indeed, the duty of the court to take notice of all interests that result from evidence before it, and not to suffer any persons to be precluded from their just demands from want of notice of any facts that appear in the course of the proceedings. (*The Maria Francaise*, 6 Rob., 282.) And where parties are not formally before the court, it acts as a general guardian of all interests which are brought to its notice. (*Ib.*) Indeed, in the common cases of condemnations, the enemy proprietor is necessarily absent by operation of law; and yet the sentence is completely valid, as well against him as against all the world. (*The Falcon*, 6 Rob., 194, 199.) To give validity, therefore, to decrees *in rem*,

it is not necessary that the adverse parties should be before the court. (*Ib.*)

When a sentence is pronounced, either of acquittal or condemnation, it is, in general, by an interlocutory decree. An interlocutory decree is proper in all cases, where anything further remains to be done by the court, as in ascertaining damages in cases of illegal capture, or in deciding who are captors, after deciding that the property is to be condemned. The right to decide who are captors entitled to distribution, belongs exclusively to the prize court, and its adjudication cannot be examined by a court of common law (*Home v. Camden*, 69*] 2 H. Bl., *533; 4 T. Rep., 382; *Duckworth v. Tucker*, 2 Taunt., 7); and no title vests in the captors until the final adjudication of the prize court. (*Ib.*) In England the usual practice is to acquit or condemn by interlocutory decree in all cases (*Marriott's Form*, 194, 196); and a definitive sentence is reserved until all other questions and interests are finally disposed of. (*Ib.* 198, 208.) In the United States it is more common to reserve a decree until a final decision of all the questions before the court; but there can be no doubt of the propriety of an adherence to the English practice, where the circumstances of the case require a suspension of a final sentence, although the propriety of an acquittal or condemnation is perfectly clear. And in case of an acquittal or condemnation by interlocutory decree there can be no question that an appeal immediately lies to the proper Appellate Court by the parties affected by that decree; for as to them it is an interlocutory having the effect of a final decree.

In respect to cases of acquittal. This may be either with or without damages and costs, or upon the terms of paying costs and expenses. In either case where the damages or expenses are uncertain, and to be ascertained, the court itself may proceed directly to assess them. (*The Lively*, 1 Gallis, 315.) But the usual practice is, to refer it to commissioners to hear the parties, examine their statements and accounts, and to report to the court in detail, such allowance as they think equitably or legally due to the parties. Accompanying the report, the reasons of the commissioners for the allowance or disallowance of any particular item are usually given; and the report, when returned to the court, is heard upon exceptions by the parties substantially, though not formally, as in a suit in chancery; for the prize court almost always proceeds as in summary suits, and not as in plenary suits, in the civil law.

When restitution is decreed, if the property remains specifically in the custody of the court, a warrant issues for the delivery, to the claimant; and in such case, unless it is otherwise ordered by the court, the expenses of the delivery are to be borne by the captors. (*The Rendborg*, 6 Rob., 142.) If the proceeds of the property are in court, an order for delivery is usually made by the court; and after a decree 70*] of restitution, the captors have no right to arrest the proceeds in the registry of the court by a caveat; that can only be done by an application to the court itself. (*The Fortuna*, 4 Rob., 278.) If the proceeds are in the hands of the captors or their agents, a monition, and, if necessary, an attachment, issues to them to bring in the proceeds. But where the captors

have not conducted unfairly, on restitution decreed, they will not be held answerable for more than the proceeds, although the sale made was less than the original value of the property. (*The Two Sumnachs*, 2 Rob., 152.) The property upon a decree of restitution may be delivered to the master as agent of the shipper, for in such case the master is the agent of the shipper, and is answerable to him. (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra.*) But in such a case neither the master nor any other prize-agent can claim the property against his principal, unless so far as to cover his expenses; and the court will thus far protect his rights; but when his expenses and his liens on the property are discharged, the court will deliver it directly to the principle upon his own application. (*The Franklin*, 4 Rob., 404; *The St. Lawrence*, 2 Gallis, 19.) After a decree for restitution of partnership property to a foreign house *in solidum*, the court will not sever the property merely because one partner is a bankrupt here; but if the assignees had put in a claim for this purpose before a decree, it would be otherwise. (*The Jefferson*, 1 Rob., 325.)

Where damages are decreed, the decree is either against the parties by name or by a description of their relation to the ship. Where a decree is against the owners of a privateer generally, a monition issues against them personally, to pay the damages assessed; and it may also issue against the sureties to the bond given on taking out the commission. In a court of the law of nations, a person may be considered as a part owner, though his name has not been inserted in the bill of sale, or ship's register; and the representatives of a person so deemed a part owner is responsible for costs and damages decreed against the owners generally, though the party of whom he is the representative was not the actual wrong-doer. (*The Nostra Signora de los Dolores*, 1 Dodson, 290.) And, as has been already *stated, a part owner [*71 is not exempted from being a party to a suit for the proceeds, by having a release from the claimant for his share. (*The Karasin*, 5 Rob., 291.)

In respect to cases of condemnation. Where an interlocutory decree of condemnation passes in favor of a privateer, it seems to be usual in England to deliver that decree with a proper commission to the master of the privateer, to make sale of the prize, and to return an account into court. (*Semble, The Venus*, 6 Rob., 285.) But in the United States, all sales of prizes, before, as well as after condemnation, are made by the marshal; and in respect to sales after condemnation, this practice is further enforced by the statute of January 27th, 1813, ch. 155. (new edit. ch. 478.)

It has been already stated that no right vests in the captors until after a final sentence of condemnation, and that the right to decide who are the captors entitled to distribution, belongs exclusively to the prize court, and cannot be entertained in a court of common law. (*Duckworth v. Tucker*, 2 Taunt., 7; *Home v. Camden*, 2 H. Bl., 533.) When the case is pronounced to be a case of condemnation, the next question therefore is, to whom it is to be condemned. This generally depends upon the question whether the capturing ship be a commissioned or non-commissioned ship; and, if

the former, whether a public or private armed vessel; and, in each of these cases, questions as to the rights of asserted joint captors may also arise before the court. Captures or seizures may also take place in port; or be made on land by conjunct land and naval forces; and in these cases questions may arise as to the right of the army and navy to share in the prizes or booty.

It is an elementary principle of prize law that all rights of prize belong originally to the government (*The Melomane*, 4 Rob., 41); and the beneficial interests derived to others can proceed only from the grant of the government; and therefore all captures wherever made enure to the use of the government, unless they have been granted away. (*The Elæbe*, 5 Rob., 173; *Sterling v. Vaughan*, 11 East, 619; *The Maria Françoise*, 6 Rob., 282; *The Joseph*, 1 Gallis, 545.) In cases of public armed ships, duly commissioned for the capture, the condemnation *is always to the government, but the proceeds are to be distributed according to the act of the 23d April, 1800, ch. 33, s. 5 and 6. In cases of privateers duly commissioned for the capture, condemnation is, by the prize act of the 26th of June, 1812, ch. 107, to the owners, officers, and crew of the privateer, and the proceeds are to be distributed according to the regulations of the same statute. But captors, even though duly commissioned, may forfeit their rights of prize by misconduct; and this, independent of any statutable provision, by the old-established law of the admiralty. (*Le Reine des Anges*, Stewart, 9; *The Comack*, Stewart, 513, 517; *The Herkimer*, Stewart, 128; S. C., 2 Hall's Am. Law Journ., 133; *The Clarissa*, cited in Stewart, 144, and 2 Hall's Am. Law Journ., 145.) And an obstinate neglect or refusal to comply with the instructions of the government, or the regulations of the prize act, have been held sufficient to authorize an infliction of the forfeiture; and, in such case, the prize is condemned to the government. (*Ib. The Bothnia & Jahnstoft*, 2 Gallis, 78, 92.) So, the unlawful rescue of the prize by the captors from the custody of the court. (*The Comack*, Stewart, 513.) And where the claimant has not affected his property with a hostile character, as by a trade with the enemy, &c.; but has been engaged in some other traffic, contravening the municipal law of his own country, so that he cannot entitle himself to a restitution of the property, it will be condemned to the government, and not to the captors. (*The Walsingham Packet*, 2 Rob., 77; *The Etrusco*, 4 Rob., 282, note; *The Venus*, 8 Cranch, 277, 287.)

In cases of non-commissioned ships, and ships commissioned against one enemy, having no commission against another whose property is captured, the captors are not entitled to any share in the prize, and the property is to be condemned to the government, or to its special grantee, if any such exist. Bynkershoek, indeed, contends, that if a non-commissioned ship is attacked, and captures the assailant in her own defense, the officers and crew are solely entitled to the prize; and this doctrine seems also to be supported by Grotius. (Bynk. Q. J. Pub., lib. 1, ch. 20, Du Ponceau's ed., 155 to 161; Grotius de J. B. et P. lib. 3, ch. 6, s. 10.) However, the general prize law 73*] of *France, Great Britain, and the United

States, is as has been above stated. (Du Ponceau's Bynk., p. 162, note d; 1 Valin, Sur l'Ord. tom. 1, p. 79; *The Haase*, 1 Rob., 286; *The Rebecca*, 1 Rob., 227; *The Amor Parentum*, 1 Rob., 303; *The Two Geuster*, 2 Rob., 284, note a; *The Melomane*, 5 Rob., 41; *The Joseph*, 1 Gallis, 545.) If, at the time of a capture by a letter of marque, the master of the capturing vessel be not on board, the capture is considered as made without a commission, and it enures to the government, or its special grantee. (*The Charlotte*, 5 Rob., 280.) And if a capture be made by a cutter fitted out by a captain of a man-of-war as a tender, and manned from his ship, but without any authority or commission, it is deemed to be made by a non-commissioned vessel, and the capture will not enure to the benefit of the man-of-war. It would be otherwise if the tender were attached to the ship by public authority; for then the ship would share. (*The Melomane*, 5 Rob., 41; *The Charlotte*, 5 Rob., 280; *Capture of Curragoa*, 4 Rob., 282, note a; *The Dos Hermanos*, ante, 76.) And if persons in the navy, land from their ships and man a fort, and thereby compel a ship to strike as prize, it is considered as a capture made at sea by a force upon land, which is a non-commissioned capture. (*The Rebecca*, 1 Rob., 227.) But it would be otherwise if the place on shore were a resort for naval purposes by persons in the navy only, for then it may be deemed a stationary tender, rather attached to, and dependent upon, the vessels, then having the vessels attached to, and dependent upon it. (*Ib.*) If a foreign cartel ship be engaged in trade, it is contrary to the duties of the ship, and the goods will be condemned to the government. (*La Rosine*, 2 Rob., 372.) And the cartel ship also, if belonging to our own citizens, will, if the trading has been very gross, be condemned also. (*The Venus*, 4 Rob., 355.)

In England, by very ancient grants from the crown, the Lord High Admiral has the benefit of all captures made at sea by non-commissioned vessels, and also of all captures by whomsoever made, of all ships and goods coming or already come into ports, creeks or roads of England and Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing *of the war; and also of all [*74 derelicts. But the crown has still reserved to itself all such ships and goods as shall be seized in port before any declaration of war, or reprisals; and also all such as shall voluntarily come in, upon revolt from the enemy, and as shall be driven or forced into port by the king's men-of-war. (*The Rebecca*, 1 Rob., 227 and 230, note a; *The Gertruyda*, 2 Rob., 211; *The Melomane*, 5 Rob., 22; *The Maria Françoise*, 6 Rob., 282; *The Joseph*, 1 Gallis, 545.) The office of Lord High Admiral has for more than a century past been put in commission. But as the office is still considered to have a legal existence, though now residing in the person of the king, the right and perquisites of that office are still distinguished as they were anciently, and are ascertained by an observance of the ancient rules, with the same exactness as if the proceeds were carried in the ancient and distinct course. (*The Gertruyda*, 2 Rob., 211; *The Maria Françoise*, 6 Rob., 282.) Hence arises the well-known distinction of condemnation to the king *jure*

coronæ, and to the king in his office of admiralty, as droits of admiralty; the former applying in all cases where the crown is still entitled to the prize property, in virtue of its sovereignty and inherent prerogatives; the latter applying to all cases where the same belongs to the office of Lord High Admiral.

In the United States, strictly speaking, there are no droits of admiralty; for all prizes, to which no persons can entitle themselves by a public or private commission of war, are condemnable to the government itself in its sovereign capacity. (*The Joseph*, 1 Gallis., 545.) But the phrase *droits of admiralty* is often used in legal adjudications in the United States, as equivalent to condemnations to the United States, in virtue of their general sovereignty and prerogative, as enforced in the courts of admiralty.

But although non-commissioned persons cannot, by making a capture, entitle themselves to the benefits of prize, yet where their conduct has been fair in all cases of condemnations as droits of admiralty, the prize court will, in its discretion, award them a recompense; and even in some cases will award them the whole value of the prize, where there has been great personal gallantry and merit. (*The Haase*, 1 Rob., 75*) 286; *The Amor Parentum*, 1 Rob., 803.) It is not necessary to enumerate at large the various cases in which property is deemed a droit of admiralty, or a prize to the government *jure coronæ*. The preceding authorities will be found to contain almost all the learning on the subject.

It being ascertained who are the captors, and that they are duly commissioned, the next subject is, the distribution of the prize proceeds; and this is regularly to be done by the prize court having possession of the cause. (*The St. Lawrence*, 2 Gallis., 19.) Regularly, there should be a decree of distribution; and neither any officer of the court nor any prize-agent, having prize proceeds in his hands, can be safe in distributing them without a decree to this effect. (*Kean v. The Brig Gloucester*, 2 Dall., 36; *Penhalow v. Doane*, 3 Dall., 54; *The Herkimer*, Stewart, 128; S. C. 2 Hall's Am. Law Journ., 133.) And the prize court have a most unquestionable and exclusive jurisdiction to decree a distribution, either upon its own motion or upon the application of the parties interested. (*Kean v. The Brig Gloucester*, 2 Dall., 36; *Bingham v. Cabot*, 3 Dall., 19; *Home v. Camden*, 1 H. Bl., 476, 524; S. C., 2 H. Bl., 633; 4 T. Rep., 382; *Duckworth v. Tucker*, 2 Taunt., 7.) Nor can any person claim a share in a prize whose claim has not been admitted and supported in the prize court. (*Duckworth v. Tucker*, 2 Taunt., 9.)

In respect to public ships, the distribution is to be made according to the act of Congress of April 23d, 1800, ch. 33, s. 5 and s. 6. Besides the officers and crew of the capturing ship, the commander of the fleet or squadron is entitled to one-twentieth, which is called the flag twentieth. In England, the commander of the fleet or squadron is entitled to a flag eighth. Many cases have arisen in England as to the circumstances under which the commander is or is not entitled to share. These cases are collected in

a recent decision in our own courts, to which the reader is referred. (*Decatur v. Chew*, 1 Gallis., 506.) And to the authorities there collected may be added the *following: *The Dio* [*76 *mede*, 1 Acton, 69, 239; *Gardner v. Lyne*, 13 East, 574; *Drury v. Gardner*, 2 Maule & Selwyn, 150; *Duncan v. Mitchell*, 4 Maule & Selwyn, 105. Upon the construction of our own act, it has been held that the commander of a squadron, to whose command a ship of war is attached, and under whose orders she sails, is entitled to the flag twentieth of all prizes made by such ship, although the other part of such squadron may never have sailed on the cruise, in consequence of a blockade by a superior force; and that to deprive such a commander of his flag twentieth on account of his having left his station under the act, it is indispensable that some local limits should have been assigned to him. (*Decatur v. Chew*, 1 Gallis., 506.) And it seems that a person acting by regular authority as commander of a ship *pro tempore*, though not commissioned as such, is entitled to the commander's share of all prizes taken. (*Pill v. Taylor*, 11 East, 414.) And the captain of a ship, actually on board at the time of a capture, is entitled to prize money, though under arrest at the time, and though another officer had been sent on board to command the ship. (*Lumby v. Sutton*, 8 T. R., 224.) But to entitle a person to share as an officer of the ship under the prize act, he should not only be on board, but also an officer of, and attached to the ship, and not a mere passenger. (*The Nostra Signora del Carmen*, 6 Rob., 302; See *Wemyss v. Linzee*, Doug., 824; *Lumley v. Sutton*, 8 T. R., 224.) But soldiers who are on board a public ship are, under the English prize act, entitled to share, although they are invalidated, and returning home in the capturing ship. (*The Alert*, 1 Dodson, 236.) And even passengers, under the expression in our prize act, as well as the English prize act, are entitled to share in the lowest class of distribution, as "persons doing duty on board." (*The Alert*, 1 Dodson, 236; *Wemyss v. Linzee*, Doug., 324.)

Besides the prize proceeds, by the act of April 23d, 1800, ch. 33, s. 7, a bounty is given of \$20 for each person on board any ship of an enemy at the commencement of an action, which shall be sunk or destroyed by any ship of the United States of equal or inferior force, to be divided among the officers and crew as prize money. No legal adjudications have as yet taken place on this clause of the act. But under the [*77 British act giving this bounty, or head-money, as it is called, it has been decided that head-money is not due when the captured ship was not a duly-commissioned ship of war (*Several Dutch Schuyts*, 6 Rob., 48); that constructive joint captors are not entitled to head-money (*L'Alerte*, 6 Rob., 238); that it is not due for British prisoners on board of the captured ships (*The San Joseph*, 6 Rob., 331); but is due for all the crew on board at the time of the attack, although some afterwards escape. (*The Babillon*, Edw., 39.) Head-money is also due whether the surrender has been produced by actual combat or not; but it is never granted unless the act of capture or of destruction is consummated. (*La Clorinde*, 1 Dodson, 436; *L'Elise*, 1 Dodson, 442.) The military character of a hostile vessel is not so lost by capture and recapture as to ex-

Wheat. 2.

tinguish the right to head-money. (*The Matilda*, 1 Dodson, 367.)

In respect to privateers, the prize act of June 26th, 1812, ch. 107, s. 4, gives the whole proceeds, after condemnation, and deducting duties and other public charges, to the captors, according to any written agreement among them; and if there be no written agreement, then one moiety to the owners, and the other moiety to the crew, to be distributed as nearly as may be among the officers and crew as in cases of public ships. A mariner who has engaged for the cruise, but is by sickness and other inevitable casualty prevented from doing duty on the cruise, is entitled to share; but it would be otherwise if the disability occurred during the cruise. (*Ex-parte Giddings*, 2 Gallis., 56.) And if one of the crew be illegally turned on shore during the cruise, he is entitled to share in all the prizes made during the cruise. (*Kean v. The Brig Gloucester*, 2 Dall., 36.) And the persons of the crew who are put on board of prizes are entitled to share in all subsequent prizes made by the privateer, and so in the converse case, the privateer will share in the prizes made by any prize vessel after capture. (*The Frederick and Mary Ann*, 6 Rob., 213; *The Brutus*, 2 Gallis.) Agreements between the owners and officers of two privateers to share in all prizes are valid; but the master and officers have no authority to make such an agreement without the consent of the owners. (Bynk. Q. J. Pub., lib. 1, ch. 18; Du Ponceau's ed., p. 139, 141.)

78* When a distribution has been decreed, it often becomes necessary, in order to perfect the decree of the court, where the proceeds are in the hands of prize-agents, or of officers of the court, to institute a suit to compel the proper parties to come in and account for the proceeds, and make due distribution. And for this purpose a suit may be maintained in the prize court by any party interested, or by any representative of the party, or by any assignee duly entitled. (*The St. Lawrence*, 2 Gallis., 19; *The Brutus*, *Id.*) Where the cause is in possession of an appellate court, the application may be made there, by a supplementary intervention, or petition; or it may be made by a direct original suit *in personam*, brought in the District Court. (*Id.*, *Home v. Camden*, 1 H. Bl., 474, 524; S. C., 2 H. Bl., 538; *Willis v. Commissioners, &c.*, 4 T. R., S. C., 5 East, 22; *The Noyanahed*, 7 Ves., 593; *Smart v. Wolff*, 3 T. R., 323; *Bingham v. Cubot*, 3 Dall., 19; *Kean v. Brig Gloucester*, 2 Dall., 36; *The Pomona*, 1 Dodson, 25; *The Herkimer*, Stewart, 128; S. C., 2 Hall's Am. Law Journ., 183.) And it is a general principle that the power of the prize court subsists after a general adjudication to compel captors and other persons having proceeds of prize in their hands, to bring the same into court, until all claims respecting the prize are definitively settled. (*Id.*) And the remedy is not confined to the stipulation taken in the cause; but the prize proceeds will be followed, in whose hands soever they may be, unless they have been purchased *bona fide*, and

Wheat. 2.

without notice of the claim. (Per Buller, J., 3 T. R., 323; Per Grose, J., 5 East, 22; *The Pomona*, 1 Dodson, 25.) This subject, indeed, has been already treated of in an early part of the present note, when we were considering the subject of prize jurisdiction; and to that part the reader is respectfully referred for further information. A few additional particulars respecting prize-agents, &c., may, however, not be without use.

It is no discharge of a prize-agent, that he has paid over to his principal the prize proceeds, after full notice of a libel pending for restitution of the property (*Hill v. Ross*, 3 Dall., 331); *nor to a marshal, that he has distributed prize proceeds pending an appeal, or where an appeal is wrongfully denied. (*Penhallow v. Doane*, 3 Dall., 54.) But an agent is only liable for the prize proceeds which have come to his own hands, and not for the proceeds which have come to the hands of his co-agents. (*Penhallow v. Doane*, 3 Dall., 54.)

Where the prize court has decreed distribution, and allotted the shares, and required the prize-agent to make payment of the proceeds accordingly, if he refuses to obey the order, the court may proceed *in personam* (Per Lord Loughborough, *Home v. Camden*, 1 H. Bl., 474, 524; and in such case it will decree interest to be paid by the agent. And, in general, the prize court may compel prize-agents or others, having prize proceeds in their hands, to pay interest on the proceeds, where a proper case is laid before it; for such proceeding is a mere incident to the prize jurisdiction. (*The Louis*, 5 Rob., 46; *Willis v. Commissioners, &c.*, 5 East, 22; *The Pomona*, 1 Dodson, 25.) And it is no objection that there has been a previous decree for interest against the captors personally. (*The Polly*, 5 Rob., 147, note; *Willis v. Commissioners, &c.*, 5 East, 22.) Interest is not usually allowed against a prize-agent, unless it has been actually made by him, or there has been an unjustifiable delay in payment. But it seems that a prize-agent has no right to detain property condemned, and in his hands for distribution, to answer demands arising, or which may arise, against the ship for other unjustifiable captures. (*The Prinz Henrik Von Preussen*, 6 Rob., 95.) And interest is not usually allowed against a commissioner for appraisement and sale, or a marshal after sale, unless in cases of a fraudulent detainer or gross delay. (*The Ereter*, 1 Rob., 173; *The Princessa*, 3 Rob., 31; *Willis v. Commissioners, &c.*, 5 East, 22.)

This note must now be brought to a conclusion, although some of the topics discussed are far from being exhausted. To some, perhaps, an apology may be necessary for the length to which it has already extended. When, however, it is considered that *no treatise exists in print, containing even a summary view of prize practice, any attempt, however humble, to collect and arrange what is so little methodized, and so little known, may be entitled to indulgence, or, at least, escape the severity of criticism.

[NOTE II.]

PRESIDENT'S INSTRUCTIONS TO PRIVATE ARMED VESSELS.

1. The tenor of your commission under the act of Congress, entitled, "an act concerning letters of marque, prizes and prize goods," a copy of which is hereto annexed, will be kept constantly in your view. The high seas, referred to in your commission, you will understand generally, to refer to low water-mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and the United States. You may nevertheless execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do.

2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crews or of their

passengers, other than persons in the military service of the enemy.

*3. Towards enemy vessels and their [*81 crews, you are to proceed in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.

4. The master and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as may be, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading; and at the same time, are to be delivered to the judge or judges all passes, charter-parties, bills of lading, invoices, letters and other documents, and writings found on board; the said papers to be proved by the affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced as they were received, without fraud, addition, subduction or embezzlement.

By the command of the President of the United States.

JAMES MONROE, Secretary of State.

[NOTE III.]

THE STANDING INTERROGATORIES.

1st Interrogate. What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what Prince or State or to whom are you, or have you ever been a subject? Are you a married man, and if married where do your wife and family reside?

2d Interrogate. Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission, what and from whom?

3d Interrogate. In what place, latitude or [*82*] port, and when was the said ship and goods, concerning which you are now examined, taken and seized? Upon what pretense, and for what reasons were they seized? Into what port were they carried, and under what colors did the said ship sail? What other colors had

you on board, and for what reason had you such other colors? Was any resistance made at the time when the said ship was taken, and if yea, how many guns were fired, and by whom, and by what ship or ships were you taken? Was the ship or vessel by which you were captured a ship of war or a vessel acting without any commission, as you believe? Were any other and what ships in sight at the time of the capture?

4th Interrogate. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said master take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of

Wheat. 2.

whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th Interrogate. Of what burthen is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6th Interrogate. Had you or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what part, share, or interest in the said vessel, or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th Interrogate. What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they by which she has heretofore been called? Had she any passport or sea chart on board, and from whom? To what ports and places did she sail during her said voyage before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port and at what time, particularly from the last clearing port, did the said ship sail previously to the capture? Set forth all the ports to which she has sailed, and at which she has touched and traded during her whole voyage out and home.

83*] 8th Interrogate. What lading did the said vessel carry at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board at the time when she was taken? When was the same put on board? Set forth the different species of lading and the quantity of each sort. Has any part of the cargo of said vessel been unladen since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen.

9th Interrogate. Who were the owners of the vessel at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession, and of whom did they purchase?

10th Interrogate. Was any bill of sale made, and by whom, to the aforesaid owners of said vessel; and if any such were made, in what month and year, and where, and in the presence of what witnesses? Was any and what engagement entered into concerning the purchase further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11th Interrogate. Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports by name? Set forth what quantities of each sort of goods were shipped at each port.

12th Interrogate. What are the names of the respective laders, or owners, or consignees of

said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk, or benefit? Have any of the said consignees or shippers any, and what interest in the said goods? If yea, whereon do you found your belief that they have such interest? Do you verily believe that at the time of the lading the cargo, and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons, and to none others?

13th Interrogate. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed which were *different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14th Interrogate. Are there in the United States of America any bills of lading, invoices, letters, or instruments relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to the United States.

15th Interrogate. Was there any charter-party signed for the voyage in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom was such charter-party made? What were the contents of it?

16th Interrogate. What papers, bills of lading, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed, or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17th Interrogate. Has the ship, concerning which you are now examined, been at any time, and when, seized as prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned.

18th Interrogate. Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such, your loss? Have you already received any indemnity, satisfaction, or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19th Interrogate. Is the said ship, or goods, or any and what part insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

20th Interrogate. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or

was the lader to take the chance of the market for the sale of his goods?

21st Interrogate. Let each witness be interrogated of the growth, produce, and manufacture, of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof.

22d Interrogate. Whether all the said cargo, or any, and what part thereof was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel, or ship, to another? From what, and to what shore, quay, boat, barque, vessel, or ship, and when and where was the same so done.

23d Interrogate. Are there in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters instruments, papers, or documents, relative to the said ship, or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers, or documents, and what are the contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th Interrogate. Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession, or power, do you believe the same now are?

25th Interrogate. Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th Interrogate. Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers by name? Of what nation, rank, profession, or occupation? Had they any commission, for what purpose, and from whom? From what place were they taken on board and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers any, and what property or concern, or authority directly or indirectly regarding the ship and cargo? Were there any officers, soldiers, or mariners secreted on board, and for what reason were they secreted? Were any of the citizens of the United States on board, or secreted, or confined at the time of the capture? How long, and why?

27th Interrogate. Were, and are, all the passports, sea briefs, charter-parties, bills of sale, invoices and papers, which were found on board, entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation of the persons therein described, or were they delivered to, or on behalf of the person or persons who appear to have been sworn, **28th** or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such

passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea briefs were granted? and if not, where was the ship at the time? Had any person on board any letpass, or letters of safe conduct? If yea, from whom and for what business? Had the said ship any license or passport from any foreign power or authority during the voyage? if so, state from whom been obtained and for what purpose and use.

28th Interrogate. Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to the captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th Interrogate. Towards what port or place was the ship steering her course at the time of her first being pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship before, or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered at any, and what time, and to what other port or place, and for what reason?

30th Interrogate. By whom, and to whom, hath the said ship been sold or transferred, and how often? At what time and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe in your conscience such sale or transfer has been truly made, and not for the purposes of covering or concealing the real property? Do you verily believe that if the ship should be restored she will belong to the persons now asserted to be the owners, and to none others?

31st Interrogate. What guns were mounted on board the ship, and what arms, and ammunition were belonging to her? Why was she so armed? Were there on board any other, and what arms and ammunition, and when and where were they put on board, and by whom, or by what authority, or for what purpose, or destination, and on whose account were they put on board?

32d Interrogate. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

Form of the Oath to be administered to each witness.

You shall true answer make to all such questions as shall be asked of you on these interrogatories; and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

Wheat. 2.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

FEBRUARY TERM, 1818.

BY HENRY WHEATON.

Counselor at law.

VOL. III.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES,
DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, *Chief Justice.*
The Hon. BUSHROD WASHINGTON, *Associate Justice.*
The Hon. WILLIAM JOHNSON, *Associate Justice.*
The Hon. BROCKHOLST LIVINGSTON, *Associate Justice.*
The Hon. THOMAS TODD, *Associate Justice.*
The Hon. GABRIEL DUVAL, *Associate Justice.*
The Hon. JOSEPH STORY, *Associate Justice.*
WILLIAM WIRT, Esq., *Attorney-General.*—Appointed November 13th, 1814.

REPORTS OF THE DECISIONS
OF THE
Supreme Court of the United States.

FEBRUARY TERM, 1818.

[COMMON LAW.]

JACKSON, Ex DEM. THE PEOPLE OF
THE STATE OF NEW YORK,

v.
CLARKE.

G. C. born in the colony of New York, went to England in 1738, where he resided until his decease; and being seized of lands in New York, he, on the 3rd of November, 1773, in England, devised the same to the defendant and E. C., as tenants in common, and died so seized on the 10th December, 1778. The defendant and E. C. having entered, and becoming possessed, E. C. on the 3^d December, 1791, bargained and sold to the defendant all his interest. The defendant and E. C. were both born in England long before the revolution. On the 22^d March, 1791, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to within the state, by purchase or descent, in fee-simple, and to sell and dispose of the same in the same manner as any natural born citizen might do. The treaty between the United States and Great Britain of 1794 contains the following provision: "Article 9th. It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now *² hold lands in the dominions *of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. Held, that he was entitled to hold the lands so devised to him by G. C. and transferred to him by E. C.

ERROR to the Circuit Court for the District of New York.

This was an action of ejectment commenced in the Supreme Court of the state of New York, and removed thence into the Circuit Court of the United States, for the New York district, where, in September, 1815, a trial was had, and a special verdict found, in the words following, to wit:

At which day in this same court, at the city of New York, in the New York district, came the parties aforesaid, by their attorneys aforesaid, and the jurors aforesaid being called also come, who, to say the truth of the above contents, being elected, tried and sworn, say, upon their oath, that long before the above-mentioned time when the trespass

and ejectment above mentioned are supposed to have been committed, namely, on the tenth day of April, 1706, Anne, Queen of England, by letters patent under the great seal of the then colony of New York, did grant unto Sampson Broughton, and divers other persons in the said letters patent named, and their heirs, a certain tract of land, situate in the then colony, now state of New York, to have and to hold the same to them, their heirs and assigns, forever, as tenants in common, and *not as joint tenants. And that the lands [*³ and tenements, with their appurtenances specified in the foregoing declaration of the said James Jackson, were part and parcel of the said tract of land granted, as aforesaid, by the said letters patent. And the jurors aforesaid, upon their oath aforesaid, further say, that the said Sampson Broughton, and the said other persons to whom the said tract of land was granted as aforesaid by the said letters patent, being so seized in fee-simple, and possessed of the said tract of land by virtue of the said letters patent, did afterwards, to wit, on the twelfth day of April, in the year last aforesaid, by good and sufficient conveyance and assurance in the law, for a valuable consideration, grant, bargain, sell, and convey unto George Clarke, now deceased (who was formerly Lieutenant-Governor of the said colony, and who was then a subject of England, and who remained so until the time of his death), and to his heirs, one equal undivided ninth part of the said tract of land granted as aforesaid, in and by the said letters patent, to have and to hold to him, his heirs and assigns, forever. And the jurors aforesaid, upon their oath aforesaid, further say, that partition of the said tract of land mentioned in the said letters patent was afterwards, to wit, in the year last aforesaid, made in due form of law, between the last aforesaid George Clarke and the other proprietors of the said tract of land mentioned and granted in and by the said letters patent. And that by virtue of the said partition, the last aforesaid George Clarke became, and was sole seized in fee-simple, and possessed of the lands and tenements, with the appurtenances specified in the said declaration of the said James Jackson, *and continued to be so seized and pos- [*⁴ sessed thereof, until the time of his death. And that the last aforesaid George Clarke died so

Wheat. 3.

seized and possessed, in the year 1759. And the jurors aforesaid, upon their oath aforesaid, further say, that George Clarke, who was late secretary of the colony of New York, was the eldest son, and heir at law of the before-mentioned George Clarke, formerly Lieutenant-Governor as aforesaid. And that upon the death of the said George Clarke, formerly Lieutenant-Governor as aforesaid, the said George Clarke, late secretary as aforesaid, as son and heir aforesaid, entered upon, and was seized in fee-simple, and possessed the lands and tenements, with the appurtenances, specified in the said declaration of the said James Jackson. And being so seized and possessed, did afterwards, to wit, on the thirtieth day of November, 1776, at Hyde, in the county palatine of Chester, in the kingdom of Great Britain, make and publish, in due form of law to pass real estate, his last will and testament, and did thereby devise unto his grand nephews, the said George Clarke, the defendant in the said declaration named, and Edward Clarke, and to their heirs and assigns, as tenants in common, and not as joint tenants, the lands and tenements in the said declaration specified with the appurtenances. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, afterwards, to wit, on the tenth day of December, 1776, at Hyde aforesaid, in the said county palatine of Chester, in the said kingdom of Great Britain, died so seized and possessed as aforesaid, and without having altered or revoked his [*5] said last will and testament. And the jurors aforesaid, upon their oath aforesaid, further say, that upon the death of the said George Clarke, late secretary as aforesaid, the said George Clarke, the said defendant, and the said Edward Clarke, claiming under the said last will and testament, entered upon and became possessed of the said lands and tenements, with the appurtenances, in the said declaration specified. And the said George Clarke, the said defendant, and the said Edward Clarke, being actually possessed of the said lands and tenements, with the appurtenances, in the said declaration specified, as under the said last will and testament, the said Edward Clark did afterwards, to wit, on the twenty-third day of December, 1791, by a deed of bargain and sale, duly executed, grant, bargain and sell, for a valuable consideration, to the said George Clarke, the said defendant, and his heirs, one equal moiety of the said lands and tenements, with the appurtenances, in the said declaration specified, and all the estate and interest of the said Edward Clarke, in and to the said lands and tenements last aforesaid, with the appurtenances, to have and to hold the same to the said George Clarke, the said defendant, his heirs and assigns; by reason whereof the said George Clarke, the said defendant, entered upon, and became, and was actually possessed of, the said lands and tenements, with the appurtenances, in the said declaration specified, claiming to be seized thereof in fee-simple, and so continued until the entry of the people of the state of New York, hereafter mentioned. And the jurors aforesaid, upon their oath aforesaid, further say, that the [*6] said George Clarke, late secretary as aforesaid, was born in the city of New York, in the

late colony, now state of New York, and that in the year 1738 he went to that part of Great Britain called England, and thenceforth continued to live and reside there on his family estate, until and at the time when he made and published his said last will and testament, and ever after, and until and at the time of his death. And the jurors aforesaid, upon their oath aforesaid, further say, that on the fourth day of July, in the year 1776, the late colony of New York, together with the other colonies of Great Britain in North America, now called the United States of America, declared themselves free and independent states, and that from that day to the first day of September, in the year 1783, the said United States and the citizens thereof, were at open and public war with the King of Great Britain and his subjects. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, the said defendant, was born in England on the twenty-eighth day of April, in the year 1768. And that the said Edward Clarke was born in England on the twenty-eighth day of November, in the year of our Lord 1770. And that the said George Clarke, the said defendant, and the said Edward Clarke, were born British subjects.

And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, died without issue, and that at the time of his death one George Hyde Clarke was his nephew; and that the said George Hyde Clarke, if he is capable of inheriting the real estate of the said [*7] George Clarke, late secretary as aforesaid, within the state of New York, is the heir at law of the said George Clarke, late secretary as aforesaid; and that the said George Hyde Clarke was born in Great Britain before the fourth day of July, in the year 1776, and hath ever since resided, and still doth reside, in Great Britain, and is still living; and that no other person than the said George Hyde Clarke is, or can be, the heir at law of the said George Clarke, late secretary as aforesaid; and that the said George Hyde Clarke is capable of inheriting the real estate of the said George Clarke, late secretary as aforesaid, within the state of New York, unless he is incapable of inheriting such real estate, by reason of his having been born, and having resided in Great Britain, as aforesaid. And the jurors aforesaid, on their oath aforesaid, further say, that on the eighth day of February, in the year 1791, the said George Clarke, the said defendant, caused to be presented to the legislature of the state of New York, a petition, in the words following, to wit:

To the honorable, the Senate and the Assembly of the state of New York, in legislature convened: The petition of George Clarke humbly sheweth, that your petitioner was born in England, and is great grandson of George Clarke, formerly Lieutenant-Governor of New York; that he resided in the city of New York for about a year preceding the month of October last, with intention, at the end of two years, to have been naturalized under the statute of the United States; that he was unexpectedly called abroad on important business, but expects to return in the course of the [*8] ensuing summer; and as his naturalization must now be un-

Wheat. 3.

avoidably suspended, to the great embarrassment of his affairs, your petitioner humbly prays that his name may be inserted in the bill now before the honorable, the legislature, to grant a similar privilege of holding lands within this state, notwithstanding the want of naturalization, and your petitioner shall ever pray, &c. GEORGE CLARKE,

By GOLDSB. BANYAR, and JAS. DUANE,
his attorneys.

And the jurors aforesaid, upon their oath aforesaid, further say, that on the twenty-second day of March, in the year 1791, an act was passed by the legislature of the state of New York, in the words following, to wit: "An act to enable Francois Christophe Mantel, and the several other persons therein named, to purchase and hold real estates within this state. Be it enacted by the people of the state of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, that it shall and may be lawful for Francois Christophe Mantel, Samuel Clows, Jun., Samuel Richardet, William Robert O'Hara, Eric Glad, George Turnbull, Thomas Mounsey, and Jan Barnhard, respectively, to purchase lands, tenements and hereditaments within this state, and to have and to hold the same to them respectively, and their respective heirs and assigns, forever, as fully to all intents and purposes as any natural born citizen may or can do, any law, usage or custom to the contrary notwithstanding. And be it further enacted by the [*] authority aforesaid, that it *shall and may be lawful for George Clarke, who is great grandson of George Clarke, formerly Lieutenant-Governor of New York, to purchase any lands, tenements or hereditaments within this state, and to have and to hold the same, and all other lands, tenements and hereditaments which he may now be entitled to within this state, by purchase or descent, to him, the said George Clarke first above named, his heirs and assigns, to his and their own proper use and behoof forever, and to sell and dispose of the same, or any part thereof, as fully, to all intents and purposes, as any natural born citizen may or can do, any law, usage or custom to the contrary notwithstanding." And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, the said defendant, and the said George Clarke, great grandson of George Clarke, formerly Lieutenant-Governor of New York, mentioned in the said act, is one and the same person. And the jurors aforesaid, on their oath aforesaid, further say, that on the first day of May, in the year 1810, the said George Clarke, the said defendant, was in the actual possession and occupation of the said lands and tenements, in the said declaration specified, with the appurtenances, and that on the day and year last aforesaid, the said people of the state of New York, lessors of the said James Jackson, entered into the said tenements, with the appurtenances, and from thence put out and removed the last aforesaid George Clarke, and were seized thereof as the law requires; and being so seized thereof, the said people, on the day and year last aforesaid, demised to the said James Jackson the [*] tenements aforesaid, with the appurtenances, to have and to hold to the said James Jackson, and his assigns, from the said first day of May then last past, until the full end

Wheat. 8. U. S., Book 4.

and term of twenty-one years from thence next ensuing, and fully to be complete and ended, in the manner in which the said demise is set forth in the said declaration of the said James Jackson. By virtue of which said demise, the said James Jackson entered into the said lands and tenements, with the appurtenances, and was thereof possessed; and he being so possessed thereof, the said George Clarke, the said defendant, afterwards, to wit, on the tenth day of May, in the year last aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which had been demised to the said James Jackson as aforesaid, and ejected, expelled and moved the said James Jackson from his said possession, as the said James Jackson hath above complained against the last aforesaid George Clarke.

And the jurors aforesaid, upon their oath aforesaid, further say, that at the time of the commencement of this action, the tenements aforesaid, in the said declaration specified, were, and ever since have been, and yet are, of a value exceeding the sum of five hundred dollars, exclusive of all costs and expenses. And the jurors aforesaid, on their oath aforesaid, further say, that the said James Jackson, at the time of the commencement of this action, was, and yet is a citizen of the state of New York, in the United States of America. And that at the time of the commencement of this action, the said George Clarke, the said defendant, in the said declaration named, *was and yet is a [*] 11 subject of the King of the United Kingdom of Great Britain and Ireland. But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner aforesaid found, the said George Clarke, the said defendant, is guilty of the trespass and ejectment above mentioned, the said jurors are entirely ignorant, and pray the advice of the court thereon. And if it shall appear to this court that the last aforesaid George Clarke, in construction of law, is guilty of the trespass and ejectment above mentioned, then the said jurors say upon their oath that the last aforesaid George Clarke is guilty of the trespass and ejectment in the said declaration of the said James Jackson mentioned, in manner and form as the said James Jackson hath above in his said declaration complained. And they assess the damages which the said James Jackson hath sustained by reason of the said trespass and ejectment, besides his costs and charges by him about his suit in this behalf expended, at six cents, and for his said costs and charges at six cents. And if it shall appear to the court, that the last aforesaid George Clarke is not guilty of the said trespass and ejectment, then the said jurors say upon their oath that the last aforesaid George Clarke is not guilty thereof, in manner and form as he hath above in his plea alleged.

On the foregoing special verdict, judgment was rendered for the defendant, George Clarke, by the Circuit Court, to reverse which, this writ of error was brought.

Mr. Champlin, for the plaintiff in error, made the following points, and cited the authorities in the margin: *1. That Secretary [*] 12 George Clarke, at the time of his death, was an alien enemy, and there being at that time no statute of wills in force in the state of New

York, the people of the state, at his death, became seized of the premises.¹ 2. That Secretary George Clarke, being an alien enemy, had no power to make a valid will, or alien his estate in any manner whatever.² 3. His will being void, and George Hyde Clarke being an alien enemy, took nothing by descent. 4. That, after the death of Secretary George Clarke, there was no person competent to take the premises by inheritance or devise, whereby the people of the state of New York, at his death, became *ipso facto* possessed thereof, without office found.

Mr. D. B. Ogden, contra, was stopped by the court.

MARSHALL, *Ch. J.*, delivered the opinion of the court, that every question arising in the cause had been settled by former decisions.

*Judgment affirmed with costs.*³

[PRIZE.]

THE FRIENDSCHAFT.

WINN ET AL., *Claimants*.

Informal and imperfect proceedings in the District Court corrected and explained in the Circuit Court.

A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof.

The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated. But even if it were proved that an enemy master, carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable,

ought not thereby to be precluded from further proof.

*The native character does not revert, by a [*15] mere return to his native country, of a merchant, who is domiciled in a neutral country at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicile still continues.

British subjects resident in Portugal (though entitled to great privileges), do not retain their native character, but acquire that of the country where they reside and carry on their trade.

A PPEAL from the Circuit Court for the District of North Carolina.

The brig *Friendschaft* was captured on a voyage from London to Lisbon, by the privateer *Herald*, and brought into Cape Fear, in North Carolina, where the vessel and cargo were libeled, in July, 1814, as prize of war. The commercial agent of His Royal Highness the Prince Regent of Portugal, interposed a claim to several packages, parts of the said cargo, on behalf of the respective owners, whom he averred to be Portuguese subjects and merchants residing in Portugal. The cargo consisted of many different shipments. Most of them were accompanied with bills of lading, directing a delivery to shipper or order. Of these a few were specially indorsed. Generally, however, they were without indorsements, or with blank indorsements only. A few shipments were accompanied with bills of lading, deliverable to persons in Lisbon, specially named in the bills.

Very few were accompanied with letters or invoices. These, it was alleged in the claim, had probably been sent by the regular packet.

In August, 1814, the District Court pronounced its *sentence, condemning as [*16] prize of war "all that part of the cargo for which no claim had been put in," and "all

1.—*Dawson v. Godfrey*, 4 Hall. Cowp. 206; *Vattel*, L. 3 Cranch, 321; *Gardner v. Wade*, ch. 5, s. 7; 2 Mass. Rep. 244. *Campbell v. —*.

2.—5 Bac. Abr. Tit. Will. B. 499; 7 Co. Rep. 33; 1 Bl. Com. 372.

3.—In the case of *M'Ilvaine v. Coxe's lessee* (4 Cranch, 209), the court determined that a person born in the colony of New Jersey, before the declaration of independence, and residing there until 1777, but who then joined the British army, and ever since adhered to the British government, has a right to take lands by descent in the state of New Jersey. But in *Dawson's lessee v. Godfrey* (4 Cranch, 321), it was held that a person born in England before the declaration of independence, and who always resided there, and never was in the United States, could not take lands in Maryland by descent.

And in the case of *Smith v. The State of Maryland* (4 Cranch, 286), it was determined that by the acts of Maryland, 1780, ch. 45 and 49, the equitable interests of British subjects in lands were confiscated, and vested in the state, without office found, prior to the treaty of peace of 1783, so that the British *cestui que trust* was not protected by the stipulation in that treaty, against future confiscations, nor by the stipulation in the 9th article of the treaty of 1794, securing to British subjects, who then held lands in this country, the right to continue to hold them.

In the Supreme Court of New York it has been held that where a married woman was a subject of Great Britain before the revolution, and always continued such, but her husband resided in this country both before and after that period, she was entitled to dower out of those lands of which he was seized before the revolution, but not of those of which he was subsequently seized. *Kelly v. Har-*

rison, 2 Johns. Cas., 29. The same court has also determined, that where a British subject died seized of lands in the state in 1752, leaving daughters in England, who married British subjects, and neither they nor their wives were citizens of the United States; even if the marriages were subsequent to the revolution, such marriages would not impair the rights of the wives, nor prevent the full enjoyment of the property according to the laws of the marriage state, especially after the provision in the 9th article of the treaty of 1794. The court seemed also to think that where the title to land in the state was acquired by a British subject prior to the revolution, the right of such British subject to transmit the same by descent, to an heir in case at the time of the revolution, continued unaltered and unimpaired; the case of a revolution or division of an empire being an exception to the general rule of law, that an alien cannot take by descent. *Jackson v. Lunn*, 3 Johns. Cas. 109. See also *Jackson v. Wright*, 4 Johns. R. 75. The treaty of 1794 relates only to lands then held by British subjects, [*14] and not to any after-acquired lands. *Jackson v. Decker*, 11 Johns. R. 418, 422.

In the case of *Fairfax's devisee v. Hunter's lessee*, 7 Cranch, 608, and ante Vol. I., p. 304, it was adjudged, 1st. That an alien enemy may take by purchase, though not by descent; and that, whether the purchase be by grant or by devise. 2d. That the title thus acquired by an alien enemy is not devested until office found. 3d. That whether the treaty of peace of 1783, declaring that no future confiscations should be made, protects from forfeiture, under the municipal laws respecting alienage, lands held by British subjects at the time of its ratification, or not, yet that the 9th article of the treaty of 1794 completely protected the title of a British devisee, whose estate had not been previously devested by an inquest of office, or some equivalent proceeding.

that part of the cargo which was shipped, as evidenced by bills of lading, either without indorsement or with blank indorsements, and not accompanied by letter or invoice, viz.:

And that part appearing by the bill of lading to consist of forty bales of goods shipped by Moreira, Vieira, and Machado. Further proof was ordered with respect to the residue of the cargo and the vessel.

From this sentence the claimants appealed to the Circuit Court. That court, in May, 1815, dismissed so much of the appeal as respected the brig, and that part of the cargo in respect to which further proof was ordered, as having been improvidently allowed before a final sentence, and affirmed the residue of the decree, except in regard to the forty bales shipped by Moreira, Vieira, and Machado, with respect to which further proof was directed, to establish the right of Francis Jose Moreira to restitution of one-third part thereof.

In April, 1816, further proof was exhibited to the District Court, in support of the claim for the parts of the cargo comprehended in the bills of lading numbered 108, 109, 141, 122, 118, which bills being deliverable to merchants residing in Lisbon, whose names were expressed therein, were not indorsed. The further proof was deemed sufficient, and restitution was ordered. The vessel and the residue of the cargo were condemned as prize of war.

From so much of this sentence as awarded [17*] restitution, *the captors appealed; and in May, 1816, the Circuit Court decreed as follows: "This court being of opinion that the former sentence of the District Court, affirmed by the sentence of this court, rendered in May term, in the year 1815, having been left imperfect by omitting to recite the particular claims intended to be involved in the condemnation pronounced in the District Court in terms of general description; and being also of opinion that the words 'all that part of the cargo which was shipped as evidenced, by bills of lading, either without indorsement or with blank indorsements, and not accompanied with letter or invoice,' could be intended for those bills only which were to shipper or order, and not to those addressed to consignee named in the bill itself, is of opinion that there is no error in the sentence of the District Court, and doth affirm the same."

From this decree the captors appealed to this court. On the interposition of this appeal, the Circuit Court ordered that Joseph Winn, a British-born subject, resident in Portugal, in whose behalf a claim was filed to No. 118, should be permitted to offer further proof to the Supreme Court, to be admitted or rejected by that court.

Mr. Wheaton, for the appellants and captors.

1. The decrees of the District Court, of August, 1814, and of the Circuit Court, of May, 1815, were final and conclusive, and ought to have precluded the District Court from subsequently allowing further proof as to these five claims. The terms of general description, which are [18*] *used by the judge of the District Court, are equivalent to a particular designation of the claims intended to be condemned. "All that part of the cargo which was shipped as evidenced by bills of lading, either without indorsement or with blank indorsements, and

not accompanied with letter or invoice," is as effectually condemned by the sentence as if the particular portions of the cargo thus documented had been specifically enumerated. The portions now claimed were shipped as evidenced by bills of lading, either without indorsement or with blank indorsements, and not accompanied with letter or invoice. Consequently, they were included in the condemnation by the District Court, which became final and conclusive upon the parties, by the decree of the Circuit Court rendered at May term, 1815, affirming that of the District Court, and from which no appeal was entered. The subsequent proceedings, by which the District Court admitted the claimants to further proof, were, therefore, *coram non judice*, and utterly null and void. These branches of the cause were completely extinct, and could not be revived in any court. 2. And can this court have the least doubt of the justice and legality of this decree of the District Court, as thus understood and explained? Is it possible that it is come to this, that in a court of prize, a mere bill of lading to A. B. or assigns, unsupported by any other documentary evidence found on board, or by the oath of the master, shall be regarded as sufficient, even to entitle the party to further proof? If goods shipped in the enemy's country can pass *the seas under so thin a [*19] veil as this, the defects of which may afterwards be supplied by fabricated proofs, what security is there for belligerent rights? To what cause are we to attribute a transaction so unusual and irregular in commerce, but to the desire of the British shippers and owners to retain in their own hands the double power of stopping the goods *in transitu* and of enabling the consignees to claim them in the prize court in case of capture? If this practice be tolerated by the court, the enemy shipper need resort to no complicated machinery of fraud in order to cover his property. He need do no more than put on board a bill of lading, unaccompanied by any invoice of the goods, or letter of advice showing in whom the property vests. In case of capture, nothing more will be necessary than to enter a claim in the name of the neutral consignee, and to demand an order for further proof, and under that order to ransack the great *officina fraudis* to find the instruments of forgery and perjury; the aid of which will not become necessary, in case the shipment, thus made, escapes the vigilance and activity of the belligerent cruisers. Should they thus escape, the goods will be sold on account of the enemy shipper, and the proceeds of the sale will be remitted to him again by the same process; and thus the whole of the enemy's trade may be effectually screened from the perils of war. A bill of lading is an instrument too easily fabricated to permit a court of prize to consider it alone as furnishing any proof (even presumptive) of property in the consignee. Whether the goods had been previously ordered by the Portuguese *consignee, or sent by [*20] the British shipper for sale on his own account, they would equally have been accompanied by the same document, which is equivalent to no evidence whatever of proprietary interest found on board. Unless some such evidence be found on board, or a foundation be laid by the preparatory examinations of the captured crew, to

let the claimants into further proof, the necessary simplicity of the prize proceedings forbids a resort to extraneous testimony; and, as that originally before the court is insufficient to entitle the party to restitution, condemnation must ensue. Not only are the bills of lading unaccompanied by invoices and letters of advice, but they do not express the shipment to be "for account and risk" of the consignees; and the freight is payable in London, and, of course, by the consignors. These circumstances distinguish this case from all those cases in which it has been determined (under the municipal law) that a bill of lading, expressing the shipment to be for account and risk of the consignee or his assigns, vests the property in him, subject only to the right of stoppage *in transitu*; and the same circumstances liken it to those where the obligation on the part of the consignor to pay the freight was held to authorize him to bring an action against the carrier master for the goods, notwithstanding the form of the bill of lading.¹ It is wholly incredible that the letters and invoices which ought to have accompanied these shipments were sent by the Lisbon packet (as suggested), since, [21*] *though duplicates of such papers may be sent, and frequently are sent, by conveyances other than that of the ship in which the goods are transported, yet it is unusual and mercantilely irregular not to send the originals with the goods. The invoices are, by the revenue laws of most, if not all countries, indispensably necessary to enter the goods at the custom-house, avoiding the inconvenience of unpacking and valuing them. These papers are required by the law of nations, and the prize code of every country, to accompany the bill of lading, in order to fortify and confirm it. The absence of them does not, indeed, in all cases, furnish a substantive ground of condemnation, and exclude the party from further proof. But in order to avoid this consequence there must be some favorable presumption raised by the circumstances of the case, and the nature of the documentary evidence found on board. This presumption cannot exist in the case of a shipment in the enemy's country, of goods, the growth or manufacture of that country, under a bill of lading, unsupported by the oath of the master, and unaccompanied by any invoice, letter of advice, or other document whatever. The privilege of further proof is imparted under the sound discretion of the court, where foundation is laid for it, by the papers found on board, and the depositions of the captured persons. Neither the documentary evidence nor the examinations *in preparatorio* afford any foundation for it in the present case; since they do not furnish any, the slightest reason for believing, that it belongs as claimed. [22*] The court would be *opening a wide door for fraud were it to extend the privilege of further proof in such a case, which is neither one of honest ignorance or mistake. It is impossible that the parties should have been ignorant of what both the usage of trade and the practice of prize courts require. It is impossible that they should have omitted by mistake what could not have been omitted but by

design. The ancient French prize law, and the prize regulations of many other countries, do absolutely exclude further proof, and condemn, or restore, upon the original evidence only. If, by the more mitigated practice which this court has adopted, further proof be sometimes allowed, it is not as of strict right, but of equitable indulgence, where the circumstances of the case lay a foundation for it, and the claimants do not forfeit the privilege by their own misconduct. 3. No additional further proof ought to be admitted in this court, under the special orders of the Circuit Court, in the claim of Mr. Winn, giving him liberty to produce still further proof (in addition to the further proof exhibited to the District Court) in this court, to be admitted or rejected, at the discretion of the court. It is a settled principle of practice that further proof cannot be introduced in this court, unless, under the circumstances of the case, it ought to have been ordered in the court below. Such is the limitation to the admission of further proof in the appellate tribunal, which has been established by the lords of appeal in England and adopted by this court. If, as has been contended, further proof ought not to *have been admitted in the District Court, [*23] the consequence follows that it ought not to be admitted here. But the lapse of time alone ought to preclude the claimants from this indulgence. They were fully apprised of the nature of the proof which their case required: they had it in their power to produce it; and, after two years have elapsed, the necessity of suppressing the frauds which might be consequent upon such excess of indulgence, demands that the court should reject the additional further proof now offered by them.² Mr. Winn's claim ought to be rejected, because, supposing his proprietary interest to be made out ever so clearly, he is a British-born subject, who offers a claim upon the ground of his being a resident merchant of Portugal, although at the time of the first adjudication he was not domiciled in that country.

The claimant makes an affidavit at London, in June, 1815, in which he describes himself as "of the city of Lisbon, in Portugal, now in London on mercantile business, swears to the property in himself, and that at the time of the shipment and capture he was a domiciled subject of Portugal, and had resided in Lisbon for several years preceding the capture, and until the 12th of June, 1814," when he left Lisbon for Bourdeaux, and "has since arrived" (without saying when) "in this city on mercantile business;" that he still is a domiciled subject of Portugal, &c. "The native character easily reverts," says Sir W. Scott;³ and it is so, not merely because *he says it, but from [*24] the very nature of things, and the gravitating tendency (if the expression may be allowed) which every person has towards his native country. Here Mr. Winn was returning to his native country, shortly after the capture, and we may safely conclude, arrived there long before the first adjudication. There he continued until long after the peace, without resuming his acquired domicile in Portugal; and more than a year afterwards, we find him still resi-

1.—*Davies et al. v. James*, 5 Burr. 2080; *Moore v. Wilson*, 1 T. R. 659.

2.—*The Dos Hermanos*, 2 Wheat. 76, 98.

3.—*La Virginie*, 5 Rob. 98.

dent in his native country. He was not in *transitu* to regain his neutral character, like Mr. Pinto in the case of *The Nereide*;¹ but he was in *transitu* to regain his native hostile character. He did regain it, and became a reintegrated British subject. That the party must be in a capacity to claim at the time of adjudication, as well as entitled to restitution at the time of sailing and capture, is an elementary principle which lays at the very foundation of the law of prize. It is alluded to by Sir W. Scott in a leading case on this subject;² it is evinced by the anciently established formula of the test affidavit, and sentence of condemnation, both of which point to the national character of the party at the time of adjudication, as an essential ingredient in determining the fate of his claim. Mr. Winn had no *persona standi in judicio* at the time of the first adjudication; and unless he has been rehabilitated by the subsequent intervention of peace, and restored to his capacity to claim by a species of the *ius postliminii*, his native character still remains fixed upon him, and his property must be condemned by relation back to the time of the first adjudication,³ to which period everything must be referred. 5. But even the Portuguese domicile of Mr. Winn will not avail to avert the condemnation of his property, because his native character is preserved, notwithstanding his residence and trade in Portugal. As the native domicile easily reverts, so also, it may with truth be affirmed that it is with difficulty shaken off. Every native subject of a belligerent power is, *prima facie*, an enemy of the other belligerent. To repel this presumption, he must show, not merely that he has acquired a personal domicile in a neutral country, but that, under all the circumstances of the case, he is unaffected with the hostile character of his native domicile. The political relations between Great Britain and Portugal completely recognize the privileged national character of British subjects in Portugal, which is preserved to them, in a manner analogous to that of European merchants in the East, who are held to take their national character from the factory to which they are attached, and from the European government under whose protection they carry on their trade.⁴ Thus, also, Sir W. Scott states, in *The Henrick and Maria*,⁵ that British subjects resident in Portugal retain their native national character in spite of their Portuguese domicile, even in the estimation of the enemy himself (France), and that they exercise an active jurisdiction over their own countrymen settled there. This peculiar inmiscible character of British subjects in Portugal is strengthened 26*] *by the circumstance of that country having been, from the earliest periods of her national existence, the ally of Great Britain; and something more than a mere common ally, as Sir W. Scott observes, in *The Flad Oyen*.⁶ The case of *The Dunaos*, cited in a note to *The Nayade*,⁷ in which the lords of appeal allowed a British-born subject resident in the English fac-

tory at Libson, the benefit of a Portuguese character, so far as to legalize his trade with Holland, then at war with England, but not with Portugal, must be considered as a departure from principle, and imputed to some motive of national or commercial policy, operating on the lords at the time. Certain it is, that the reasons on which Sir W. Scott grounds the opinion expressed by him, are entitled to much more weight than is the mere authority of the lords, unsupported by any reasons whatever. This court, which is the supreme appellate prize tribunal of this country, will scrutinize carefully all the precedents settled in the British prize courts (since the United States ceased to be a portion of the British empire), and will regard rather the reason than the authority on which they are founded. Trace the treaties between Great Britain and Portugal, and it will be found that they impress something like a provincial dependence on Portugal, and an independent character on British subjects resident in that country. It is to the lights of history that we must resort to account for compacts so singularly unequal. Before the subjugation of Portugal by Spain, the ancient *Portu- [*27] guese kings granted special immunities to English merchants settled in their dominions. The want of capital in a poor and comparatively barbarous country made it necessary to encourage the establishment of foreign merchants in factories, which were essential to their protection, on account of the difference of language, manners, religion, and laws, almost (if not quite) as great as between Christendom and the countries of the East.⁸ On the restoration of the monarchy by the house of Braganza, in 1640, John IV. was supported by Charles I., of England, who was the first prince that acknowledged the new Portuguese monarch, and entered into a treaty with him. Under the English commonwealth, this treaty was renewed by Oliver Cromwell, whose energy in maintaining the foreign influence and commercial interests of his country is so well known. Charles II. married the Infanta of Portugal, confirmed all former treaties, and made a new and perpetual one with Alfonso VI. Under his mediation and guarantee, Spain acknowledged the independence of Portugal; which Great Britain has since constantly maintained, by succoring Portugal against her enemies. In return for a friendship so ancient, so unalterable, and so beneficial, Portugal has lavished upon the subjects of Great Britain the most precious commercial privileges; and for them has even relaxed her commercial monopoly, and opened to them the *sanctum sanctorum* of her possessions in the two Indies. These privileges have been uniformly *revived and renewed in [*28] every successive treaty which has been formed between the two countries, and may be enumerated under the following heads: First. Prizes made by British subjects, from nations at peace with Portugal, may be carried into the Portuguese ports for adjudication, and condemned whilst lying there.⁹ If the ports of Portugal can be so far considered as British, as that British prizes may be carried into them, and con-

1.—9 Cranch, 388.

2.—The *Herstelder*, 1 Rob. 97.

3.—The *Indian Chief*, 8 Rob. 25.

4.—2 Rob. 50.

5.—1 Rob. 135.

6.—4 Rob. 210.

Wheat, 3.

7.—2 Posthelwaite's Dict. of Trade and Commerce, art. Treaties.

8.—The *Henrick and Maria*, 4 Rob. 50.

demned, surely they must be considered such in respect to British subjects residing and trading there. The rule of reciprocity or amicable retaliation may be extended to them (being enemies), though it may not be extended by the court to the subjects of Portugal (because they are friends), and the judicial department cannot reciprocate to, or retaliate on them the unjust proceedings of their nation. Second. Portugal is bound, by treaty, to deliver up British vessels captured and brought into her ports by the enemies of Great Britain, but her friends.¹ Third. British subjects resident in Portugal are exempt from the ordinary jurisdiction of the country; and are amenable only to the judge conservator appointed by themselves, who has cognizance of all civil causes in which they are concerned; and the ordinary authorities of the country cannot proceed against them in criminal cases, without a permission in writing from the judge conservator, except only where the offender is taken *flagrante delicto*.² Fourth. 29*) *The Portuguese courts of probate, or orphans' court, have no authority whatever in the distribution of the effect of British subjects deceased, in Portugal, but the same is referred to the judge conservator, under whose superintendence administrators are appointed by a majority of the British merchants resident in the place.³ Fifth. British subjects in Portugal have the privilege of being paid their debts due to them by Portuguese subjects, whose property may be seized by the inquisition, or the king's exchequer.⁴ Sixth. They are exempted from the operation of the fundamental law of the Portuguese monarchy, which has immemorably excluded every other religion from Portugal, except the Roman Catholic; and they are permitted to enjoy their own religious principles and worship as Protestants.⁵ Seventh. This favored nation are also exempted from all the monopolies, and other exclusive privileges, with which the internal and external commerce of Portugal and her colonies are cramped and restrained, and to which Portuguese subjects are exposed. The only exception to this immunity is the crown farm, for the exclusive sale of certain precious productions.⁶ The treaty of 1810, now subsisting, confirms and renews all the privileges and immunities granted by former treaties, or municipal regulations, except only the stipulation that free ships should make free goods. These privileges and immunities segregate British residents in *Portugal from the general society, and from the commercial, political, and ecclesiastical regulations of the country. They distinguish those residents from the other inhabitants, as much as the merchants of Christendom are distinguished from the natives in the oriental countries. The privileged character of Christians, established in those countries, depends as much upon the conventional law as does that of British subjects settled in Portugal. The treaties and capitulations between the powers of Christendom and

the Porte secure to the subjects of the former, privileges not more extensive than those which are now enjoyed, and have been enjoyed from time immemorial by the British in Portugal.⁷ It is true, that by the treaty of 1810, art. 26, His Britannic Majesty renounces the right of establishing factories or corporations of merchants in the Portuguese dominions, but there is a proviso that this concession "shall not deprive the subjects of His Britannic Majesty, residing within the dominions of Portugal, of the full enjoyment, as individuals engaged in commerce, of any of those rights and privileges which they did or might possess, as members of incorporated commercial bodies; and, also, that the trade and commerce carried on by British subjects shall not be restricted, annoyed, or otherwise affected, by any favors within the dominions of Portugal;" and in the case of *Mr. Freneau*, the lords of appeal in England decided, that the claimant was to be considered as a Dutchman, because he carried on trade at Smyrna, under *the protection of the [*31 Dutch consul, although it was proved in that gentleman's case that there was no Dutch factory at Smyrna, and that the Dutch merchants there are not incorporated.⁸

Mr. Gaston, for the respondents and claimants.

1. On the first point the claimants have to encounter a difficulty purely technical, which cannot pretend to a foundation in justice, and which, indeed, aims to prevent a decision upon the merits of the controversy. If this difficulty can neither be surmounted nor escaped without a violation of the established principles and rules of jurisprudence, the claimants must submit without repining. But it will be impossible for the friends to the repose of nations, and to the impartial administration of justice in the courts of belligerents, not to regret that the highest tribunal in our land should find itself so fettered with forms as to be unable to do what shall appear to them to be right; as to be compelled to condemn as prize of war what the inferior tribunals shall have restored (in their opinion justly) as neutral property. The captors' objection is founded on a literal exposition of the decree of August, 1814, inconsistent with its obvious meaning. However desirable it may be that precision should be used in drawing up the decrees of judicial tribunals, yet the infirmity of human nature, and the imperfection of human language, alike demand that these decisions should not be perverted by verbal criticism from their substantial import. No one can doubt the *meaning of the sentence of August, 1814. No one can hesitate to say that it designed not to condemn such part of the cargo as were evidenced by bills of lading addressed to consignees, specially named in them. This design appears as distinctly as though it had been expressed in the most formal terms. The court exempts from condemnation, and reserves for further proof, all the cases of bills of lading deliverable to shipper or order, which are specially indorsed to consignees. 1
fortiori, it could not but exempt from condemnation those where the bills of lading are addressed to consignees specially named in the

1.—2 Chalmers's Coll. Treat. 279.

2.—2 Chalmers, 271; Treaty of 1874, art. 7. 13, Treaty of 1810, art. 10.

3.—2 Chalmers, 271. Ib. 281.

4.—2 Chalmers, 280.

5.—2 Chalmers, 285.

6.—Treaty of 1810, art. 3.

7.—Valin, Sur l'Ordon. 234, 235; 2 Chalmers, 436.

8.—Cited in *The Indian Chief*, 3 Rob. 32. Ib. App. Note No. 1. 296.

bills of lading. It is the order of the English shipper for the delivery of the goods to the Portuguese consignee that raises the doubt where resides the proprietary interest—whether in the shipper or in the consignee. And unquestionably the probability that such interest in the consignee is, at least, as strong where the consignment is original, and on the face of the bill of lading, as where it is made by an indorsement of the bill. The sentence of August, 1814, which is insisted on as condemning the property in question, could not have that effect until it was completed. A blank was purposely left for the insertion of the parts of the cargo intended to be condemned. Until this blank was filled up, or something done by the court equally definitive and precise, the sentence was necessarily imperfect, both in substance and in form. This imperfection continued as to the District Court until August term, 1816, and then the property in question was not only not condemned, but ordered to be restored. The affirmation of the sentence of August, 1814, by [33*] the Circuit Court, was in general terms. It cannot, therefore, have any other effect than if the sentence affirmed had been repeated *in totidem verbis*. The sentence of condemnation, therefore, of the Circuit Court, of May, 1815, was incomplete; and remained so until November term, 1816, when in direct terms it was declared that it should not apply to the present claims. Whatever informalities or errors of proceeding may have been had below, yet as the property to which the claims apply is still in the custody of the law, and the whole case in relation to it is now before this court, all these errors and irregularities will be so corrected, as to make the final decision of the controversy, and disposition of the property, conform to the rights of the parties litigant. Whether the District Court, in August, 1814, did or did not condemn this part of the cargo; whether it did or did not decree that further proof should be heard in relation to it; yet if it ought not to have been condemned—if further proof ought to have been received in relation to it—this court will receive such further proof. 2. But, it is contended, that whatever might have been the meaning of the sentence of the District Court of August 1814, affirmed in the Circuit Court in May, 1815, it ought to have condemned the goods in question and not to have let in the claimants to further proof. And this position is founded on the assertion that the bills of lading, No. 108, 109, 141, 122 and 118, furnish no evidence whatever of proprietary interest in the consignees, and on the apprehension that the admission of further proof in cases so circumstanced might destroy all security for belliger- [34*] ent rights. And, does a bill of lading furnish no evidence, not even presumptive, of proprietary interest in the consignee? It is understood, and such was the language of this court in the case of *The St. Jozé Indiano*,¹ that in general the rules of the prize court, as to the vesting of property, are the same with those of the common law. Now, "every authority which can be adduced, from the earliest period of time down to the present hour, agree, that at law, the property does pass as absolutely and as effectually (by a bill of lading) as if the goods

had been actually delivered into the hands of the consignee."² "If, upon a bill of lading" (says Lord Hardwicke, in *Snee v. Prescott*),³ between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee." The right of the consignor to stop goods *in transitu* is not founded on any presumed property in the consignor, but necessarily supposes the property to be in the consignee; for, "it is a contradiction in terms to say a man has a right to stop his own goods *in transitu*." It is a right founded wholly on equitable principles, "which owes its origin to courts of equity, and the question is not whether the property has vested under the bill of lading, for that is clear, but whether on the insolvency of the consignee, who has not paid for the goods, the consignor can countermand the consignment, *or, in other [35*] words, divest the property which was vested in the consignee."⁴ Unless, therefore a totally different rule, as to the vesting of property, is to be asserted in a court of prize from that which is established at law, a bill of lading absolutely vests the property in the consignee, and, of course, is the appropriate and definite evidence of his proprietary interest. But, it is said, these bills of lading do not express the shipment to be for the account and risk of the consignees, and state that the freight has been paid in London, and, "of course, by the consignors." Surely it is not seriously contended that the omission to declare the shipment to be on account of the consignees, and the declaration that the freight has been paid in London, and, "of course, by the consignors," could have been designed to secure to the consignors the right of stopping *in transitu*. This right is founded on principles of equity which give it a direct application to shipments made on account of the consignees, and which have no connection whatever with the legal consequences of the payment of freight. Let us see, however, what inferences may be fairly drawn from the peculiarities which are noticed in the bills of lading. They omit to state that the shipment is on account and risk of the consignees. Shall we thence infer that the shipment is on account and risk of the consignors? This is not the inference of the law. If the bill of lading vests the property in the consignee, he, of course, sustains the peril of the shipment, unless there be an agreement to the contrary. It would be a singular *absurdity, indeed, if the law, [36*] upon the instrument, presumed that the consignee was the owner, and at the same time inferred that he did not bear the ordinary risks of ownership. Where the shipment is on account and at the risk of the consignor, and not of the consignee, there it may be proper to express the fact, because it is opposed to the legal presumption. But that an omission to state, what, without statement is presumed can be converted into an argument against the presumption, will be an instance of intellectual dexterity, rather fitted to surprise than to satisfy the inquirer after truth.

2.—Per Buller, J., in Dom. Proc., *Lickbarrow v. Mason*, 6 East. 23. Note.

3.—1 Atk. 245.

4.—6 East, 23. Note.

1.—1 Wheat. 212.

Wheat. 3.

demned, surely they must be considered such in respect to British subjects residing and trading there. The rule of reciprocity or amicable retaliation may be extended to them (being enemies), though it may not be extended by the court to the subjects of Portugal (because they are friends), and the judicial department cannot reciprocate to, or retaliate on them the unjust proceedings of their nation. Second. Portugal is bound, by treaty, to deliver up British vessels captured and brought into her ports by the enemies of Great Britain, but her friends.¹ Third. British subjects resident in Portugal are exempt from the ordinary jurisdiction of the country; and are amenable only to the judge conservator appointed by themselves, who has cognizance of all civil causes in which they are concerned; and the ordinary authorities of the country cannot proceed against them in criminal cases, without a permission in writing from the judge conservator, except only where the offender is taken *flagrante delicto*.² Fourth. **29*** The Portuguese courts of probate, or orphans' court, have no authority whatever in the distribution of the effect of British subjects deceased, in Portugal, but the same is referred to the judge conservator, under whose superintendence administrators are appointed by a majority of the British merchants resident in the place.³ Fifth. British subjects in Portugal have the privilege of being paid their debts due to them by Portuguese subjects, whose property may be seized by the inquisition, or the king's exchequer.⁴ Sixth. They are exempted from the operation of the fundamental law of the Portuguese monarchy, which has immemorially excluded every other religion from Portugal, except the Roman Catholic; and they are permitted to enjoy their own religious principles and worship as Protestants.⁵ Seventh. This favored nation are also exempted from all the monopolies, and other exclusive privileges, with which the internal and external commerce of Portugal and her colonies are cramped and restrained, and to which Portuguese subjects are exposed. The only exception to this immunity is the crown farm, for the exclusive sale of certain precious productions.⁶ The treaty of 1810, now subsisting, confirms and renews all the privileges and immunities granted by former treaties, or municipal regulations, except only the stipulation that free ships should make free goods. These privileges and immunities segre-

30* gate British residents in Portugal from the general society, and from the commercial, political, and ecclesiastical regulations of the country. They distinguish those residents from the other inhabitants, as much as the merchants of Christendom are distinguished from the natives in the oriental countries. The privileged character of Christians, established in those countries, depends as much upon the conventional law as does that of British subjects settled in Portugal. The treaties and capitulations between the powers of Christendom and

the Porte secure to the subjects of the former, privileges not more extensive than those which are now enjoyed, and have been enjoyed from time immemorial by the British in Portugal.¹ It is true, that by the treaty of 1810, art. 26, His Britannic Majesty renounces the right of establishing factories or corporations of merchants in the Portuguese dominions, but there is a proviso that this concession "shall not deprive the subjects of His Britannic Majesty, residing within the dominions of Portugal, of the full enjoyment, as individuals engaged in commerce, of any of those rights and privileges which they did or might possess, as members of incorporated commercial bodies; and, also, that the trade and commerce carried on by British subjects shall not be restricted, annoyed, or otherwise affected, by any favors within the dominions of Portugal;" and in the case of *Mr. Fremenez*, the lords of appeal in England decided, that the claimant was to be considered as a Dutchman, because he carried on trade at Smyrna, under "the protection of the [*31 Dutch consul, although it was proved in that gentleman's case that there was no Dutch factory at Smyrna, and that the Dutch merchants there are not incorporated."

Mr. Gaston, for the respondents and claimants.

1. On the first point the claimants have to encounter a difficulty purely technical, which cannot pretend to a foundation in justice, and which, indeed, aims to prevent a decision upon the merits of the controversy. If this difficulty can neither be surmounted nor escaped without a violation of the established principles and rules of jurisprudence, the claimants must submit without repining. But it will be impossible for the friends to the repose of nations, and to the impartial administration of justice in the courts of belligerents, not to regret that the highest tribunal in our land should find itself so fettered with forms as to be unable to do what shall appear to them to be right; as to be compelled to condemn as prize of war what the inferior tribunals shall have restored (in their opinion justly) as neutral property. The captors' objection is founded on a literal exposition of the decree of August, 1814, inconsistent with its obvious meaning. However desirable it may be that precision should be used in drawing up the decrees of judicial tribunals, yet the infirmity of human nature, and the imperfection of human language, alike demand that these decisions should not be perverted by verbal criticism from their substantial import. No one can doubt the "meaning of the sense" [*32 tence of August, 1814. No one can hesitate to say that it designed not to condemn such parts of the cargo as were evidenced by bills of lading addressed to consignees, specially named in them. This design appears as distinctly as though it had been expressed in the most formal terms. The court exempts from condemnation, and reserves for further proof, all the cases of bills of lading deliverable to shipper or order, which are specially indorsed to consignees. *A fortiori*, it could not but exempt from condemnation those where the bills of lading are addressed to consignees specially named in the

1.—2 Chalmers's Coll. Treat. 270.

2.—2 Chalmers, 271; Treaty of 1674, art. 7, 13, Treaty of 1810, art. 10.

3.—2 Chalmers, 271. Ib. 281.

4.—2 Chalmers, 280.

5.—2 Chalmers, 285.

6.—Treaty of 1810, art. 3.

7.—Vallin, Sur l'Ordon. 234, 235; 2 Chalmers, 426.

8.—Cited in *The Indian Chief*, 3 Rob. 82. Ib. App. Note No. I. 295.

bills of lading. It is the order of the English shipper for the delivery of the goods to the Portuguese consignee that raises the doubt where resides the proprietary interest—whether in the shipper or in the consignee. And unquestionably the probability that such interest in the consignee is, at least, as strong where the consignment is original, and on the face of the bill of lading, as where it is made by an indorsement of the bill. The sentence of August, 1814, which is insisted on as condemning the property in question, could not have that effect until it was completed. A blank was purposely left for the insertion of the parts of the cargo intended to be condemned. Until this blank was filled up, or something done by the court equally definitive and precise, the sentence was necessarily imperfect, both in substance and in form. This imperfection continued as to the District Court until August term, 1816, and then the property in question was not only not condemned, but ordered to be restored. The affirmance of the sentence of August, 1814, by **33*** the Circuit Court, was in general terms. It cannot, therefore, have any other effect than if the sentence affirmed had been repeated *in totidem verbis*. The sentence of condemnation, therefore, of the Circuit Court, of May, 1815, was incomplete; and remained so until November term, 1816, when in direct terms it was declared that it should not apply to the present claims. Whatever informalities or errors of proceeding may have been had below, yet as the property to which the claims apply is still in the custody of the law, and the whole case in relation to it is now before this court, all these errors and irregularities will be so corrected, as to make the final decision of the controversy, and disposition of the property, conform to the rights of the parties litigant. Whether the District Court, in August, 1814, did or did not condemn this part of the cargo; whether it did or did not decree that further proof should be heard in relation to it; yet if it ought not to have been condemned—if further proof ought to have been received in relation to it—this court will receive such further proof. 2. But, it is contended, that whatever might have been the meaning of the sentence of the District Court of August 1814, affirmed in the Circuit Court in May, 1815, it ought to have condemned the goods in question and not to have let in the claimants to further proof. And this position is founded on the assertion that the bills of lading, No. 108, 109, 141, 122 and 118, furnish no evidence whatever of proprietary interest in the consignees, and on the apprehension that the admission of further proof in cases so circumstanced might destroy all security for belliger-**34*** ent rights. And, does a bill of lading furnish no evidence, not even presumptive, of proprietary interest in the consignee? It is understood, and such was the language of this court in the case of *The St. Jose Indiano*,¹ that in general the rules of the prize court, as to the vesting of property, are the same with those of the common law. Now, “every authority which can be adduced, from the earliest period of time down to the present hour, agree, that at law, the property does pass as absolutely and as effectually (by a bill of lading) as if the goods

had been actually delivered into the hands of the consignee.” “If, upon a bill of lading” (says Lord Hardwicke, in *Snee v. Prescott*),² between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee.” The right of the consignor to stop goods *in transitu* is not founded on any presumed property in the consignor, but necessarily supposes the property to be in the consignee; for, “it is a contradiction in terms to say a man has a right to stop his own goods *in transitu*.” It is a right founded wholly on equitable principles, “which owes its origin to courts of equity, and the question is not whether the property has vested under the bill of lading, for that is clear, but whether on the insolvency of the consignee, who has not paid for the goods, the consignor can countermand the consignment, *or, in other [**35** words, divest the property which was vested in the consignee.”³ Unless, therefore a totally different rule, as to the vesting of property, is to be asserted in a court of prize from that which is established at law, a bill of lading absolutely vests the property in the consignee, and, of course, is the appropriate and definite evidence of his proprietary interest. But, it is said, these bills of lading do not express the shipment to be for the account and risk of the consignees, and state that the freight has been paid in London, and, “of course, by the consignors.” Surely it is not seriously contended that the omission to declare the shipment to be on account of the consignees, and the declaration that the freight has been paid in London, and, “of course, by the consignors,” could have been designed to secure to the consignors the right of stopping *in transitu*. This right is founded on principles of equity which give it a direct application to shipments made on account of the consignees, and which have no connection whatever with the legal consequences of the payment of freight. Let us see, however, what inferences may be fairly drawn from the peculiarities which are noticed in the bills of lading. They omit to state that the shipment is on account and risk of the consignees. Shall we thence infer that the shipment is on account and risk of the consignors? This is not the inference of the law. If the bill of lading vests the property in the consignee, he, of course, sustains the peril of the shipment, unless there be an agreement to the contrary. It would be a singular *absurdity, indeed, if the law, [**36** upon the instrument, presumed that the consignee was the owner, and at the same time inferred that he did not bear the ordinary risks of ownership. Where the shipment is on account and at the risk of the consignor, and not of the consignee, there it may be proper to express the fact, because it is opposed to the legal presumption. But that an omission to state, what, without statement is presumed can be converted into an argument against the presumption, will be an instance of intellectual dexterity, rather fitted to surprise than to satisfy the inquirer after truth.

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1.—1 Wheat. 212.
Wheat. 3.

A bill of lading evidences an agreement made by the master with the shipper for the delivery of the goods to the consignee. His undertaking is simply to carry the goods for the stipulated price to the consignee. He knows not that the consignee is to sustain the risk of the shipment. He cannot, therefore, with propriety, aver it in his contract. If, indeed, the consignor is to sustain the risk, and wishes this fact to be stated in the master's undertaking, then has he the full evidence which warrants the insertion of such a clause in the bill of lading. And, accordingly, such is the mercantile usage. Bills of lading ordinarily express account and risk when they are not the account and risk of the consignee. But it is otherwise with invoices. These are documents passing between the parties to the shipment, and contain the declaration of the consignor to the consignee. These, therefore, declare, however it may be, at whose account and hazard the shipment is made. The other peculiarity noticed in the bills of lading **37*** is, that the "freight is paid in London, and, "of course, by the consignors." If this corollary, thus summarily deduced, of a payment by the shippers, mean no more than a payment by the consignees through the shippers as their immediate agents at London, it may be admitted as probable, and, at all events, as harmless. But, if it mean a payment by the shippers as principals, or on their own account, then it is denied to follow from the proposition which it claims as its premises. But the peculiarities, thus examined, are relied on as constituting a support on which to rest the doctrine contained in the cases of *Davis et al. v. James*,¹ and *Moore v. Wilson*,² which are cited (as it would seem) to prove that where the consignor pays the freight the bill of lading does not vest the property in the consignee. It is not material to inquire how far these cases would now stand the test of a strict scrutiny. It is but doing justice, however, to the great men who decided them, to say that they establish no such doctrine. Lord Mansfield expressly declares that he does not proceed at all on the ground of proprietorship, but simply on the agreement of the carrier. And Lord Kenyon, in *Daves v. Peck*,³ states, that the doctrine which they furnish is no more than that the consignor may bring an action for breach of contract against the carrier on his agreement, where the consignor is to be at the expense of the carriage, "where he stands in the character of an insurer to the consignee for the safe arrival of the goods." It is alleged that if the interest in **38*** these claims "were bona fide neutral, it is incredible that the invoices and letters would not have accompanied the shipment. Is it not equally probable, where the shipment is not on neutral account, or partly on neutral and partly on hostile account, and there is no attempt at deception, that it would have been accompanied with letters and invoices? Yet in the vast multitude of the shipments clearly on enemy account, made by this ship, and which have been condemned without a controversy, there is not one in ten thus accompanied. The packet sails between London and Lisbon with a regu-

larity, certainty, and frequency, little short of what takes place in transmissions by mail. It is the great and established medium of conveyance, established by treaty stipulations, for passengers and letters. Is it strange, therefore, that all the communications between the shipper and the owner of the goods, except a copy of the bill of lading (which at once evidences the property, and is directory to the master), should have been sent by this certain and regular and official medium of conveyance? If duplicates of these communications had accompanied the shipments in question, this unusual caution might have been construed into a proof of guilt, and these additional evidences of neutral proprietorship stigmatized as the badges of fraud. But it is alleged, also, that the bills of lading are not verified. The only individual of the crew examined by the commissioners, is the master, and he supports the bill of lading as far as can be expected of a carrier-master. In answer to the 18th interrogatory, he declares that the bills of lading are not false or colorable; and in answer to the 20th, "that he presumes the goods shipped [**39** belong to the respective consignees. The rights of belligerents are not the only rights deserving of the notice, and entitled to the protection of courts of prize. Though human testimony may sometimes be corrupt, and often fallacious, it is by human testimony alone that human tribunals can hope to eviscerate the truth. Condemnation should take place only when the fact of enemy's property has been ascertained; and where that fact is doubted, proof should be resorted to. These principles have received the countenance of all those engaged in the administration of public law, whom the civilized world (cruisers excepted) regard with reverence. They will be found stated with simplicity and perspicuity in the famous British answer to the Prussian memorial, and communicated to the American government in 1794, as the basis of the proceedings in British courts of admiralty; and which has been adopted by this court as the substratum of its own conduct in cases of prize. 3. When it is recollected that the claimants have sought to furnish proof, both from the port of shipment and the port of destination, from London and from Lisbon; that during the war, the means of procuring such proof from Europe and bringing it to the United States were unfrequent and uncertain; and that delay will not be occasioned by listening to the additional proof now tendered, it is believed that the court will not refuse to hear it. The case of *The Bernon*⁴ shows that the court, after receiving further proof, may order additional proof, if requisite to enlighten its judgment; "and the case of *The Frances*⁵ is an authority [**40** in point, that the Appellate Court may order additional proof, if the further proof on which the cause has been heard below is defective. May not the Appellate Court then hear it, if to prevent injurious delays it be prepared in anticipation? 4. The only inquiries of fact, as to the character of the claimant, according to the rules laid down by Sir William Scott, in *The Herold*,⁶ are, was he at the time of seizure

1.—5 Burr. 2880.

2.—1 T. R. 659.

3.—8 T. R. 330.

4.—1 Rob. 86.

5.—8 Cranch, 308, 353.

6.—1 Rob. 97.

entitled to restitution; and is he, at the time of adjudication, in a capacity to claim. The present capacity of the claimant is without doubt. His right to restitution must be tested by his national character at the time of seizure, on the 10th of May, 1814. But the objection is founded entirely on a misconception of the meaning of the affidavits. Whether the facts testified be true or not, must depend on the veracity of the deponents. If they are to be believed, they prove a residence of the claimant as an established merchant at Lisbon, for several years preceding the seizure, and up to the 12th of June thereafter; the leaving of Lisbon on mercantile business, *animo revertendi*, on the 12th of June, 1814, and the continuance of his domicile, residence and establishment there, and a continued purpose of actually returning thither, up to the date of the affidavits. 5. It must be conceded that, for commercial purposes, among the civilized nations of Europe and the West, the national character of an individual is ordinarily that of the country in which he resides. No position is better established than this, that if a person goes to another country, and there ^{41*} engages in trade and takes up his residence, he is by the law of nations to be considered as a merchant of that country. This general rule applies to the case of British merchants domiciled in Portugal. They owe allegiance to the government, are protected by its laws, mingle intimately with the natives in all the social and domestic relations, cherish Portuguese industry, increase Portuguese capital, and contribute to the revenue of Portugal. It is true that a very intimate commercial connection has long subsisted between Portugal and Britain, and that the subjects of the latter are encouraged to settle in the Portuguese dominions, by many advantageous regulations in favor of their traffic. But it is by no means true that any British authority is exercised in Portugal, or that Portugal can be viewed as the dependent province of Britain. First. There is no authority for the assertion that the ports of Portugal are open in war for the adjudication of British captures made from nations at peace with Portugal. An irregular practice formerly obtained to that effect, to which Sir Wm. Scott alludes in *The Henrick and Maria*; but it was sanctioned neither by treaty nor decree. The treaty of 1810 is utterly silent on that head, and it is a matter of notoriety, that on the breaking out of the late war between the United States and Great Britain, a royal decree was issued, forbidding the cruisers of belligerents from bringing their prizes into the dominions of Portugal, which was enforced throughout the war. Second. Portugal is not bound by treaty to deliver up British vessels brought into her ports which have been taken by the ^{42*} enemy of Britain. *The 30th article of the present treaty limits the obligation to the restitution of property plundered by pirates. And this obligation is reciprocal. Third. British residents are not exempt from the jurisdiction of the Portuguese tribunals. They have the privilege, indeed, of choosing from among the commissioned judges of the realm one who is to be presented to the king for his approbation as their judge conservator, and who, if approved, is so appointed. The authority of this judge (who is usually selected because of his

knowledge of the English language) reaches only to the trial in the first instance of commercial disputes brought before him by British merchants, and is ever subordinate to the higher tribunals of justice established in the realm, who, in all cases, possess over him an appellate jurisdiction. The privilege is not peculiar to the British, but is extended to every friendly European nation. Fourth. The provision of the treaty of 1654, relative to the appointment of administrators to British residents dying intestate, is not renewed in the treaty of 1810. There is in lieu of it a reciprocal stipulation (art. 7th) for the disposal, by the subjects of both nations, of their personal property by testament. Fifth. The provision for applying the effects seized by the inquisition to the payment of the debts due the British creditor, is but a dictate of justice, and probably places these creditors on the same footing with native creditors. It is not found in the treaty of 1810. Sixth. There is nothing extraordinary in the mutual stipulation for the tolerance, by each, of the religion of the subjects of the other, so far as it may consist with the laws of their respective realms. Seventh. Nor is it unusual to ⁴³ grant to the subjects of other nations an exemption from monopolies obligatory on native merchants. It is perfectly familiar to the court, that under the British treaty of 1795 such an exemption was accorded to American merchants from the monopoly of the British East India Company. And in the treaty of 1810 it will be seen that the stipulations are reciprocal. There is much difficulty in ascertaining the precise nature of the immunities enjoyed by British merchants in Portugal, at the date of the treaty of 1810, because the practice had been to grant them occasionally by *alcarras*. These are temporary proclamations, which have effect only for a year and a day. It is very certain that some privileges heretofore granted were not then possessed. For instance, the *alcarras* of 1717 exempts Englishmen from certain taxes to which the natives are liable, while the 7th article of the treaty of 1810 provides that they shall be liable to the same taxes (and no other) as are imposed on the natives of Portugal. The probability is, that the most important of these immunities are especially enumerated in the treaty. It is unnecessary, however, to proceed further with this examination. Enough appears to show that the attempt to take the case of British merchants resident in Portugal out of the general rule applied to domicile among civilized nations, whatever admiration may be due to its boldness, cannot receive the sanction of an enlightened court. The analogy between such merchants and Europeans in Turkey, who, there, neither sustain their original character nor take the character of the people within whose territories they sojourn, but owe their name and political ⁴⁴ existence to the factory and association under whose protection they carry on a precarious traffic—who are viewed as a people exempt from Turkish dominion,¹ and who never mix with the natives in any social or domestic concern—is too forced and unnatural to afford a basis for any arguments applicable to them both. No author-

1.—See Consular Certificate in *The Herman*, 3 Rob., Appen. 1. 286.

ity is cited in support of this objection, other than a remark of Sir William Scott in *The Henrick and Maria*, which must be understood *secundum subjectam materiam*. He is there speaking of the validity of a condemnation in England of an enemy's ship, carried into Lisbon or Leghorn—into the port of a very close and intimate ally. But in opposition to it there are great authorities. The case of the Armenian merchants resident at Madris under special privileges, who were, nevertheless, subjected to the general rule of domicile, bears directly upon it.¹ The case of *The Nayade*, which applies the commercial rule of domicile to Prussian merchants in Portugal, also bears upon it.² The case of *The Danaos*,³ decided in March, 1802, at a time when the objection was stronger than at present, is directly in point, and of the highest prize tribunal in England. In *The St. Joze Indiano*⁴ it was expressly decided by one of the learned judges of this court, that British residents in the dominions of Portugal take the character of their domicile, and, as to all third parties, are to be deemed Portuguese subjects. This decision was acquiesced in by the counsel for the captors. In the case of *The Antonio* 45*] *Johanna*, such *was considered the settled rule; and, accordingly, restitution was made by this court to Mr. Ivers, a resident British merchant, at St. Michael's, one of the firm of Burnet & Ivers, of the moiety claimed in his behalf as a Portuguese subject.⁵ The counsel who now advances this objection, declined then to bring it forward.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

The appellants contend, 1st. That the sentence pronounced by the District Court in August, 1814, which was affirmed by the Circuit Court in May, 1815, condemned finally, the packages for which a decree of restitution was afterwards made, and that the subsequent proceedings were irregular, and in a case not before the court. 2d. That upon the merits, farther proof ought not to have been ordered, and a condemnation ought to have taken place.

On the first point, it is contended that these goods, having been comprehended in invoices not indorsed, nor accompanied with letters of advice, are within the very terms of the sentence of condemnation, and must, consequently, be considered as condemned.

The principle on which this argument was overruled in the court below is to be found in its sentence. The District Court, in its decree of 1814, did not intend to confine its description of the property condemned to the general terms used in that decree, but did intend to 46*] enumerate the particular bills to *which those terms should apply. This is conclusively proved by reference to the subsequent intended enumeration, which is followed by a blank, obviously left for that enumeration. Had the enumeration been inserted as was intended, the

particular specification would undoubtedly have controlled the general description which refers to it. The unintentional and accidental omission to fill this blank, leaves the decree imperfect in a very essential point; and if the case, and the whole context of the decree can satisfactorily supply this defect, it ought to be supplied. This court is of opinion that no doubt can be entertained respecting the bills with which the District Court intended to fill up the blank. The condemnation of shipments evidenced by bills of lading, with blank indorsements, or without indorsement, could apply to those only which required indorsement, or which were in a situation to admit of it. These were the bills which were made deliverable to shipper, or to the order of the shipper. Bills addressed to a merchant, residing in Lisbon, could not be indorsed by such merchant until the vessel carrying them should arrive at Lisbon. Consequently, such bills could not be in the view of the judge when condemning goods, because the bills of lading were not indorsed; and, had he completed his decree, such bills could not have been inserted in it. No conceivable reason exists for admitting to farther proof, the case of a shipment, evidenced by a bill of lading, made deliverable to shipper, or order, and indorsed to a merchant, residing in Lisbon; and at the same time condemning, without admitting to farther proof, the same *shipment, if evidenced by a bill of lading, made deliverable, in the first instance, to the Lisbon merchant. No. 108, for example, is made deliverable at Lisbon, to *Segnior Jose Ramos de Fonseca*, and is consequently not indorsed. It is contended that these goods are condemned. But had the bill been made deliverable to shipper, or order, and indorsed to *Segnior Jose Ramos de Fonseca*, farther proof would have been admitted.

Nothing but absolute necessity could sustain a construction so obviously absurd. This court is unanimously of opinion that justice ought not to be diverted from its plain course by circumstances so susceptible of explanation that error is impossible; and that when the decree was returned to the District Court of North Carolina, with the blank unfilled, that court did right in considering the specification intended to have been inserted, and for which the blank was left, as a substantive and essential part of the decree, still capable of being supplied, and in acting upon, and explaining the decree, as if that specification had been originally inserted.

This impediment being removed, the cause will be considered on its merits.

It is contended, with great earnestness, that farther proof ought not to have been ordered, and that the goods which have been restored ought to have been condemned as prize of war. In support of this proposition, the captors, by their counsel, insist that the rights of belligerents would be sacrificed, should a mere bill of lading, consigning the goods to a neutral, unaccompanied *by letter of advice or in- 48*] voice, let in the neutral claimant to further proof.

It is not pretended that such a bill would of itself justify an order for restitution; but it certainly gives the person to whom it is addressed a right to receive the goods, and lays

Wheat. 3.

1.—*The Angellique*, 3 Rob., Appen. B. 294.

2.—4 Rob. 206.

3.—4 Rob. 210.

4.—2 Gallis. 268, 292.

5.—1 Wheat. 150.

the foundation for proof that the property is in him. It cannot be believed that admitting farther proof in the absence of an invoice or letter of advice endangers the fair rights of belligerents. These papers are so easily prepared that no fraudulent case would be without them. It is not to be credited that a shipper in London, consigning his own goods to a merchant in Lisbon, with the intention of passing them on a belligerent cruiser as neutral, would omit to furnish a letter of advice and invoice adapted to the occasion. There might be double papers, but it is not to be imagined that papers so easily framed would not be prepared in a case of intended deception.

It is unquestionably extraordinary that the same vessel which carries the goods should not also carry invoices and letters of advice. But the inference which the counsel for the captors would draw from this fact does not seem to be warranted by it. It might induce a suspicion that papers had been thrown overboard; but in the total absence of evidence that this fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances. But were it even admitted 49*] that a belligerent master carrying a *cargo chiefly belligerent, had thrown papers overboard, this fact ought not to preclude a neutral claimant, to whom no fraud is imputable, from exhibiting proof of property. In the case before the court, no attempt was made to disguise any part of the cargo. By far the greater portion of it was confessedly British, and was condemned without a claim. The whole transaction with respect to the cargo, is plain and open; and was, in the opinion of this court, a clear case for further proof.

The further proof in the claims 108, 109, 141 and 122, consists of affidavits to the proprietary interest of the claimants; of copies of letters, in some instances ordering the goods, and in others advising of their shipment; and of copies of invoices—all properly authenticated. This proof was satisfactory, and the order for restitution made upon it was the necessary consequence of its admission.¹

1.—M. Bonnemant, in his commentary upon De Habreu, makes the following remarks:

"Parmi les pieces dont un navire doit être pourvu pour la régularité de sa navigation, il en est de deux sortes; les unes servent à prouver la neutralité du navire, les autres celle de la cargaison.

"Celles relatives à la cargaison sont les connaissements, les polices de chargement, les factures. Toutes ces pieces sont pleines et entières, si elles sont en bonne et due forme. Toute ne sont pas d'absolue nécessité; comme elles sont corrélatives, elles se suppléent entre elles et peuvent être supplées par d'autres équivalentes. Mais si l'on en découvre d'autres qui les démentent, s'il se rencontre des double expéditions on autres documents capable d'ébranler la confiance, la presumption de fraude ne change des-lors en certitude, on ne presume pas simplement le navire ennemi, on le suppose.

"La preuve de la neutralité est toujours à la charge du capture.

"The French prize practice not allowing further proof, but acquitting or condemning upon the original evidence consisting of the papers found on board and the depositions of the captors and captured. The only exception to this rule is, where the papers have been spoliated by the captors, or Wheat. 3.

*In the claim to No. 118, made for [*50 Joseph Winn, the further proof was not so conclusive. It consisted of the affidavit of the claimant to his proprietary interest, and to his character as a domiciled Portuguese subject, residing and carrying on trade in Lisbon. The affidavit was made in London on the 29th day of June, 1815, but states the claimant to have been at his fixed place of residence in Lisbon at the time of the capture, where he had resided for several years preceding that event, and where he continued until the 12th of June, 1814, when he left *Lisbon for Bourdeaux, and [*51 has since arrived in London on mercantile business. That he is still a domiciled subject of Portugal, intending to return to Lisbon, where his commercial establishment is maintained, and his business carried on by his clerks until his return. To a copy of this affidavit is annexed that of Duncan M'Andrew, his clerk, made in Lisbon, who verifies all the facts stated in it.

This property was also restored by the sentence of the District Court, and affirmed in the Circuit Court. On an appeal being prayed, the Circuit Court made an order, allowing this claimant to take farther proof, to be offered to this court. The proof offered under this order consists of a special affidavit of one of the shippers, of sworn copies of letters ordering the shipment, and of the invoice of the articles shipped.

This claim not having been attended, when the sentence of restitution was made, with any suspicious circumstances, other than the absence of papers which have since been supplied, and which was probably the result solely of inadvertence, this court is of opinion that the farther proof now offered ought to be received. It certainly dissipates every doubt respecting the proprietary interest. The only question made upon it respects the neutral character of the claimant.

It has been urged that the native character easily reverts, and that by returning to his native country the claimant has become a re-integrated British subject. *But his com- [*52 mercial establishment in Lisbon still remains; his mercantile affairs are conducted in his absence by his clerks; he was himself in Lisbon

"Cette preuve ne peut et ne doit resulter que des papiers trouves a bord; *toute autre indirecte ne peut etre recue ni pour ni contre, c'est la disposition de l'art. 11. du reglement du 26 Juillet, 1778, et des precedens qui veulent qu'on n'ait egard qu'aux pieces trouvees a bord, et non a celles qui pourroient etre produites apres la prise.

"C'est au capteur a prouver ensuite l'irrégularité des pieces, a les discuter de la maniere qu'il juge convenable pour en demontrer la fraude et la simulation.

"Quant aux irrégularités que peuvent contenir certaines pieces de bord, ce n'est pas a des omissions de forme usitées que les tribunaux doivent s'attacher, c'est par l'ensemble des pieces, et sur tout par la verité des choses qui en résulte, qu'il s'en doit déterminer; l'expérience n'a que trop démontré que la plus grande régularité dans les papiers masquoit souvent la fraude et la simulation, nimia cautio dolus." Bonnemant's Translation of De Habreu, Tom. 1, p. 28.

lost by shipwreck, and other inevitable accidents. Valin, Traité des Prises, ch. 15, n. 7. But the Spanish law admits of further proof in case of doubts arising upon the original evidence. De Habreu, part 2, ch. 15.

at the time of the capture; he has come to London merely on merchantile business, and intends returning to Lisbon. Under these circumstances, his Portuguese domicile still continues.

But, it is contended that the connection between Britain and Portugal retains the British character, and the counsel for the captors has enumerated the privileges of Englishmen in that country.

These privileges are certainly very great; but, without giving them a minute and separate examination, it may be said generally, that they do not confound the British and Portuguese character. They do not identify the two nations with each other, or affect those principles on which, in other cases, a merchant acquires the character of the nation in which he resides and carries on his trade. If a British merchant, residing in Portugal, retains his British character when Britain is at war and Portugal at peace, he would also retain that character when Portugal is at war and Britain at peace. This no belligerent could tolerate. Its effect would be to neutralize the whole commerce of Portugal, and give it perfect security.

Sentence affirmed.

53*]

*[CHANCERY.]

M'IVER, ASSIGNEE, &C.,

v.

KYGER ET AL.

Bill for the specific performance of an agreement for the exchange of lands. The contract enforced.

THIS cause was argued by *Mr. Taylor* for the appellant, and by *Mr. Swann* for the respondent.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

On the 25th day of March, 1789, George Kyger and Josiah Watson entered into articles for the exchange of a lot in Alexandria, estimated at \$2,200, for certain lands in Kentucky, the property of Watson. The lot was to be conveyed to Watson within eighteen months from the date of the contract; in consideration of which, Watson stipulated to convey to Kyger such lands, surveyed and patented for him, on the waters of Elkhorn in Kentucky, as the said Kyger should select, to the extent of \$2,200, at one dollar per acre, as soon as Kyger should make his election, and furnish a plot and survey of the lands chosen.

On the 23d day of December, 1790, a second agreement was entered into, which, after reciting the terms of the first, states that George Kyger had represented to the said Josiah, that

the land on Elkhorn was not so valuable as Kyger had supposed; and had proposed to extend the time for surveying *and choos- [*54 ing the lands in Kentucky, and to be allowed to take lands to the amount of \$2,200 on the waters of Elkhorn, or from other lands patented for the said Josiah, in Kentucky, at the intrinsic value which such land bore at any time between the 25th day of March, 1789, and the 25th day of September, 1790. On this representation it was agreed that the time for choosing, valuing, and conveying the lands in Kentucky, should be extended eighteen months; that Kyger might take lands to the stipulated amount, from other tracts, which were specified, at the intrinsic value between the periods before mentioned, taking not less than 700 acres out of any one tract. To ascertain the value of these lands, Thomas Marshall, the elder, was chosen on the part of Watson, and Samuel Buler on behalf of Kyger; and it was agreed that if T. Marshall should die or refuse to act, the agent of Watson in Kentucky should nominate some other person in his stead. A similar provision was made for supplying the place of Buler. The selection and valuation being thus made, Josiah Watson was to convey the land selected and valued.

In the year 1806, Daniel Kyger and others, devisees of George Kyger, party to the said contracts, filed their bill in chancery in the Circuit Court for the county of Alexandria, stating the contracts above mentioned; and stating, farther, that the lot in Alexandria had been duly conveyed; that Thomas Marshall had refused to act as a valuer; that the agent of Watson had nominated John M'Whattan in his place; that in the year 1791, the said M'Whattan and Buler proceeded to make a valuation, by which the lands on *Elkhorn were [*55 valued at \$1,200, and by which one tract of 1,800 acres on Ravin Creek, and one other tract of 1,200 acres on Forklick Creek, were taken to complete the amount in value to which Kyger was entitled under the contract.

The bill proceeds to state that this valuation was made known to Josiah Watson, and the conveyances demanded, but from some unknown cause were not made until Josiah Watson became bankrupt. That in the year—George Kyger departed this life, having first made his last will in writing, in which he devised all his real estate in Kentucky to the plaintiffs. In the year 1805 the plaintiffs presented to Josiah Watson an affidavit made by M'Whattan and Buler, stating the valuation they had made, and demanded a conveyance. He excused himself on account of his bankruptcy, but executed a release which recites the agreement and valuation; and that a deed for the lands had been executed by him, which was in the hands of John M'Iver, the defendant. This release is annexed to the bill. The bill prays that M'Iver, the defendant, who is the assignee of the bankrupt, may be decreed to convey the lands contained in the valuation of M'Whattan and Buler.

The answer admits the contracts, but does not admit that Thomas Marshall declined acting as a valuer, or that M'Whattan was appointed in his place. It avers that the Elkhorn lands were worth the sum at which they were rated in the first contract, and that the second was

Wheat. 3.

NOTE.—See notes to *Hepburn v. Dunlop*, 1 Wheat. 179; *Pratt v. Carroll*, 8 Cranch, 471; *Morgan v. Morgan*, 2 Wheat. 290, and *Colson v. Thompson*, 2 Wheat. 336.

obtained by the fraudulent representations of Kyger. That the valuation of M'Whattan and Buler was not only unauthorized, but 56*] *made under an imposition practiced on them by Kyger, who prevailed on them to consider the contract as obliging them to value the lands on Elkhorn and Eagle Creek at no more than one dollar per acre, although they might be worth more. That Josiah Watson never admitted that Kyger was entitled to more than the Elkhorn and Eagle Creek land, which was, therefore, not conveyed to his assignees, though the other lands mentioned in the bill were so conveyed. The defendant consents that a conveyance be decreed for the Elkhorn and Eagle Creek lands, and insists that the bill as to the residue ought to be dismissed.

Several depositions were taken, which generally estimate the Elkhorn and Eagle Creek land at a dollar or more per acre. One deposition estimates them at 83 cents. Parts of those lands were sold by Kyger at various prices, whether on credit, or on what credit, is not stated, averaging rather more than one dollar per acre.

The deposition of M'Whattan was taken by the defendant, and states that the valuers acted under the first agreement; and, to the best of his recollection, thought themselves bound to estimate the first rate land at not more than one dollar per acre.

The court decreed a conveyance for all the lands contained in the valuation, from which decree the defendant appealed to this court.

The appellant contends:

1st. That the second contract ought to be annulled, having been obtained by fraud. If this be against him, then, 57*] *2d. The valuation ought to be set aside, and a revaluation directed.

1. Admitting the lands on Elkhorn and Eagle Creek to have been worth, intrinsically, one dollar per acre, a fact not entirely certain, the court is of opinion that the second contract is not impeachable on that ground. It is not suggested, nor is it to be presumed, that Watson derived his sole knowledge of the value of his lands from the representations made by Kyger. The value fixed in the first contract was probably founded on his previous information, and there is no reason to doubt that when Kyger was dissatisfied with the stipulated price, Watson was perfectly willing to leave the value to arbitrators mutually chosen by the parties. The court perceives no reason for annulling the second contract.

2. On the second point, the establishment of the valuation made by M'Whattan and Buler, there is a total want of testimony. The defendant, in his answer, denies the authority of M'Whattan to act as a valuer, and there is no proof to support the allegation of the bill. The *ex-parte* affidavit of M'Whattan and Buler, did it even contain any evidence of their authority, is inadmissible; and the recitals of the deed of release executed by Watson after he became a bankrupt are not evidence. The decree, therefore, so far as it establishes this valuation, and orders conveyances to be made in conformity with, must be reversed, and that valuation set aside and a new one directed.

Decree accordingly.

Wheat, 3.

*[PRACTICE.]

[*58

THE DIANA.

Decree in an instance cause affirmed with damages, at the rate of six per centum per annum, on the amount of the appraised value of the cargo (the same having been delivered to the claimant on ball), including interest from the date of the decree of condemnation in the District Court.

APPEAL from the Circuit Court of South Carolina.

This was an information under the non-importation laws, against the ship *Diana* and cargo. Condemnation was pronounced in the District and Circuit Courts, and the cause was brought by appeal to this court. At the last term, on the hearing, it was ordered to further proof; and the further proof not being satisfactory, the decree of the court below was affirmed at the present term.

Mr. Berrien, for the United States, inquired whether the damages should be computed from the date of the bond given for the appraised value of the cargo, or from the decree of the District Court.

The court was of opinion that the damages should be computed at the rate of six per centum on the amount of the appraised value of the cargo, including interest from the date of the decree of condemnation in the District Court.

Decree affirmed.

Cited—5 Otto, 618.

*[INSTANCE COURT.]

[*59

THE NEW YORK. TROUP, Claimant.

Libel under the non-importation acts. Alleged excuse of distress repelled. Condemnation pronounced.

THIS cause was argued by *Mr. D. B. Ogden* for the appellant and claimant, and by *Mr. Hopkinson* and *Mr. Baldwin* for the United States.

*LIVINGSTON, J., delivered the opinion [*60 of the court:

This is an appeal from the Circuit Court for the Southern District of New York.

This ship was libeled for taking on board, at the Island of Jamaica, with the knowledge of the master, 51 puncheons of rum, 23 barrels of limes, and 20 barrels of pimento, with intention to import the same into the United States, contrary to the provisions of an act of Congress interdicting commercial intercourse between Great Britain and the United States, passed *the 1st of March, 1809, and the cargo was [*61

1.—The latter counsel cited *The Eleanor*, Edwards, 150, 160. In this case Sir William Scott observes, that "real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws. But if a party is a false mendicant, if he brings into a port a ship or cargo, under a pretence which does not exist, the holding out of such a false cause fixes him with a fraudulent purpose. If he did not come in for

libeled for an importation into the United States, in violation of the provisions of the same law.

A claim was interposed by John Troup, of the city of New York, merchant, which denies the allegation of the libel, as to the intention with which the articles mentioned in the libel were put on board at Jamaica; and as to the importation, he states, that on or about the 6th of October, 1811, the said ship, with the said cargo on board, being on the high seas on the American coast about five leagues distant from land, and having lost her rudder, and being otherwise disabled, was, by stress of weather, compelled to put into the port of New York, contrary to the will and design of the master, and against the express orders of the claimant, as owner thereof, communicated to the said master before his arrival.

On board the vessel were two manifests of the cargo, both of which stated the cargo to have been laden on board at Montego Bay, in Jamaica; but one of them declared her destination to be Amelia Island, and the other New York. The latter was delivered to an officer of the customs, and a certificate by him indorsed thereon, stating that fact, dated the 14th of October, 1811. The other manifest was exhibited at the custom-house in New York, on the 25th of October, 1811, at which time the master took the oath usual on such occasions, stating that the said manifest contained a true account of all the goods on board, and that there were not any goods on board, the importation of which into the United States was prohibited by law.

62*] *John Davison, the master, deposed, that he was with the said ship at Jamaica, in August, 1811. That his orders from the claimant were not to take on board at Jamaica any West India produce for the United States. That the consignee of the said ship, the Northern Liberties (evidently a mistake for the New York), insisted upon it that he should take a cargo of West India produce on board, stating it, as his opinion, that the non-intercourse law would probably be repealed before she could arrive at New York, and that, at any rate, he could stand off and on Sandy Hook until he should receive the orders of his owner how to proceed. That he was thus induced to take the said cargo on board, with which he sailed with orders from the consignee, and with in-

tention to obey them, not to attempt to come into the port of New York unless he received from the owner directions off Sandy Hook so to do; that on the 6th of October, in the same year, while on the voyage from Jamaica, they had a severe gale of wind from the south-west, varying to the southward and eastward, accompanied with a very heavy sea, which continued nearly twenty hours, in the course of which they split the foresail and carried away the rudder. That on the 11th day of October they made soundings about 40 miles to the southward of Sandy Hook, where he received a letter from the owner by a pilot-boat, the contents of which he communicated to the crew, and told them he should wait off the Hook until he received farther orders from the owner; but they declared that the rudder was in such a state that it was unsafe to remain in her at sea, and that they would leave the ship [*63 in the pilot-boat unless he would bring her into port. That, in his opinion, it would have been dangerous and very unsafe to continue at sea with the said ship in the condition in which the rudder then was, and he therefore consented to bring her into New York, believing that it was necessary to do so for the preservation of the cargo and the lives of the people on board; that he was towed into New York by a pilot-boat, as the pilot would not take charge of the ship unless she was towed.

The letter of the owner, referred to in the master's testimony, is dated in New York, the 8d of October, 1811, and is addressed to him as follows:

"Not knowing if you have rum in, I take this precaution by every boat; if you have rum, you are to stand off immediately at least four leagues, and keep your ship in as good a situation as you can, either for bad weather or to come in if ordered; you must get the pilot to bring up all the letters for me, &c., also, a letter from yourself, stating the state of your ship, provisions, &c., and bring them to town as soon as possible; give me your opinion of your crew, if you think they can be depended on if we find it necessary to alter our port of departure. If you have rum in, I expect the ship must go to Amelia Island, or some other port, as they seize all that comes here. You may expect to see or hear from me in a day or two after your being off, you keeping the Highlands N. W. of you I think will be a good berth. If you are within

the only purpose which the law tolerates, he has really come in for one which it prohibits—that of carrying on an interdicted commerce in whole or in part. It is, I presume, an universal rule, that the mere coming into port, though without breaking bulk, is *prima facie* evidence of an importation. At the same time, this presumption may be rebutted; but it lies on the party to assign the other cause, and if the cause assigned turns out to be false, the first presumption necessarily takes place, and the fraudulent importation is fastened down upon him. The court put the question to the counsel, whether it was meant to be argued, that the bringing a cargo into an interdicted port, under a false pretense, was not a fraudulent importation, and it has not been denied that it is to be so considered." "Upon the fact of importation, therefore, there can be no doubt; and, consequently, the great point to which the case is reduced is the distress which is alleged to have occasioned it. Now, it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient

to say it was done to avoid a little bad weather, or in consequence of foul winds; the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act; where, for instance, the ship has sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage. Such a case, though there might be no existing storm, would be viewed with tenderness; but there must be at least a moral necessity. Then, again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage; for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and is, therefore, liable to be rigidly examined."

three leagues of the land you are liable to seizure by any armed vessel."

On the 18th of October, 1811, a survey was [64*] made *of the New York by the board of wardens, which stated the rudder gone, the stern-post and counter plank injured; the oakum worked out, the main cap split and settled, fore-top-sail yards sprung, pallbits broken; fore-top-sail sheet bili started and broken. This injury was stated by the master to the wardens to have happened in a gale, in lat. 27° 30' N. and long. 80° W. The wardens gave it as their opinion that the said vessel ought to be unloaded, and hove out to repair her damages before she could proceed to sea in safety.

On the 7th of November, of the same year, after the New York was unloaded, the wardens again surveyed her, and reported the middle rudder brace broken, the crown of the lower brace gone, some of the sheathing fore and aft gone, the rudder badly chafed, and so much injured as not to be fit to be repaired.

On this evidence the District Court pronounced a decree of restitution. From this sentence the United States appealed to the Circuit Court, held for the southern district of New York, in the second circuit, where that sentence was reversed. From this last decree, an appeal is made to this court, whose duty it now is to inquire which of these sentences is correct.

If the articles in question were taken on board with the intention of importing the same into the United States, and with the owners or master's knowledge, a forfeiture of the vessel must be the consequence, whether she were forced in by stress of weather or not; and even if no such intention existed at the time of load- [65*] ing at Jamaica, the same consequence *will attach to the goods, if it shall appear that the coming in of the vessel was voluntary on the part of the master.

The claimant has first endeavored to clear the transaction of all illegality in its inception, and thinks he has offered testimony sufficient to satisfy the court that there was no intention at the time of loading at Jamaica, to import, the cargo into the United States.

When an act takes place, which in itself, and unexplained, is a violation of law, and the inducements to such infraction are great, it will not be thought unreasonable in a court to expect from a party who seeks relief against its consequences, the most satisfactory proofs of innocence, especially, as such proof will generally be within his reach. If, then, any papers, which in the course of such a transaction must have existed, are not produced, or if any others which come to light, do not correspond with the master's relation; and especially, if all the witnesses who are in the power, and many of them in the interest, and under the influence of the party, are omitted to be examined, when it is impossible that they should not be intimately acquainted with the most material circumstances; and instead of this, the chief, if not only reliance of the claimant, is placed on the evidence of a party, who, if the allegations of the libel be true, is himself liable to a very heavy penalty; when such a case occurs, a court must be expected to look at the proofs before it with more than ordinary suspicion and distrust.

In this case, there was an importation which, Wheat. 3.

prima facie, was against law, and was in the same degree *evidence of an original in- [*66] tention to import; the burthen, then, of showing the absence of such an intention, was thrown upon and assumed by the claimant. In doing this he satisfies himself with the examination of the master, who states that he had orders from his owner not to take on board at Jamaica any West India produce for the United States. What is become of these orders? Does a master sail on a foreign voyage with verbal instructions only? This is not the common course of business. Instructions to a master of a vessel are generally in writing; and for the owner's greater security, there is always left with him a copy certified or acknowledged by the former. If so, why are they not produced? They would speak for themselves, and be entitled to more credit than the declarations of a person so deeply interested to misrepresent the transaction, as this witness is. The court, therefore, might well throw out of the case the little that is said of these instructions, so long as they are not produced; and it is not pretended that they were not reduced to writing, or if they were, that they are lost; which, indeed, is not a very supposable event, if the ordinary precautions on this occasion have been observed. But notwithstanding these very positive orders, the master, in direct violation of them, and at the hazard of the most serious consequences to himself, takes on board a cargo expressly prohibited by his owner, in compliance with the directions and opinion of a consignee, whose name is also withheld, and who does not appear to have had any right to interfere in this way. So great a responsibility would have attached upon such *a pal- [*67] pable breach of orders that it is a good reason for doubting whether they ever existed. Nor is this part of the master's testimony verified by the claim, which observes a profound silence in relation to these or any other orders that may have been given. If no written instructions were delivered to the master, which we are at liberty to believe, as none are produced, a better mode could hardly have been devised to avoid detection. It has been said in argument, that the intention of the master's coming to the United States was altogether contingent, and depended on a repeal of the non-intercourse act, and that he, accordingly, did not mean to come in if that act were still in force. But how does this appear? Nothing of the kind is stated in his deposition; on the contrary, his coming in, according to his own account, depended not on the repeal of this law, but on the orders of his owner; he came, he says, on this coast, with intention to obey the orders of the consignee, not to attempt to come into port unless he received orders from the owner, off Sandy Hook, so to do. If, therefore, he had found those laws yet in force, which he probably had heard was the case, soon after his coming on the American coast, and long before he fell in with the pilot-boat which carried down the letter of his owner, he still intended to have come in, if his owner had ordered him so to do. His intention, therefore, as taken from his own relation, is not altogether of that innocent nature which it has been represented to be. When the vessel sailed from Jamaica, does not exactly appear; all we know from the master's account is, that she was

there in August, and met with a gale on the 6th [68*] of October following. It is probable, however, from these dates, that she had been long enough at sea to meet with one or more vessels from the United States, from which information might have been received of the actual state of things in this country in relation to this law. Whether any such vessel were met with, we know not; but might have known if any of the crew, or of the passengers had been examined, or the log-book produced. If such information were received on the coast, and the master of the New York had persisted afterwards in keeping the sea until he could hear from his owner, it would amount to strong proof of an original design to come here. The opinion which has already been intimated on this part of the case, which depends on the intention with which the cargo was loaded, will be much strengthened by proceeding to consider the plea of necessity on which the coming in is justified, and the facts relied on, in support of this plea. The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skillful mariner, a well-grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade. Such accidents happen in every voyage; and the commerce of no country could be subject to any regulations, if they might be avoided by the setting up of such trivial accidents as these. It ought, also, to be very apparent, that the [69*] jury, whatever it may be, has not been in any degree produced, as was too often the case, during the restrictive system, by the agency of the master and some of the crew.

Does, then, the testimony in this case carry with it that full conviction of the *vi major* which ought to be made out to avoid the effects of an illicit importation? It will not be right or proper for the court, in considering this part of the case, to divest itself of those suspicions which were so strongly excited in the first stage of this transaction; for if it were not very clearly made out that the lading of these goods on board was innocent, it will be some excuse for the incredulity which the court may discover respecting the tale of subsequent distress. On this point, also, the claimant is satisfied with the testimony of the master. Not a single mariner, not one of the passengers, although several were on board, is brought forward in support of his relation. Of the wardens' survey, notice will presently be taken. Now, admitting the master's story to be true, with those qualifications, however, which are inevitable, he has made out as weak a case of necessity as was ever offered to a court, in the many instances of this kind which occurred during the existence of the restrictive system. A gale of less than twenty hours' continuance was all the bad weather that was encountered, in which it is said the rudder was carried away and the foresail split; the rudder may have been injured, but it could not have been carried away, if it be true, as from the master's own account must have been the case, that the vessel after this accident made at least one thousand miles in the course of the first five days, immediately after. But it is said, that is

336

*no evidence as to the place where the ac- [*70] cident happened. Of this fact, the survey produced by the claimant himself is conclusive. It was taken from the mouth of the captain himself, and if he or the wardens committed a mistake in this important particular, why was it not corrected by an examination of the master, or a production of the log-book? Nor has it escaped the attention of the court, that if the New York were disabled in lat. 27° 30' north, long. 80° west, she might have reached Amelia Island, her pretended port of destination, with much more ease, and in much less time than she employed in sailing more than ten degrees to the north, and taking her station off Sandy Hook; for she was, on the 6th of October, much nearer to that island, and the wind was as fair as could be desired to carry her there. The plea of distress, therefore, is contradicted by a fact which could not have existed, if it had been as great as is now pretended; nor can it be believed, if any great danger had been produced by the gale of the 6th of October, that either the crew or the passengers would have submitted, not only to come so many degrees to the north, but continue hovering on the coast until the owner could be heard from. No leak appears to have been the consequence of the storm, no mast was lost, nor any part of the cargo thrown overboard; and if she steered and sailed as well as it seems she did, without a rudder, even a loss so very essential and serious to other vessels, must be allowed to have worked little or no injury whatever in this case. To the subsequent surveys by the *wardens of the port, as far as they ex- [*71] hibit the condition of the New York, but little importance is to be attached. It appears to have been an *ex-parte* proceeding, and if all the injuries which they describe existed, as they no doubt did, it is not certain whether they were produced by the gale spoken of, or by any other accident at sea, or by the act of the master himself; and, at any rate, their recommending repairs before she went to sea again was very natural, the vessel being then in port; but is no proof at all that she might not as well, and better, have gone to Amelia Island, as have come to that port. The letter to the master, which has been produced, does not place in a very fair light the pretensions of the claimant. However unpleasant the task, the court is constrained to make some remarks on it. It seems agreed that it is but little calculated to lull the suspicions which other parts of this case have excited. The interpretation resorted to by the claimant is at variance with the only appropriate sense of the terms which are used, and with the most manifest intentions of the writer. By changing the port of departure, nothing else could have been intended than to legalize the voyage by the crew swearing that the New York had sailed from some West India possession, not under the dominion of Great Britain. This sense of the letter, which seems inevitable, is but little favorable to the character of the claimant, or to the integrity of the transaction. Nor should it be forgotten that the master does not decide upon coming in until this letter is received; whereas, if his situation were as perilous as he now represents it, he could not and would not have waited *for orders. It is unnecessary to rely [*72] much on the two manifests; although one of them, bearing on its face a destination for New

Wheat. 3.

York, is certainly much at variance with the pretended contingent destination of this vessel. The oath which the master made at the custom-house, that no goods were on board of the New York, the importation of which was prohibited by law, was not only false, but is an evidence of very great incaution on his part; for if the collector would administer the oath in no other form, it was no reason whatever for his attesting to a fact, the falsity of which was apparent on the very manifest which was attached to the oath.

The alleged opposition of the crew to wait for further orders, and their threats to come up in the pilot boat, have not been overlooked. This allegation depends altogether on the credit due to the master, and is a circumstance not very probable in itself. No pilot, in the then condition of the New York, could have been so ignorant, and so regardless of his duty, as to take from her, without the master's consent, any part, much less the whole, of her crew. If the threat, therefore, were really made, the master ought not to have been alarmed at it, and probably would have treated it with contempt, if it had not been suggested by himself, or had not suited his then purpose; at any rate, if by remaining longer at sea than he ought to have done, or by hovering on the coast in expectation of orders from his owners, after having received so many injuries on the 6th of October, any additional danger were produced, or well-grounded apprehensions and opposition on the part of [73*] the crew, he would not, without great reluctance on the part of the court, be permitted to draw any very great advantage from a circumstance which his own imprudence, if not his own fault, occasioned. The towing of the New York into port by a pilot-boat is supposed to be a circumstance which must have proceeded from her disabled condition. This does not follow. It may have proceeded from the request of her master; for it can hardly be believed that a vessel that had behaved so well after the gale of the 6th of October, and which is not stated to have met with any injury from subsequent causes, should, the moment it was necessary to take a pilot on board, be so ungovernable as to require towing into port. If this were really the case, it is a matter of some surprise that the claimant should not have recourse to the pilot himself to establish the fact, and the reason of it.

Notwithstanding the untoward circumstances, which have already been taken notice of, and the temptations which existed to commit violations of the restrictive laws, which it is known were great, and led to frequent infractions of them, the court is asked to acquit this property, without producing the letter of instructions to the master, or the orders to the consignee in Jamaica, where it is alleged there was one, although his name is not given, or any bill of lading, or invoice, or log-book, and in the face of two manifests, the one purporting a destination contrary to law. To expect an acquittal, in a case involved in so much mystery, it is not too much to say, that the uncommon circumstances attending it should have been [74*] explained and accounted for in the most satisfactory manner. But when for this explanation the court is referred to the unsupported testimony of the master, who is himself the *particeps criminis*, if any offense have been committed, and who stands convicted on the papers before us, of a palpable deviation from truth, and whose account, if true, would have induced him and his crew to direct their course to Amelia Island, instead of encountering a more northern latitude, we must believe that the mate and others, who might have proved the fact of distress, if real, beyond all doubt, were not produced, not from mere negligence or inattention, but from a conviction that they would afford no sanction to the master's relation. It is now near eighteen months since the decree of the Circuit Court was pronounced, in which an intimation was given that further testimony would be admitted here, and yet none has been produced.

It is the opinion, therefore, of a majority of the judges, that the sentence of the court be affirmed with costs.

JOHNSON, J. This is a libel against the cargo of the ship New York. The vessel herself was libeled for lading a cargo with intent to violate the laws of the United States; but the cargo in this case is libeled as forfeited, for having been imported into the city of New York contrary to law. The intent with which it was laden on board becomes immaterial as to the cargo, except so far as it might operate to cast a shade of suspicion over the act of coming into port. The defense set up is, that the ship sailed [75*] with the alternative destination to go into New York if legal, and if not, to bear away for Amelia Island. That she was ordered to call off the port of New York for information; and in her voyage thither she encountered a storm, from which she sustained such damage as to oblige her to put into New York for the safety of the lives of the passengers and crew. That a vessel under such circumstances has a right to call off a port for information has been decided in various cases; and it has, also, been decided, and is not now questioned, that if in the prosecution of that voyage, she sustains such damage as renders it unsafe to keep the sea, she might innocently enter the ports of the United States to repair, and resume her voyage. The laws of the United States make provision in such cases for securing the cargo to prevent an evasion of our trade laws.

There are, then, but two questions in the case: 1st. Whether her actual state of distress was such as to make it unsafe for her to keep the seas. 2d. Whether that state of distress was the effect of design or accident. Admitting that the greatest frauds that can be imagined had been proven to have been in contemplation, yet, as the libel does not charge the lading with intent to import into the United States, it is immaterial to this decision to inquire what was intended, if it be made to appear that the distress was real, and not pretended or fictitious. Now, as far as I can judge, the facts in this case are such as leave nothing for the mind to halt upon. The distress was obvious to the senses, and the nature of it such as could not have been produced by the ingenuity of man. Without dwelling upon less important [76*] particulars, it appears, from the surveys, that the fore-topsail yards were sprung; the main-cap split and settled; and the rudder carried away, or, in the words of the survey, gone; and the stern-post, after-sheathing, and counter-plank much chafed. These words *carried away*

and gone, mean, in nautical language, wholly disabled or rendered useless. And that such was the state of the rudder is evident from the contents of the surveys. For, when the vessel was hove keel out, it appeared that the middle rudder brace was broken, and the crown of the lower brace gone; so that it is evident the rudder must have swung in the chains. And that this was the case, appears from several particulars, also gathered from the surveys: 1st. The impossibility, on any other supposition, to believe that the surveyors would on the first survey, before the vessel was hove down, report the rudder gone. 2d. The chafed state of the rudder and stern-post could only have been produced by the action of the rudder against the stern-post, when forced to and fro by the waves, and must have occurred at sea. And, lastly, the same cause naturally produced the injury reported to have been done to her counter-plank and after sheathing. These injuries, I repeat, could not have been done by the hand of man, especially those sustained under water; and although I see neither fraud nor falsehood in the case, yet I care not though every word of the testimony, besides, be false; that falsehood could neither have produced these injuries nor repaired them; and the evidence is [*77] sufficient to show that the safety of *the lives of the passengers and crew required the vessel to put into port, and therefore it was innocent.

In this opinion I am supported by two of my brethren, the Chief Justice, and WASHINGTON, J.

Decree affirmed.

Cited—3 Wheat. 407.

[PRACTICE.]

THE SAMUEL. BEACH ET AL., Claimants.

A witness offered to be examined, *viva voce*, in open court, in an instance cause, ordered to be examined out of court.

THIS cause, being an instance, or revenue case, had been ordered to further proof at a former term.¹

Mr. Dagget, for the claimants, now offered to produce a witness to be examined, *viva voce*, in open court on further proof; but the court, for the sake of convenience, ordered his deposition to be taken in writing out of court.

MARSHALL, Ch. J., delivered the opinion of the court, reversing the decree of condemnation in the court below, and ordering the property to be restored as claimed.

Decree reversed.

Cited—1 Wall. 9.

1.—*Vide ante*, vol. I., p. 9.

*[INSTANCE COURT.]

[*78]

THE SAN PEDRO. VALVERDE, Claimant.¹

Decree of restitution affirmed, with a certificate of probable cause, in an instance cause, on further proof.

THIS cause was ordered to further proof at the last term. Further proof was produced at the present term, and the cause submitted thereon without argument.

MARSHALL, Ch. J., delivered the opinion of the court, affirming the decree of restitution in the court below, with a certificate of probable cause of seizure.

Decree affirmed.

[PRIZE.]

THE STAR. DICKENSON ET AL., Claimants.

An American vessel was captured by the enemy, and after condemnation and sale to a subject of the enemy, was recaptured by an American privateer. Held, that the original owner was not entitled to restitution on payment of salvage, under the salvage act of the 3d of March, 1800, ch. 14, and the prize act of the 28th of June, 1812, ch. 107.

*By the general maritime law, a sentence [*79] of condemnation completely extinguishes the title of the original proprietor.

By the British statute of the 18th George II., ch. 4, the *jus postliminii* is reversed to British subjects upon all recaptures of their vessels and goods by British ships, even though they have been previously condemned, except where such vessels, after capture, have been set forth as ships of war.

The statute of the 43d George III., ch. 180, s. 30, has no further altered the previous British laws than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy.

Neither of these statutes extend to neutral property.

The 5th section of the prize act of the 28th June, 1812, ch. 107, does not repeal any of the provisions of the salvage act of the 3d of March, 1800, ch. 14, but is merely affirmative of the pre-existing law.

By the law of this country the rule of reciprocity prevails upon the recapture of the property of friends.

The law of France denying restitution upon salvage after 24 hours' possession by the enemy, the property of persons domiciled in France is condemned as prize by our courts on recapture, after being in possession of the enemy that length of time.

APPEAL from the Circuit Court for the District of New York.

It appeared by the libel, claim, evidence, and admissions of the parties in this cause, that the ship Star was captured by the American privateer Surprise, on the high seas, on the 27th of January, 1815. That the ship Star was then on a voyage from the British East Indies to London. That she was under the British flag, had British papers as a trading vessel, and a

1.—*Vide ante*, vol. II., p. 9.

NOTE.—A prize which has been taken in violation of the neutrality of the United States, and which is brought within the jurisdiction of the United States for adjudication will be restored. The *Estrella*, 4 Wheat. 298; The *Neustra Senora de la Coridad*, 4

Wheat. 3.

license from the British East India Company, and that her ostensible owners were British subjects, residing in London. It further appeared that previously to the late war, and till, and at the time of the capture and condemnation in the British *Court of Admiralty hereinafter mentioned, the said ship was a duly registered American ship, and was owned by Isaac Clason, deceased, an American citizen, residing in New York, or by the claimants, his executors, who were also American citizens, residing in New York.

That soon after the commencement of the late war, the said ship sailed from the United States on a foreign voyage, and immediately after leaving a port of the United States on the said voyage, was captured by a British vessel of war, and carried into Halifax, Nova Scotia, where she was regularly libeled and condemned as prize in the Court of Vice-Admiralty of that province; after which she was purchased by the British subjects who claimed to own her at the time she was recaptured by the Surprise. This last-mentioned capture having been made, the ship Star was brought into the port of New York, and libeled in the District Court of New York as prize to the said privateer; upon which libel the appellants put in a claim, claiming the said ship as the property of their testator, and claiming to have the said ship restored to them upon the payment of salvage; which claim was rejected, and the ship was condemned. The cause was then carried to the Circuit Court, where the decree of the District Court was affirmed. It was then brought, by appeal, to this court.

Mr. Key, for the appellants and claimants. The question in this cause arises under the prize act of the 26th of June, 1812, sec. 5, which, it is **81*** contended, *repeals the salvage act of 1800, as to this matter. The latter act provides that condemnation in the enemy's prize courts shall be a bar to restitution on salvage to the original owner. The 5th section of the prize act of 1812 declares, "that all vessels, goods, and effects, the property of any citizen of the United States, or of persons resident within, and under the jurisdiction of the United States, or of persons permanently resident within, and under the protection of any foreign prince, government, or state, in amity with the United States, which shall have been captured by the enemy, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." This sec-

tion directs all vessels, goods, and effects, of citizens and neutrals, recaptured from the enemy, to be restored on payment of salvage, without reference to the fact whether they had been previously condemned or not; and so far it modifies and repeals the salvage act of 1800. The original owner is, therefore, entitled to restitution, notwithstanding the British condemnation. Upon any other interpretation the entire section would become wholly inoperative, as every case is included in the previous act of 1800. When that act passed, our law conformed to the English rule which then prevailed. England subsequently altered her law, and our act *of 1812 copied the British **[*82]** statute of the 43d George III.¹ That act must have been intended to make some change in the existing legislation on the subject; and it is probable that Congress meant to make a distinction between recaptures by public ships and by private ships, unfavorable to the latter. The "provisions heretofore established" do not refer to all the provisions of the act of 1800; these words merely refer to the rate of salvage fixed by that act, and not to the principle of restitution. The latter is changed; the former remains unaltered.

Mr. Winder and *Mr. Harper*, contra. The act of 1800 was not a prize act for privateers. The provision in the act of 1812 is merely incidental, and refers to the pre-existing law. Our policy of 1812 was not like that of England, which contemplates the extreme probability of the recapture of British vessels, even after condemnation by the enemy. Our object was to hold out the most liberal encouragement to cruising. The British salvage acts merely refer to the recapture of British property; our act extends to neutral, as well as American property. The British statutes are merely an exception to the general rule, municipal and local. Our law is founded on the law of nations. The construction contended for might extend to enforce a demand of restitution after the lapse of an indefinite length of time, and after the intervention of repeated treaties of peace. *The **[*83]** act of 1800 is merely in affirmance of the law of nations, which universally vests the title of the original owner after condemnation. The very term *recapture*, implies former ownership still subsisting; but it does not subsist here. How could the former owner be considered the "lawful owner" after condemnation? "The nature of each case" is to be determined by reference to the act of 1800, and imports something more than the mere rate of salvage. The contrary construction would make a distinction between public ships and privateers, unfavora-

1.—Park on Insurance, 94th ; London ed., 2 Marshall on Ins. 501; Horne's Compendium, 34.

Wheat. 497, 502; *La Armistad de Rues*, 5 Wheat. 385; *La Concepcion*, 6 Id. 235; *The Grau Para*, 7 Wheat. 471; *The Arrogante Barcelones*, 7 Wheat. 496; *Stoughton v. Taylor*, 2 Paine, 655.

Such a capture, however, if authorized by the sovereign of the captor, is legal between the parties, and if the prize is carried into his jurisdiction it cannot be recovered.

Stoughton v. Taylor, 2 Paine, 655, 685; 3 Wheat. Cr. Cas. 282.

Under the salvage act of March 3, 1790, as well as by the general maritime law, the rule of reciprocity is to be applied to recapture of the property Wheat. 3.

of friends. If the friendly nation would restore in a like case, then the U. S. are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. *The Adeline*, 9 Cranch, 244, 288.

Salvage is not due for rescuing the vessel of a neutral out of the hand of a belligerent, who has taken possession for a supposed violation of a treaty, or of the law of nations. *Waite v. The Antelope*, Bee's Adm. 233.

Capture, as prize of war, overrides all previous liens. *The Battle*, 6 Wall. 498.

See note to *Williams v. Armroyd*, 7 Cranch, 423.

ble to the latter, contrary to the uniformed policy of the country; and would create a confusion as to the recapture of the property of friends, which it cannot be supposed the legislature intended to introduce. The equitable rule of reciprocity would be prostrated; and neutral property must, in all cases, be restored (after or before twenty-four hours' possession by the enemy), although the friendly power would not in the same case restore. Such a departure from the public law of the world is not to be lightly presumed; and statutes made *in pari materia* are to be construed together, and nothing is to be repealed by mere implication that may stand consistently with former enactments.

Mr. Jones, in reply. The claimants found their claim to restitution on payment of salvage, upon the 5th section of the act of the 26th of June, 1812. The captors resist the claim because the vessel was condemned before the recapture, and contend that the act of the 3d of March, 1800, is the law which is to determine **§4*** the rights of the parties. This seems, *in fact, to be contending that a prior law repeals a subsequent one. If the act of 1812 is taken by itself there can be no doubt but there must be restitution. But the captors insist that the words, "according to the nature of the case agreeably to the provisions heretofore established by law," which are found in the act of 1812, refer to the act of 1800, so as to determine by that law when restitution is, or is not to be made. Yet it seems obvious that these words refer to that law only for the measure and rule of salvage. According to the law of 1812, property of a citizen of the United States, recaptured from the enemy, is liable to be restored, but it is to be restored upon the payment of salvage, agreeably to the nature of the case. And to determine the nature of the case, and for no other purpose, we are referred to the pre-existing laws. If the act of 1812 is to be construed as the captors would construe it, then this fifth section is an absolute nullity. For if the law of 1800 is to be resorted to in order to determine, as well when restitution is to be made as the salvage to be paid, there is no case in which the law of 1812 can have any operation. By the marine law of England, as it stood previously to any statute regulation on the subject, there could be no restitution after condemnation. Our law of 1800 adopted this principle. But by the English law, restitution is now to be made in all cases on the payment of salvage. The act of 1812 was doubtless intended to be in conformity to this just modification of the English law, of which it is almost a literal copy. There was good reason for this modification of the marine law in respect to our privateers. The **§5*** enemy had their courts of vice-admiralty at our very doors; our vessels would be captured one day and condemned the next. The legislature did not intend that the American owner should be deprived of his right of restitution by a condemnation, when there would be no more merit in recapturing a vessel that had been condemned than one that was not. There might have been reason for distinguishing between captures by our public and by private armed vessels. It was to be supposed that our privateers would be cruising about the ports of the enemy in our neighborhood, and

would be likely to recapture American property recently captured and recently condemned. The employment of our men-of-war, it might have been contemplated, would be more distant and difficult. Why should the condemnation have any effect as to the right of restitution, when the property is recaptured from the hands of an enemy? The law, as to restitution on salvage, would have no operation if the property after condemnation came to the hands of a citizen or a neutral, because then there could be no recapture. To let the title to restitution depend on the condemnation, is to let the right of the citizen depend on the act of the enemy.

STORY, J., delivered the opinion of the court:

This is the case of an American ship, captured by the enemy during the late war, and after condemnation and sale to an enemy merchant, recaptured by the American private armed ship *Surprise*. And the question is, whether, under these circumstances, *the [**§6** ship is to be restored on salvage to the former American owner, or condemned as good prize of war. If the case were to stand on the general salvage act of 1800, in cases of recapture (act of 3d of March, 1800, ch. 14), it is perfectly clear that the claimants are barred of all right; for that act expressly excepts from its operation all cases where the property has been condemned by competent authority. The same result would flow from the principles of the law of nations. It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title to the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture or on the *pernoctation*, or on the carrying *infra praeidia*, of the prize; it is universally allowed that, at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property recaptured from an enemy after condemnation would, by the law of nations, be lawful prize of war, in whomsoever the antecedent title might have vested.

It is supposed, however, that the provisions of the salvage act of 1800, ch. 14, are materially changed, in cases of captures by private armed ships, by the fifth section of the prize act of the 26th of June, 1812, ch. 107. That section declares "that all vessels, goods, and effects, the property of any citizen of the United States or of persons resident within and under the protection of the United States, or of persons *permanently resident within and [**§7** under the protection of any foreign prince, government, or state, in amity with the United States, which shall have been captured by the enemy, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners upon payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." The argument is, that as the section directs all vessels,

goods, and effects of citizens and neutrals recaptured from the enemy to be restored, without any reference to the fact whether they had been previously condemned or not, it so far qualifies and repeals the salvage act of 1800; and that consistently with this construction, the words "agreeably to the provisions heretofore established by law," may and ought to be referred to the rate of salvage fixed by the act of 1800, and not to the provisions of that act generally. In support of this argument, it has been urged; that upon any other construction the whole section becomes completely inoperative, as every case is embraced in the previous law. That Congress may well be presumed to have intended to make a discrimination between cases of recapture by public and private ships of war, unfavorable to the latter; and that Congress may have had in view a conformity to the British prize code, which since the passing of the act of 1800 had been changed in the manner now contended for by the claimant.

88*] *The argument asserted from the British prize code, certainly, cannot be supported upon the notion of any supposed recent change in the law relative to recaptures. So early as the reign of George II. the *jus postliminii* was, by statute, reserved to British subjects upon all recaptures of their vessels and goods, by British ships, even though a previous condemnation had passed upon them, with the exception of cases where such vessels, after capture, had been set forth as ships of war. The statute of 43 Geo. III., ch. 160, s. 39, has no further altered the previous laws than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy. And the terms of this statute are very different from the language of the fifth section of our prize act of 1812, and expressly exclude from its operation and benefits all neutral property.

In respect to the legislative intention, it is extremely difficult to draw any conclusion unfavorable to private armed ships from the language or policy of the prize act, or any subsequent act of Congress passed during the war. The bounties held out to these vessels, not only by the prize act, but by other auxiliary acts, manifest a strong solicitude in the government to encourage this species of force. But we are not at liberty to entertain any discussions in relation to the policy of the government, except so far as that policy is brought judicially to our notice in the positive enactments, and declared will of the legislature. We must interpret, therefore, this clause of the prize act by the general rules of construction applicable to **89*]** *all statutes; and in this view we are of opinion that the doctrine contended for by the claimant ought not to prevail.

In the first place, the section in question contains no repealing clause of any of the provisions of the salvage act of 1800, and therefore the whole laws on this subject are to be construed together, and unless so far as there is any repugnancy between them, are to be considered as in full force. That the section is free from all doubt in its language need not be asserted; but that every portion of it may, by fair rules of interpretation, be deemed merely affirmative of the existing law, is with great confidence maintained. There is no repugnancy

which requires or even affords a presumption of legislative intent to repeal any portion of the salvage act. It is true that the section declares that all vessels, goods, and effects recaptured shall be restored; but to whom are they to be restored? Certainly, by the very terms of the act, to the "lawful owners," which to prevent the most injurious, and we had almost said absurd, consequences, must mean the "lawful owners" at the time of the recapture. But the lawful owners of recaptured property, which has been, already, lawfully condemned, is not the original proprietor, but the person who has succeeded to that title under the decree of condemnation. Suppose the property at the time of the capture had belonged to one neutral, and after condemnation had been sold to another neutral and then captured and recaptured by the enemy, can there be a doubt that the latter is, to all intents and purposes, the true and lawful owner, and that he may assert his title ***90** against the first proprietor? Besides, recapture by force of the term would seem most properly applied to cases where an inchoate title only was vested by capture. Can it be said, in strict propriety of language, that property captured from an enemy, which at the time is the lawful property of an enemy purchaser, is recaptured from his hands? The recapture is always supposed to be from those who are the original captors, not from persons who have, by operation of law, succeeded to the title acquired under a decree of condemnation.

The section, however, does not stop here; nor is it necessary to rest its construction upon the import of a few detached terms. It proceeds to declare that the recaptured property shall be restored to the lawful owners upon payment of a reasonable salvage, "according to the nature of each case, agreeably to the provisions heretofore established by law." Here is a direct and palpable reference to the salvage act, not for the purpose of repeal, but for the purpose of recognizing it as in full force in respect to all cases of recapture. It is argued that the reference is confined to the mere rates of salvage established by that act. Let us see whether, consistently with any supposed legislative intention, or any reasonable principle, such a construction can be sustained.

In the first place, it would make a discrimination between recaptures of property belonging to the United States and property belonging to neutrals and citizens, wholly unaccountable upon any principles of national policy. In case of a previous condemnation, the property, if belonging to citizens or neutrals, would be restored on salvage; if belonging ***to the** ***91** United States, it would be wholly condemned as good prize of war. In the next place, the property of neutrals and citizens, if recaptured by public ships, would be good prize; but if recaptured by private armed ships, would be restored on salvage. Yet in respect to neutrals or citizens, if the intention was to confer a benefit on them, the reason would seem equally to apply to both cases. And if there was a policy in discouraging captures by privateers, and encouraging captures by public ships, it is strange that the legislature should not, in relation to captures not within the purview of this clause, have made a similar discrimination. The reason would be the same, and yet in those

cases the salvage act uniformly gives a higher rate of salvage to private armed ships than to public ships; and the prize acts superadd an exclusive bounty on prisoners of war captured by private armed ships of no inconsiderable value. And whatever might be the case in relation to our own citizens, it is somewhat singular that the legislature should be paying bounties out of the treasury to encourage privateers, when they were in favor of neutrals, having no legal title, taking from them a large proportion of the lawful proceeds of prize.

There is yet another case which affords a more striking illustration of the difficulties which surround this construction. The salvage act of 1800 declares, that upon the recapture of neutral property the rule of reciprocity shall prevail. If the neutral would in the like case restore on salvage, then the American courts are to restore on the same salvage; if otherwise, then they are to condemn. If, therefore, by the 92*] prize act of 1812, restitution is to be made in all cases of recapture of neutral property, and yet in the like cases the neutral sovereign would not restore, it would follow that the restitution would be without payment of any salvage, which would be repugnant not only to the intent, but to the words both of the salvage act and the prize act in any mode of interpretation. In a recent case in this court (*The Adeline*, 9 Cranch, 244), condemnation passed upon some French property which, during the late war, had been captured by the enemy, and recaptured by an American privateer, upon the ground that the rule of reciprocity established by the salvage act of 1800 applied to the case; and as France would deny restitution, our courts were bound to apply the same principle to her.

There does not, therefore, seem any solid reason on which to rest the construction contended for by the claimant. And there are the most weighty reasons, founded upon public inconvenience, upon national law, and upon the very terms of the salvage and prize acts, for the contrary construction. In considering the section in question as merely affirmative, every

difficulty vanishes, and the symmetry of a system apparently built up with great care and caution, as well as in strict accordance with the received principles of public law, is maintained and enforced.

But it has been asked if the section is merely affirmative, what reason can be assigned for its enactment? If no satisfactory answer could be assigned, it would not impair the force of the preceding reasoning. It is very common for the legislature to make laws in affirmance both of the common *and statute law. This [*93] very act gives the district courts cognizance of captures, and yet it was clearly settled that the courts already possessed the same jurisdiction. Doubts may, and often do, arise how far a provision already in existence may be applied to cases contemplated in new statutes. To obviate such doubts, whether real or imaginary, is certainly not an irrational or unsatisfactory mode of legislation, and often prevents serious mischiefs during the fluctuations of professional opinions, prior to a legal adjudication. It was probably to obviate some doubt of this sort that the clause in question was inserted in the act. Nor is it difficult to perceive some room for subtle doubt from the generality of the preceding (s. 4) section. That section declares that "all captures and prizes of vessels and property shall be forfeited," and accrue to the owners, officers and crew of the capturing private armed ship; and from the generality of this language it might possibly (we do not say upon any sound interpretation) have been doubted whether the words "all captures" might not be held to comprehend captures of neutral property, which had not yet been condemned. At all events upon every view of this case the court are of opinion that the property having been previously condemned and title passed to the enemy, and, consistently with the salvage and prize acts, must be decreed to be good prize of war.

Decree affirmed with costs ¹

Cited—2 Sprague, 119; 1 Wood. & M. 484.

1.—*Vide ante*, Vol. II. Appendix, note I. pp. 40-49. As by the salvage act of the 3d of March, 1800, 94*] ch. 168, the rule *of reciprocity (or, as Sir William Scott calls it, amicable retaliation), is the rule to be applied to cases of recaptures of the property of friendly nations, it may be useful to state the provisions contained in the different maritime codes on this subject, or which have been substituted in their place by treaty.

The present British law of salvage is established by the act of the 43d Geo. III., ch. 160, the 39th section of which provides that, "If any ship or vessel, taken as prize, or any goods therein, shall appear, in the Court of Admiralty, to have belonged to any of His Majesty's subjects, which were before taken by any of His Majesty's enemies, and at any time afterwards retaken by any of His Majesty's ships, or any privateer, or other ship, or vessel, under His Majesty's protection; such ships, vessels and goods, shall, in all cases (save as hereafter excepted), be adjudged to be restored, and shall be accordingly restored, to such former owner, or owners, he or they paying for salvage, if re-taken by any of His Majesty's ships, one-eighth part of the true value thereof, to the flag officers, captains, &c., to be divided, &c. And if retaken by any privateer, or other ship or vessel, one-sixth part of the true value of such ships and goods to be paid to the owners, officers, and seamen of such privateer, or other vessel, without any deduction. And if retaken by the joint operation of one or more of His Majesty's ships, and one or more private ships

of war, the judge of the Court of Admiralty, or other court having cognizance thereof, shall order such salvage, and in such proportions, to be paid to the captors, by the owners, as he shall, under the circumstances of the case, deem fit and reasonable. But, if such recaptured ship or vessel shall appear to have been set forth by the enemy as a ship or war, the said ship or vessel shall not be restored to the former owners; but shall, in all cases, whether retaken by any of His Majesty's ships, or by any privateer, be adjudged lawful prize, for the benefit of the captors.

This rule, with respect to the property of British subjects, is applied to recaptures of the property of nations in amity with Great Britain, until *it [*96] appears that they act towards British property on a less liberal principle; in such case it adopts their rule, and restores, at the same rate of salvage, or condemns, under the same circumstances in which their own law and practice restores or condemns. *The Santa Cruz*, 1 Rob. 5, 63.

By the most recent French law, if a French vessel be retaken from the enemy, after being in his hands more than twenty-four hours, if recaptured by a privateer, she is good prize to the recaptor; but if retaken before twenty-four hours have elapsed, she is restored to the owner, with the cargo, upon the payment of one-third the value for salvage, in case of recapture by a privateer, and one-thirtieth in case of a recapture by a public ship. But in case of recapture by a public ship, after

[COMMON LAW.]

LANUSSE v. BARKER.

B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January, 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her five hundred bales of cotton on the owners' account; "for the payment of all shipments on owners' account, thy bills on T. & Son, of Portland, or me, 60 days' sight, shall meet due honor." On the 13th of February, B. again wrote to L. reiterating the former request, and inclosing a letter from T. & Son to L. containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills 102^d on me for their account. *for cotton they order shipped by the Mac shall meet with due honor." On the 24th of July, 1806, B. again wrote L. on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor at 60 days' sight." L. proceeded to purchase and

ship the cotton, and drew several bills on B., which were paid. He afterwards drew two bills on T. & Son, payable in New York, which were protested for non-payment, they having, in the meantime, failed; and about two years afterwards, drew bills on B. for the balance due, including the two protested bills, damages and interest.

Held, that the letters of the 13th of February and 24th of July, contained no revocation of the undertaking in the letter of the 9th of January; that, although the bills on T. & Son were not drawn according to B.'s assumption, this could only affect the right of L. to recover the damages paid by him on the return of the bills, but that L. had still a right to recover on the original guaranty of the debt.

It was also held that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also held, that L. had a right to recover from B. the commissions, disbursements, and other charges of the transaction.

Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at

twenty-four hours' possession, she is restored on a salvage of one-tenth. (a)

96. *Although the letter of the ordinances previous to the revolution condemns as good prize. French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems to have been the constant practice in France to restore such property when recaptured by the king's ships. Vallin sur l'Ord. Liv. 3, tit. 9, Des Prises, art. 3; Traite des Prises, ch. 6, sect. 1, n. 8, s. 88; Pothier, De Propriete, n. 9; Emerigon, Des Assurances, tom. 1, p. 497. The reservation contained in the above ordinance of 1779 made the salvage discretionary in every case, it being regulated by the king in counsel according to the particular circumstances. Emerigon, Ib.

France applies her own rule to recaptures of the propriety of friendly nations. Pothier, De Propriete, n. 100; Emerigon, Des Assurances, tom. 1, p. 499. By the regulation of the 2 Prairial, 11th year, art. 54, this relaxation of the rule as to captures by public ships is extended to allies generally, so as to grant them restitution after twenty-four hours' possession by the enemy upon the payment of a salvage of one-tenth; but restitution recaptured by public ships has always been made to the subjects of Spain on account of the intimate relation subsisting between the two powers, whilst it is refused even to them in recaptured by privateers. Azuni, Part 2, ch. 4, s. 11; Bonnemant's Translation of De Habreux, tom. 2, p. 83, 84.

The French law, also, restores upon payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the enemy leave the prize a derelict, or it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. Ordonnance de 1831,

liv. 3, tit. 9, Des Prises, art. 9, *Vide ante*, Vol. II., Appen. p. 47.

*Spain formerly adopted the law of France, [*97 having taken its prize code from that country, with which it had been so long connected by the closest ties; and in the case of the San Jago (mentioned in The Santa Cruz, 1 Rob. 50), it was applied by the lords of appeal upon the principle of reciprocity as the rule in British recaptures of Spanish property. But by the Spanish prize ordinance of the 20th of June, 1801, art. 38, it was modified as to the property of friends, it being provided that when it appears that recaptured ships of friends are not laden for enemy's account, they shall be restored, if recaptured by public vessels, for one-eighth, if by privateers, for one-sixth salvage; provided, that the nation to whom such property belongs has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property, it being restored without salvage if recaptured by a king's ship before or after twenty-four hours' possession; and if recaptured by a privateer within the twenty-four hours, upon payment of one-half for salvage; if recaptured after that time it is condemned to the recaptors. The Spanish law has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.

Portugal had adopted the French and Spanish law in her ordinances of 1704, and of December, 1706. But in May, 1797, after the Santa Cruz was taken, and before the judgment in that case, Portugal revoked her former rule that twenty-four hours' possession devastated the property, and allowed restitution, on salvage of one-eighth, if the recapture was by a public ship, and one-fifth if by a privateer. In The Santa Cruz and its fellow cases, Sir W. Scott distinguished between recaptures made

(a).—"Si aucun navire de nos sujets pris par nos ennemis, a ete entre leur mains jusques à vingt-quatre heures, et après, qu'il soit recoué et repris par aucuns de nos navires de guerre ou autres de nos sujets, la prise sera declaree bonne: mais si la dite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le navire de guerre qui l'aura recoué et repris, le tiers." Ordonnance d'Henri III. en Mars, 1584, art. 61. "Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeure entre leur mains pendant vingt-quatre heures, il sera restitué au propriétaire, avec tout ce qui étoit dedans à la réserve du tiers qui sera donné au navire qui aura fait la recousse." Ordonnance de 1681, Liv. 3, tit. 9, des Prises, art. 8. "Les réglemens concernant la recousse continueront d'être observés suivant leur forme et tenor; en conséquence, lorsque les navires de ses sujets auront été repris par les corsaires armés en course contre les ennemis de l'état, après avoir été vingt-quatre heures en leur mains, ils leur appartiendront en totalité; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire recoué et de sa cargaison. En ce qui concerne les reprises faites par les vaisseaux, frégates ou autres

bâtiments de sa majesté, le tiers sera adjugé a son profit pour droit de recousse, si elle est faite dans les vingt-quatre heures; et après ledit délai, la reprise sera adjugée en totalité a sa majesté, sans que les états-majors des dits vaisseaux et frégates puissent y rien prétendre; se réservant sa majesté d'accorder aux équipages, une gratification proportionnée a la valeur du bâtiment et de sa cargaison, d'après les connoissances et factures, comme aussi de donner aux états-majors des vaisseaux qui auront faites les reprises, et qui auroient eu soin de se distinguer par des actions, de valeur, telles grâces ou récompenses que sa majesté avisera bon être, suivant les circonstances." Ordonnance de 15 Juin, 1779. "Lorsque les bâtimens Français auront été repris par les vaisseaux de la république, après avoir été 24 heures au pouvoir de l'ennemi, les bâtimens et leur cargaisons appartiendront en totalité aux équipages preneurs; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire repris et de sa cargaison." Loi d'Octobre, 1793. By the regulation of the 2d of Prairial, year 11, art. 54, the rate of salvage on recaptures by public ships, before twenty-four hours' possession, was fixed at one-thirtieth.

Wheat. 8.

that place. In this case, therefore, the legal interest at New Orleans was allowed.

An agreement of the parties entered on the transcript, stating the amount of damages to be adjudged to one of the parties upon several alternatives (the verdict stating no alternative), not regarded by this court as a part of the record brought up by the writ of error; but a *venue de novo* awarded to have the damages assessed by a jury in the court below.

ERROR to the Circuit Court for the District of New York.

This was an action of *assumpsit* brought in the Circuit Court of New York by the plaintiff in error, against the defendant, to recover the amount of 500 bales of cotton, shipped by the 103*] plaintiff from New Orleans, on account of John Taber & Son, of Portland, in the district of Maine, upon the alleged promise of the defendant to pay for the same, with the incidental disbursements and expenses.

At the trial a verdict was taken, and judg-

ment rendered thereon for the defendant, and the cause was brought up to this court by writ of error.

On the 19th of December, 1805, the defendant, a merchant in New York, wrote a letter to the plaintiff, a merchant in New Orleans, containing, among other things, the following passage:

"I am loading the ship Mac for Jamaica; she belongs to my friends, John Taber & Son, Portland, who, I expect, will order her from thence to New Orleans, to thy address for a freight, and in that case, if thee makes any shipments for my account to the port where she may be bound, give her the preference of the freight."

This letter was received by the plaintiff on the 6th of February, 1806.

On the 9th of January, 1806, the defendant wrote to the plaintiff the following letter:

before and since the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage fixed by the Portuguese ordinances.

The ancient law of Holland regulated restitution on salvage at different rates, according to the length of time the property had been in the enemy's possession. *Bynk. Q. J. Pub. l. 1, ch. 5. But as between the United States and the Netherlands, this matter is regulated by the convention of 1782, the first article of which provides, that recaptured vessels of either nation, not having been twenty-four hours in possession of the enemy of either, shall be restored on payment of one-third salvage, if recaptured by a privateer. By the 2d article, if the vessel has been twenty-four hours in possession of the enemy, and is recaptured by a privateer, she shall be condemned to the recaptors. By the 3d article, if the recapture is made by a public ship, the property is to be restored on payment of a thirtieth part for salvage, in case it has been twenty-four hours in possession of the enemy; if longer, a tenth part.

The treaties between the United States and Prussia of 1785 and 1790, by which recaptures from a common enemy were regulated, have both expired.

The ancient law of Denmark condemned after twenty-four hours' possession by the enemy, and restored if the property had been a less time in his possession, upon payment of a moiety for salvage. But the ordinance of the 28th of March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one-third for salvage.

By the ancient Swedish ordinances, and that of July, 1784, it is provided, that the rates of salvage on Swedish property shall be one-half of the value, without regard to the length of time the property may have been in the enemy's possession. The treaty between the United States and Sweden of 1783, which has expired, contained precisely the same stipulations on this subject as that with the Netherlands.

Although our salvage act may not, perhaps, extend to cases of recapture from pirates, yet there can be little doubt that the benefit of the same equitable rule of reciprocity which is recognized by the statute, and is also a principle of public law, would be imparted to such cases. Thus Valin is of the opinion that the property of friendly nations,

retaken from pirates by French captors, ought not to be restored to them upon payment of salvage. If the law of their own country gives it wholly [*99] to the retakers, otherwise there would be a defect of reciprocity, which would offend against that impartial justice which is due from one state to another. (a)

As a capture by pirates cannot divest the title of the original owner by any length of possession, however great, it is obvious that the former proprietor is entitled to restitution in case of recapture from them by friendly powers, upon the payment of a reasonable salvage. But certain nations have established a different rule, at least as respects the property of their own subjects, and give the whole property recaptured from pirates to the retakers. Such was, or is, the usage of Holland, Spain, and some of the Italian states. Grotius, De J. B. ac P. L. 3, ch. 9, sec. 17; De Habitu, Part 2, ch. 6.

But Grotius is of the opinion that such a municipal regulation cannot prevent foreigners from reclaiming their property upon payment of a reasonable salvage, because by the universal law of nations the property of the original owner is not divested on a capture by pirates. (b)

And by the 9th article of the treaty of 1795, between the United States and Spain, the latter has dispensed with her peculiar law in this respect, both parties having stipulated to restore the property of either nation recaptured from pirates.

In case of recapture from pirates, the French law restores the property of subjects and allies (in which last term neutrals are included), on payment of one-third for salvage. (c)

A capture by a cruiser of the Barbary powers is not a "piratical seizure, which will have the [*100] effect of invalidating the conversion of property under it. They were formerly considered as pirates, but have since acquired the rights of legation and of war in form. Consequently, recaptures from them are to be judged by the same rule as those from any other public enemies. The Helena, 4 Rob. 3; Sir L. Jenkins's Works, Vol. II., p. 791; Bynk. Q. J. Pub. L. 1, ch. 17; Emerigon, Des Assurances, tom. 1, p. 526. (c) But the law of nations, as received among the nations of Europe and the countries colonized by them, or that portion of the human race dominated by Christendom, is not to be applied to them, to the Turks, and other Mohammedan people, with the same rigor and in all the details with which it is administered among that class of nations to which it is peculiarly applicable.

tiers de la valeur du vaisseau, et des marchandises pour frais de recousse. Ord. de 1681, L. 3, tit. 9, Des Prises, art. 10.

(c).—Depuis long-temps, les mœurs antiques étoient disparues des Bords Africains. Les Barbares étoient devenus de vrais pirates. Bugta, *ed algeri, infanti, nidi di corsari*, dit le Tasse; Jérusalem délivrée, chant. 15, st. 21. Mais aujourd'hui ils ne méritent plus cette qualification, parce que dans leur guerre, ils se conforment à l'ancien droit des gens. Ce n'est que par représailles que leurs prisonniers deviennent esclaves parmi nous." Emerigon, loc. cit. Tom. 1, p. 256.

(a).—"Mo foroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leur effets repris sur des pirates par des Français, ne doivent s'entendre que de ceux qui suivent la même jurisprudence que nous; autrement, il n'y auroit pas de réciprocité: ce qui blesseroit l'égalité de justice, que les états se doivent les uns aux autres. Sur l'Ord. L. 3, tit. 8, art. 10; Traité des Prises, ch. 6, sec. 2, n. 8.

(b).—"Les navires et effets de nos sujets ou alliés repris sur les pirates, et réclamés dans l'an et jour de la Déclaration qui en aura été faite en l'Amirauté, seront rendus aux propriétaires, en payant le

(Original per Mac.)

NEW YORK, 1st month, 9th, 1806.

Paul Lanusse, Esq.:

"Esteemed Friend—This will be handed you by Captain Robert Swaine, of the Portland ship Mac, which vessel is bound from this to Jamaica, and from thence to New Orleans in pursuit of freight; she will be to thy address; she is a good ship, between three and four **104***] *years old, has an American register; is of an easy draft of water, although rather large; a freight for Liverpool will be preferred; if not to be had, for such other port as thee thinks proper, send her. If no freight offers for Europe, send her to this, or some neighboring port, with all the freight that can be had, which I have not any doubt will be sufficient to load her; if thee can get three-fourths as much for this port as for Europe, I should prefer it; if not, I should prefer a freight to Europe. Immediately after her arrival, I wish thee to commence loading her on owners' account, who wish thee to ship five hundred bales on their account, but do not wish to limit the quantity, a few bales more or less according as freight offers; and for the payment of all shipments on owners' account, thy bills on them, John Taber & Son, Portland, or me, at 60 days sight, shall meet due honor; all shipments on owners' account, if the ship goes for Liverpool, address to Rathbone, Hughes & Duncan; if for London, Thomas Mullet & Co.; if Bourdeaux, to John Lewis Brown & Co.; if Nantz or Cherbourg, Preble, Spear & Co.; if Antwerp, J. Ridgway, Merting & Co.; if Amsterdam, Daniel Cromelin & Sons. Captain Swaine will take a sufficiency of specie from Jamaica for ship's disbursements; please write me often, and keep me advised of the state of your market, &c. Of thy shipments by the Mac on owners' account, let as much go on deck as can be safely secured, and have her dispatched from your port as soon as possible.

Thy esteemed friend,
JACOB BARKER."

105*] *And on the 26th of January, 1806, the defendant wrote the plaintiff as follows:

"Since writing thee under date of the 9th instant, I have engaged for the ship Mac the freight of eight hundred bales of cotton from New Orleans to Liverpool, agreeably to the inclosed copy of charter-party. I have, therefore, to request thy exertions in dispatching her for Liverpool, filling her up either on freight, or

owners' account, and particularly fill her deck and quarters on owners' account. Her owners wish large shipments of cotton made on their account, which, if bills can be negotiated on New York, I have informed them thee would make. I, however, am clearly of opinion, that it will be more for their interest to have her filled up on freight; on this subject I shall write thee again more fully. Capt. Swaine will take with him from Jamaica, eight thousand Spanish dollars, for my private account, which I wish invested in cotton." This letter was written on the same sheet of paper, and immediately following a duplicate of the preceding letter of the 9th of January, and was received by the plaintiff on the 18th of March, when he wrote an answer, saying: "On my part, nothing shall be wanting to satisfy the contracting parties, when the ship arrives, and your instructions shall be strictly observed, conforming myself to the latter you gave, and in case of necessity, I think, it will be easy to place bills."

On the 13th February, 1806, the defendant wrote the plaintiff as follows:

"Inclosed, I hand thee a letter from the owners of ship Mac, to which I have only to add, that thy *bills on me for their ac-[***106** count for the cotton they order, shipped by the Mac, shall meet due honor."

On the 29th of August, 1806, the plaintiff wrote the defendant:

"A few days ago I was favored with a few lines from Messrs. John Taber & Son, importing that they wrote to you, to Capt. Swaine, and me, such directions as you might think proper, but I have not as yet been favored with any of yours. The Mac remains precisely in the same situation. Four thousand two hundred and fifty dollars demurrage have been paid on her account, and I only wait for further information from you, to act, in case demurrage is refused."

On the 24th of July, 1806, the defendant wrote the plaintiff as follows:

"Relative to the unfortunate situation of the Mac, I have to observe, that if she remains at your port idle, Fontaine Maury, or his agent there, must pay the demurrage every day, or the master must protest, and end the charter; as long as the demurrage is paid, agreeable to charter-party, the ship must wait; as soon as that is not done, the captain or owners' agent can end the voyage by protesting, and entitle the owners to recover their full freight; so that thee had better take the eight hundred

The Helena, 4 Rob. 3; The Kinders' Kinder, 2 Rob. 88; The Hurtige Hane, 3 Rob. 324; The Madonna del Burso, 4 Rob. 169; Ward's History of the Law of Nations. The same formalities in proceeding to condemn captured property, are not required in order to divest the title of the original owner. It is sufficient, if the confiscation takes place in their way, and according to the established custom of that part of the world. The Helena, 4 Rob. 3. But they are held to be bound to an observance of the law of blockade, that being one of the most universal and simple operations of war; and if a European army or fleet is blockading a town or port, they are not at liberty to trade with it. The Hurtige Hane, 3 Rob. 324. And, though, in prize causes, an Indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christendom, in consideration of their peculiar situation and character, and of their not being professors of exactly the same law of nations with **101*]** *ourselves; yet in matters of contract be-

tween such persons, or between them and other foreigners, courts of justice have not thought themselves at liberty to act otherwise than by the general rules applicable to all forensic business. The Jerusalem, 2 Gallis. 191-201.

The case of the rescue of captured vessels and cargoes from the enemy, by the insurrection of the persons on board, is not provided for by our salvage act or the British statute. Nor is the case of rescue mentioned in the French and other continental ordinances. Restitution to the original owner, is, however, universally decreed in such cases, without regard to the length of time the recaptured property may have been in the enemy's possession; and the rate of salvage is discretionary, and dependent upon the value of the services performed. The Two Friends, 1 Rob. 271; The Walker, Stewart, 105; Valin Traité des Prises, ch. 6, sec. 1, n. 18; Bonnemant's Translation of De Habreue, tom. 2, p. 84; Emerigon, Des Assurances, tom. 1, p. 505.

Wheat. 3.

345

bales, on account of Fontaine Maury at a low rate, than to subject him to such a heavy loss; thee will, on receipt of this, be pleased to receive the demurrage daily, or end the charter, and dispatch her for Liverpool on owners' account, taking all the freight that offers, and fill her up with as much cotton as possible (not less than five hundred bales), logwood and staves, as it will not answer to keep so valuable a **107*** ship there any longer, *without earning something for her owners. Although I say fill her up with cotton, logwood, and staves, on owners' account, thee will please understand, that I should prefer her being dispatched agreeable to charter-party; if that cannot be done, I prefer her taking freight for Liverpool, excepting about five hundred bales the owners wish shipped on their account; yet, rather than have her idle, the owners wish her loaded on their own account; for the payment of which, thy bills on me shall meet due honor at 60 days sight, which I presume thee can easily negotiate."

On the 26th of September, 1806, the plaintiff wrote the defendant:

"Since my respectful last of 29th August, I am favored with your much esteemed of 24th July, the contents of which I have duly noticed."

"I have to inform you of the disaster which has befallen the Mac. On the night of the 16th and 17th inst. we experienced a most violent gale, which has done great injury to the shipping, and drove the Mac from her moorings to a considerable distance from the town," &c. "Nor can I flatter you of procuring either freight for her or accomplishing your order before December," &c.

On the 6th of September, 1806, the defendant wrote the plaintiff as follows:

"Since I last had this pleasure, ordering a protest against the charterers of the Mac, and that vessel dispatched on owners' account for Liverpool, with staves, logwood, and cotton, I have not received any of thy acceptable communications. I now confirm *that order, and request, if a full cargo be not engaged for the Mac, on receipt of this, that you ship two hundred bales of cotton for my account, to the address of Martin, Hope & Thornley, and thy bills on me, at 60 days sight, shall meet due honor for the same. On receipt of this, lose no time in purchasing the two hundred bales, and what may be yet wanted for the ship on owners' account, as a very considerable rise has taken place in that article at Liverpool; therefore, thee will not lose any time in making the purchase."

On the 10th of October, 1806, the defendant wrote the plaintiff:

"By thy letter of the 29th of August, to John Taber & Son, I observe thee had an idea of sending the Mac here, if a freight did not soon offer, which I think thee would not (on reflection) do, if a freight from this port did not offer, as she had much better remain at New Orleans than be sent here in ballast. Therefore request, if she is not dispatched agreeable to charter-party, that she remain at your port until a freight can be obtained for her, with what thee can ship on owners' account. They wish at least five hundred bales of cotton. I hope thee did not ship logwood,

as I find that article will not pay any freight; therefore, if thee has not made a shipment of that article, please omit it. Thee must, of course, keep the ship as long as demurrage is paid."

On the 26th of November, 1806, the defendant wrote the plaintiff:

*"I wish the Mac got off as soon as ***109** possible, and prepared for a voyage; when I wish five hundred bales of cotton shipped, on account of her owners, for Liverpool, and the ship filled up with freight goods, even at a low rate; if freight should be scarce, and thee can purchase good flour at about four and a half dollars per barrel, thee will please ship from five hundred to one thousand barrels, on account of the owners of the Mac, and on thy making any purchases for those objects, inform Rathbone, Hughes & Duncan, Liverpool, by letter duplicate and triplicate, requesting them to have the full amount of thy shipment on owners' account insured, stating particularly when thee expects the ship to leave New Orleans, &c., &c. If cotton falls to twenty cents, please ship five hundred bales of cotton for my account, by the Mac, consigned to Martin, Hope & Thornley, drawing on me at sixty days for the same. I do not wish a bale shipped at a higher price than twenty cents, and I hope thee will engage the freight as low as **14d**. My only reason for ordering it in the Mac is to assist her owners; therefore, if a full charter offers for her, or if anything should prevent her going, thee will ship five hundred bales by some other good vessel, or vessels."

On the 29th of December, 1806, the defendant wrote the plaintiff:

"I am favored with thy letter of the 7th, by which I am pleased to observe the Mac was off, and likely to be dispatched for Liverpool. Her owners are desirous that she be dispatched for that place without delay, as I mentioned to thee in my last letter on the *subject ***110** of the Mac's business. If thee has contracted for the cotton, or any part thereof, that I ordered, let all that has been contracted for be shipped according to my last request, but do not purchase a bale, for my account, after this letter reaches thee, above sixteen cents, as that article has become very dull at Liverpool, and likely to be low, in consequence of the success of the French army on the continent. If thee can purchase at or under sixteen cents before May, thee may purchase and ship such part of the five hundred bales as has not been purchased before this letter reaches thee."

On the 22d of January, 1807, the plaintiff wrote the defendant as follows:

"I have now commenced the purchase of cotton for account of Messrs. John Taber & Son, and have paid hitherto twenty-two cents cash, at which price seventy-two bales were ready to be shipped, as I expect to find an opportunity of placing my bills upon you. I shall complete the purchase of 500 bales, which will be necessary, in order to get a full freight," &c. "I have now to inform you, that I have drawn on you, under date of the 15th of January, for \$1,800. Say \$1,800, payable sixty days after sight, to the order of Mr. A. Brasier, in Philadelphia, which draft goes on account of the 72 bales of cotton already purchased, and request you to honor the same."

And on the same day he wrote the defendant:
 "The present merely serves to inform you,
 that I have this day valued upon you.

111*] *\$1,370.00 Order Joseph Thebaud.
 607.28 Declaire & Count.
 1,100.00 Stephen Zacharie.

\$3,077.28 sixty days after sight, and refer to my letter of this day."

On the 13th of February, 1807, he wrote the defendant:

"I have engaged 150 bales for account of Messrs. John Taber & Son, at market price, which I expect in town in a few days, when I shall without delay ship the same on board the Mac, making the 220 bales in all. This commencement, I hope, will encourage shippers to give us some freight; at all events, I shall keep you duly advised of my proceedings. Under date of the 6th inst. I took the liberty of valuing upon you \$801.22½ sixty days after sight, to the order of Jacob D. Stagg; on the 12th inst. \$573, to the order of Samuel Lord, and shall continue drawing as opportunity offers."

On the 16th of the same month he wrote the defendant:

"The present merely serves to inform you that I have this day valued upon you \$600. Say \$600 to the order of Benjamin Labarte, sixty days after sight, and request you to honor the same, and place to account of J. T. & S."

On the 20th of February, 1807, the defendant wrote the plaintiff:

112*] "I am in daily expectation of hearing of the Mac's progressing for Liverpool. Before this reaches thee, I hope she will have sailed; if not, please lose no time in dispatching her. That thee may be fully acquainted with the wishes of her owners, I annex a copy of the last letter I have received from them, and request thee to comply with their wishes in every particular."

The copy of the letter from John Taber & Son, referred to in this letter, is as follows:

"PORTLAND, 2D MO. 9, 1807.

"Jacob Barker:

"By last mail we received thy favor of the 2d inst. inclosing one from Captain Swaine to thee. We notice thy proposition for us to give liberty for the Mac to take freight for any port in Europe, but as we have got her and her freight insured in Liverpool, at and from New Orleans to that port, we wish to have her go there, even if we load on owners' account. We are well satisfied that Lanusse hath not yet loaded her, as we have no doubt cotton will be much lower in a short time. And as we apprehend that shippers of cotton will now turn their attention to other parts of Europe, we think the probability is, that cotton will be in demand in Liverpool by the time the Mac will arrive there; we likewise think it will answer to ship good flour, and probably some good staves can be purchased; we had rather have her loaded on our own account with those three articles than to take freight for any other port, but we think there can be no doubt but that when she begins to load on owners' account that some considerable *freight can be obtained. We really wish thee to write Lanusse to Wheat. 3.

dispatch her, with liberty to take two thousand barrels of good fresh flour, if freight does not offer sufficient with the five hundred bales of cotton before ordered, to load her without delay, as we have no doubt good flour will answer, and we cannot think of her being longer detained at New Orleans.

We remain, thy assured friends,
 (Signed) JOHN TABER & SON."

And on the 3d of March, 1807, the plaintiff wrote the defendant:

"The present merely serves to inform you that I have this day valued upon you \$10,000. Say \$10,000, payable sixty days after sight, to the order of Mr. Thomas Elmes, and request you to honor the same, and place to account of J. T. & S."

On the 6th of March, 1807, he again wrote the defendant:

"I refer to my respectful last of 13th, 16th, 24th ult. and 3d inst., the contents of which I confirm. On the 16th I valued upon you for \$600, and on the 3d inst. for \$10,000, making in all the sum of \$16,351.3½, on account of the shipment per Mac, for account of Messrs. John Taber & Son. I have already bought 72 bales at 22 cents, 107 do. at 20½ cents, 175 do. at 20½ cents, together 354 bales, and 30m staves, amounting to about \$22,000. There remains 146 bales more to be purchased, which I hope to get; the total amount, with charges and commission, will *be about \$34,000—for which sum I [*114 shall order Messrs. Rathbone, Hughes & Duncan, to get insurance effected. I shall continue to draw on you as occasion presents."

On the 11th of March, 1807, he wrote the defendant, informing him that he had drawn on the defendant to the order of Mr. F. Depau, for \$6,000, and to the order of Mr. J. P. Ponton for \$691.50.

On the 15th of April, 1807, the defendant wrote the plaintiff:

"I have this moment received the unpleasant information of the failure of John Taber & Son, therefore beg the favor of thy taking every precaution to secure my claim on them for the payment of the cotton thee has shipped for their account by the Mac. If that ship has not got clear of your river, take up the bills of lading and fill up new bills, consigning the cotton to my order, forwarding me several of the bills, and instruct Captain Swaine to hold the cotton until he hears from me; and if part of the old set have gone on, let them go, but take a new set, and make all the freight money payable to my order, and if she has got clear of the river, make an arrangement with the shippers of the cotton to pay thee the freight money, and give them a receipt for it, forwarding that receipt to Liverpool, but for the consignee to keep as a secret that the freight money has been paid, until they get all the freight goods."

And on the 16th of April, 1807, the defendant again wrote the plaintiff:

"I have taken the best counsel, and [*115 find the goods per ship Mac can be stopped for thy account *in transitu*, and have therefore taken all the steps in my power to have that object effected; and shall succeed so far as to keep the property at thy disposal until thy

power reaches Martin, Hope & Thornley, which will enable them to hold the property for thy use; therefore send the power by the packet, and send duplicates and triplicates by other vessels, and several copies by mail and packet to me to be forwarded; also draw on Rathbone, Hughes & Duncan, for the whole amount of shipment, ordering Martin, Hope & Thornley to pay them £1,000 of the amount drawn for, if they accept the bills. Confirm what I have written, copies of which I enclose for thy government. Thy bills on me will all be protested for non-payment, that thee can say thee has not received pay for the cotton, but shall endeavor to furnish money that will prevent disappointment to the holders. This, my counsel tells me, is indispensable, to enable thee to benefit by *transitu*, which cannot be done by any other person, nor by thee after thee gets pay for the goods shipped."

And on the same day the defendant wrote to Martin, Hope & Thornley, of Liverpool, as follows:

"I inclose a letter written as agent and friend of Paul Lanusse to Rathbone, Hughes & Duncan, which you will have the goodness to hand them, and make a memorandum of the delivery, and endeavor to make the contract for Lanusse as therein mentioned, and I will indemnify you from all loss in so doing; if you cannot make an absolute agreement with R., H. 116*] & D., to receive all the property Lanusse has or may ship by the Mac for account of Taber & Son, to be applied for the payment of the bills Lanusse has or may draw on them, excepting £1,000, and the profits on the adventure, which they may place to the credit of Taber & Son, if they are so much indebted to R., H. & D., if not so much, then such sum as may be due them. You will cause insurance on the cargo of ship Mac to the amount of £9,000 sterling, and proceed as the agent of Lanusse to get hold of the property; you certainly can stop it *in transitu*."

On the same day the defendant also wrote to Rathbone, Hughes & Duncan:

"As the agent of my friend Paul Lanusse at New Orleans, I have, in consequence of the failure of John Taber & Son, to inform you, that the goods he is shipping on board the Mac, Captain Swaine, have not in any part been paid for, therefore they are to be stopped *in transitu*, for the benefit of my said friend Paul Lanusse, who is by me represented; and as his agent, I charge you, on your peril, not to accept, or in any manner commit yourselves for said Taber & Son, on account of said shipment, but if you are willing to receive said consignment, sell the same, and apply the whole proceeds to the payment of such drafts as Lanusse may draw on you, which shall not exceed the amount of invoice."

On the 30th of April, 1807, the defendant wrote the plaintiff:

"I annex copy of my last respects, and have to request, in the most pointed manner, thy 117*] particular attention to my request therein. I have sent out many letters in hopes of meeting the Mac; if any of them meet her in the Mississippi, Captain Swaine will return to New Orleans with all his papers for thee to alter the direction of the goods shipped by that vessel for account of Taber & Son; if not so successful as

to meet her, but if any of them meet her after she leaves the Mississippi, she will stop at this port, when I will make the necessary alterations; but if none of my letters meet her, my only chance for securing myself is by thy stopping the property *in transitu*. To have that done, thee must immediately send out powers to Liverpool, therefore I beg thee to confirm all I have written to Martin, Hope & Thornley."

On the 20th of May, 1807, the plaintiff wrote to the defendant:

"Your esteemed favor of the 15th ultimo has just reached me, and with much regret do I learn the failure of Messrs John Taber & Son. I hope that you will not be a sufferer, and that you have taken timely precaution. Agreeably to your request, I have written on to Liverpool, but am afraid my letters will come to late, as the Mac sailed from the Balize on the 23d of April, and as she is a good sailer, will no doubt have discharged her cargo before the receipt of my letter. For your government I inclose you invoice and bill of lading of the 500 bales cotton shipped per Mac; also, my account current with Messrs. John Taber & Son, according to which a balance of \$1,251.28½, for which amount I shall value upon you as occasion offers. You will, I hope, have taken the necessary measures to meet my drafts dated March 20th, drawn direct on Messrs. Taber & [118] Son, in Portland, payable in New York, of which I advised you. I am anxious to receive your further communications, and most sincerely hope that you have been able to cover your claim, and not be a loser by this unfortunate accident."

And on the 9th of June, 1807, he wrote the defendant:

"I have only time to inform you of the receipt of your favor of 16th and 30th April, and to assure you that I shall punctually follow your instructions, and lose no time in forwarding to you and to Liverpool all necessary papers, relying on your integrity and honor. I feel no uneasiness respecting my concern in this unfortunate business, at the same time I most sincerely regret that you should be a sufferer, but hope things may yet result favorable."

On the 28th of August, 1807, the plaintiff wrote the defendant:

"The last mail brought me the non-acceptance, protest, &c., of the two bills of exchange drawn by me on the house of John Taber & Son, under date of the 20th of March, 1807, in favor of Thomas Elmes, and indorsed by him to Messrs. Corp, Ellis and Shaw, each for \$5,000, making the sum of \$10,000, and which I have been obliged here to pay to Mr. Elmes, together with ten per cent. damages, amounting to the further sum of \$1,000, giving a total of \$11,000. It is unnecessary for me to dwell upon the serious inconveniences which have resulted from this circumstance, or to repeat how prejudicial the whole of the transaction with the house of John Taber & Son [119] has been to my affairs. I, however, rely upon you for the payment of this money, as it was entirely upon your recommendation, upon the strength of your assurances and the respectability of your guaranty, that I was induced to embark in this business, and to procure cotton for the cargo of the ship Mac; but this subject has already been sufficiently enlarged upon in

Wheat. 3.

my former letters to you, and I sanguinely trust that you will not delay making the necessary arrangements for this re-imbursement. No information has as yet been received by me from Liverpool, respecting the fate of the 500 bales of cotton shipped on board the Mac. I feel anxious to know the success of the steps which have been taken in that quarter. I trust that you will communicate to me the earliest information that you may receive on this subject."

On the 30th of January, 1806, John Taber & Son wrote to the plaintiff as follows:

"We wrote thee the 24th inst., since which we have received a letter from Jacob Barker, informing that he had engaged eight hundred bales of cotton for the Mac, previous to her sailing from New York, from your port to Liverpool, which has fixed her route; as she hath so much freight engaged, we flatter ourselves that she will be filled up immediately. It is our wish to have two hundred bales of good cotton shipped on owners' account, and as much more as may be necessary to make despatch, as we are not willing to have her detained in your port for freight. To re-imburse thyself for the cotton purchased on owners' account, thou may draw bills at sixty days' sight, either on Jacob 120* Barker or on us. If thou *can sell bills on Rathbone, Hughes & Duncan, merchants, at Liverpool, at par, thou may on them, taking care not to send the bills before she sails, and to write on timely to them to get insurance made on the amount of property shipped on our account."

On the 27th of March, 1806, the plaintiff wrote J. Taber & Son:

"Your much respectful favor of the 30th of January last came duly to hand. I observe what you say respecting the purchase of cotton for your account to go by ship Mac, of which our friend, Jacob Barker, likewise makes mention; this ship has not yet made her appearance, but as soon as she does you may depend on my utmost exertions to follow your orders, and give the ship all dispatch that lays in my power. The mode of re-imbursements for purchases made here, will be by drawing on our friend Barker, agreeable to his advice, as I think it will be less difficult for me to place bills on New York. Cotton is rising, and fetches now 26 cents. Notwithstanding, I shall follow your orders with respect to the Mac, unless anything to the contrary should reach me before she arrives. As for drawing on Liverpool, it is altogether out of my power, for such bills are seldom asked for here. I shall advise Messrs. Rathbone, Hughes & Duncan, in due time, to effect insurance on the property I may ship on your account. Awaiting the pleasure of announcing you the Mac's arrival, I continue with respect, &c."

On the 5th of June, 1806, the plaintiff wrote J. Taber & Son: "Cotton is pretty steady at 22 cents. Should circumstances authorize my 121* purchasing for *your account, I shall, in preference, value for the amount on Mr. Jacob Barker."

On the 29th of June, 1806, John Taber & Son wrote to the plaintiff:

"We have not been favored with any of thy communications since 4th month, 7th. We have been daily expecting to hear of our ship Wheat. 8.

Mac being laden and ready for sea, as we had not the least idea but that the eight hundred bales that Jacob Barker contracted for would be ready at the time agreed on, and expected thou would have purchased a sufficiency to fill up on owners' account, provided freight did not offer in season. By last mail we received a letter from Jacob Barker informing that he feared the contractors would not furnish the eight hundred bales, and that in consequence thereof the Mac would be detained until further orders from us. We, therefore, have this day wrote Barker to give thee and Captain Swaine such directions as he may think proper. But we hope she will be despatched for Liverpool before this reaches thee, as it is our wish to have her go there."

On the 15th of July 1806, John Taber & Son wrote the plaintiff:

"Thy favor of the 5th ultimo by mail was this day received, the contents noticed. We are very sorry to find that the Mac is so detained with you, we having flattered ourselves that she would have been at Liverpool by this. We wrote thee 27th ultimo by mail, directing thee to follow Jacob Barker's instructions respecting the Mac, which we now confirm, and *say that we wish thee to follow his in- [*122 structions at all times the same as from us."

On the 29th of August the plaintiff wrote J. Taber & Son:

"Your esteemed favor of the 29th of June has duly come to hand, but I have in vain expected further directions from Mr. Barker, for the want of which I have experienced many difficulties."

On the 25th of July, 1806, J. Taber & Son again wrote the plaintiff:

"Thy favor of the 13th ultimo was this day handed us by Captain Webb, of the Phoenix. It had been broken open at sea by an English cruiser. We have not received a copy of thy process; we should like to see it. We are extremely sorry that we had not, in the first instance, given thee orders to have laden our ship with staves, logwood, and cotton, on our account, with what freight could be obtained; we should certainly have done it, if we had the least idea that we should have been disappointed of the eight hundred bales. We have this day received letters from Jacob Barker, informing he had given thee direction to load immediately as above; hope thou can make it convenient to put a large share of cotton on board on our account, as we think that article will pay much more than staves; we trust thou will send to Jacob Barker such documents as will enable him to recover freight and demurrage."

And on the 30th July, 1806, Taber & Son wrote the plaintiff:

"We hope that the Mac will sail for Liverpool before *this reaches thee, with a [*123 cargo on owners' account and a large proportion of cotton."

On the 16th of September, 1806, the plaintiff wrote J. Taber & Son:

"I am successively favored with your much esteemed of 15th, 25th, and 30th of July, and have taken due notice of their contents. Mr. Jacob Barker has likewise wrote me, and shall follow his instructions as far as lays in my power."

On the 3d of October, 1806, Taber & Son wrote the plaintiff:

"We observe that thou had thoughts of sending the Mac to New York after a few weeks, if thou did not receive further instructions; but we trust that will not be the case, as we presume that thou received Jacob Barker's orders soon after, to load her on owners' account for Liverpool, except the demurrage was continued to be paid. If so, we are willing to let her lay until the charterers procure the 800 bales freight. When that is the case, we presume thou will not let her be detained for the remainder part of the cargo to the charterer's damage. We renew our request for thee to continue to follow Jacob Barker's instructions from time to time, respecting the Mac, the same as from us. We are well satisfied with thy proceedings."

On the 12th of December, 1806, the plaintiff wrote J. Taber & Son, acknowledging the receipt of their letter of the 3d of October, and saying: "I have not, as yet, commenced the purchase of cotton, only small parcels have as **124*** yet come to hand; as soon as I can *succeed I shall value upon Jacob Barker for the amount," &c.

On the 9th of November, 1806, J. Taber & Son wrote the plaintiff:

"We do not pretend to give thee any positive order respecting the Mac, as we have heretofore directed thee to follow Jacob Barker's directions; but we will give thee a sketch of our wishes, viz.: To have the Mac dispatched to Liverpool, as soon as possible, with about five hundred bales of cotton on owners' account, and the remainder of her cargo on freight," &c.

On the 22d January, 1807, the plaintiff wrote J. Taber & Son:

"I have written this day to Mr. Barker, and keep him advised of the state of affairs here. Upon remarks on the subject of demurrage, I have unconditionally passed to your account the total sum paid in, and shall employ the funds for the expenses of the ship, and the surplus for the purchases of cotton for your account. I am happy to inform you that I have already made a commencement, and purchased 72 bales at 22 cents, which are now ready to be shipped on board the Mac. I shall, as opportunity offers, draw upon Mr. J. Barker for the amount, and complete the 500 bales to be shipped for your account, which will be absolutely necessary to procure a full freight.

I valued upon Mr. J. Barker, \$1,800, which sum is passed to your credit. I need not recommend to you to take the necessary measures, in order to have my drafts duly honored **125*** by that gentleman." *On the 13th of February, the plaintiff wrote J. Taber & Son, and after mentioning a further purchase of cotton for their account he states: "I add you a note of my drafts, upon Mr. J. Barker, on account of this shipment, for your account, and shall keep you constantly advised of my proceedings."

On the 9th of February, 1807, Taber & Son wrote the plaintiff:

"We having by last mail received account, that the Mac had not begun to take in her cargo on New Years day; we are well satisfied that thou had not purchased cotton for us at the high price that we understood it was selling at, as we presume it will be much lower

850

by the time this reaches thee. If the Mac hath not taken in any of her cargo before this reaches thee, we wish thee to commence loading her on owners' account immediately, as we have ever found that when our ship commenced loading on owners' account, that freight soon offered. Jacob Barker informed us some time past that he had given thee directions to ship five hundred bales of cotton on our account, and liberty to ship some flour, which we think may answer well, provided it is good. If freight cannot be obtained, to fill her up with the flour and cotton that Barker hath ordered, we should like to have her filled up with good staves or timber, the growth of your country; but no logwood or mahogany. We much wish to have the Mac dispatched for Liverpool as soon as may be."

On the 6th of March, 1807, the plaintiff wrote J. Taber & Son:

"On the 13th ultimo I last had the pleasure of *addressing you. I have since pro- ***126** cured a full freight for the Mac at three cents per pound cotton, and she will be dispatched in all this month for Liverpool. I shall ship on board for your account five hundred bales cotton and thirty thousand staves, of which you now may get insurance effected; the amount per invoice will be about \$3,400. I have, since my last, valued upon Mr. J. Barker for \$600 and \$10,000, on account of these purchases, and shall continue to draw as occasion offers. As soon as the entire purchase is completed I shall hand you the invoice and account current, and shall acquaint Messrs. Rathbone, Hughes & Duncan with my proceeding respecting the above order for insurance, and shall have early opportunities of giving them timely information. I have communicated to Mr. Jacob Barker the present state of affairs."

And on the 20th of March, 1807, the plaintiff wrote to J. Taber & Son:

"The present merely serves to inform you that I have this day valued upon you, payable in New York, the sum of \$10,000, in two bills of \$5,000 each, say, ten thousand dollars, sixty days after sight, to the order of Thomas Elmes, Esq., which drafts go on account of cotton purchased for your accounts, and shipped on board the ship Mac. It is upon the particular request of Mr. Elmes that I have altered the mode of my drawing direct on Mr. Jacob Barker."

On the 17th of April, 1807, the plaintiff again wrote J. Taber & Son:

"I have now the pleasure of informing you that *the Mac has sailed for Liverpool ***127**, having on board 500 bales of cotton for your own account, and 549 bales on freight. Inclosed I hand you invoice and bill of lading of the former, amounting to \$33,098.31, for which you will please credit my account. I have engaged 30m staves, but they were of inferior quality, and I preferred not shipping them. With my next I shall hand you account current, &c. Capt. Swaine has taken along with him all the necessary documents to recover from the underwriters on the ship Mac; the amount of expenses incurred since the gale until she was afloat, were \$3,042.25."

On the 24th of April, 1807, the plaintiff wrote to J. Taber & Son:

"I refer to my respectful last of the 17th in Wheat. 3.

stant, and have now the pleasure of handing you account current to this day, and other papers respecting our transactions, agreeable to which, there is yet a balance due me of \$1,276.51½, for which amount I shall value upon you as occasion may offer."

Besides the above correspondence, the plaintiff produced in evidence an answer of the defendant to a bill of discovery, filed by the plaintiff in a suit formerly depending in the Supreme Court of the state of New York, which was commenced in April, 1810, and discontinued in October, 1813, of which answer the following is an extract:

And this defendant, further answering, says, that previous to the month of May, 1807, he had large commercial dealings with the house or firm of John Taber & Son, of Portland, in 128* the state of Massachusetts. *And that the said firm or house of John Taber & Son, having failed prior to the said month of May, 1807, and at the time of such failure largely indebted to this defendant; and this said defendant visited Portland for the purpose of securing his demand against said firm or house of John Taber & Son, and soon after his return, he, about the 1st of May, 1807, in conversation with Gabriel S. Shaw, of the firm of Corp, Ellis & Shaw, merchants, residing in this city, about the charter of a ship, mentioned to said Shaw, that he, Barker, had just returned from Portland, where he had been for the purpose of getting security from John Taber & Son, when he, said Shaw, informed him that they had, a few days previously, sent bills drawn at New Orleans on said Taber & Son, under cover to the said Tabers, for acceptance, to the amount of ten thousand dollars; and inquired if he, this defendant, supposed they would, in the deranged state of their business, return them regularly protested or accepted. From this defendant's knowledge of said Taber's business he believed that those bills were drawn in payment for the ship Mac's cargo; this being the only information this defendant had of any bills being drawn at New Orleans on said John Taber & Son, he was induced to accompany the said Gabriel Shaw to his office, to ascertain the particulars; who, at the instance of this defendant, exhibited to him either a letter or one of the same sets of bills by which this defendant learnt they were drawn by Paul Lanusse, at New Orleans, on John Taber & Son, Portland, in part payment for the cargo of the Mac. That this defendant, 129* acting *from the information so received, and from no other information or advice whatever, and, also, from an apprehension that the said complainant, when he should hear of the failure of the said house of John Taber & Son, would claim from this defendant the amount for which the said bill or bills were drawn, and thereby expose this defendant to an expensive course of litigation in resisting the said claim, if any should be made, he, this defendant, wrote to the said John Taber & Son a letter on the subject of the said bill or bills, and which letter, he believes, is as follows, to wit:

"NEW YORK, 5 mo. 5th, 1807.

John Taber & Son—I am this day advised of Paul Lanusse's having drawn on you to the amount of ten thousand dollars, which bills Wheat. 3.

were forwarded to you for acceptance; for the payment for those drafts I am not liable, as I only promised to accept in case of his drawing on me. You, undoubtedly, accepted those bills; if not, and you have them, be pleased, at all events, to accept them, as if they are returned without acceptance, the charge will be, as at first, for the shipment, for which Lanusse may possibly think me answerable, but if the bills are accepted, he can only look to you. The debt, as to him, thereby becomes of another nature, but as to you it is the same thing, and cannot place you in any worse situation. Therefore, let them be accepted, and if you have returned them without acceptance, authorize me to accept them as your agent to this business; give immediate attention, as I *must not be made answerable for them; [*130 although injured,

I am yet your friend,
JACOB BARKER."

And that afterwards this defendant wrote another letter to the said John Taber & Son, which he believes is as follows:

"NEW YORK, 5 mo. 15, 1807.

John Taber:

This day's mail brought me thy letter, by which I am surprised to observe thee has refused compliance with my request. I cannot account for the strange advice your merchants gave respecting protesting those bills. I, however, admit that in ordinary cases there would not be much impropriety in protesting them, though I could not possibly alter the state of your business, the debt being indisputable, their being accepted only acknowledged the debt to be due; but I must insist if thee has any regard to justice, that thee will, if not returned, accept them for account of John Taber & Son; if returned, authorize me to accept them for their account. I consider the argument that I expected to secure the Mac and cargo, no excuse at all, particularly as no attachment can be made in this state for partial benefit, all attachments must be made for the benefit of all the creditors. So that if I have property in my hands, the best possible step the creditors could take would be for one of them to attach it in my hands; therefore, must pointedly insist on thy accepting, or ordering *me to accept [*131 those bills. As to advice from thy neighbors, it is one of those simple cases that do not require advice, and I say expressly, when thee considers my situation, thee cannot honestly refuse my request. If I was in thy situation, and all the world advise me not to do it, I should not pay the least respect to such advice, but accept the bills without a moment's hesitation. If thou thinks Paul Lanusse will be a more difficult creditor than I shall be, thee will, under present circumstances, be mistaken, to where I am thus forced into a monstrous loss, I shall be very difficult, although, in common cases, should be favorably disposed.

Your friend,
JACOB BARKER."

The plaintiff further proved by Joseph Thebaud, of New York, the plaintiff's agent, that in the beginning of October, 1807, he received from the plaintiff the following account, dated

1st September, 1807, at New Orleans, which he showed to the defendant, and demanded pay- ment of the same, which was refused by the defendant:

132*] *DR. *Mr. Jacob Barker, of New York, for account of Messrs. John Taber & Son, of Portland, in acct. current with Paul Lanusse,* CR.

1807.
April 13. To amount of 500 bales of cotton as per invoice, \$33,098 31
24. Disbursements of ship Mac, as per account, 5,943 69
My commissions on freight procured for the Mac, \$5,974 80 @ 5 per cent. 298 73
Do. on demurrage collected, \$5,150 @ 2½ per cent. 128 75
My drafts of March 20, on John Taber & Son, favor of Tho. Elmes, \$5,000 00
do 5,000 00
Damages paid, 10 per cent. 1,000 00
11,000 00
\$50,469 48
To balance per cent. \$12,251 28

Errors excepted.

New Orleans, 1st September, 1807.

(Signed)

PAUL LANUSSE.

1807.
Jan. 23. By my draft fav. Brasler, \$1,800 00
do Stephen Zacharie, 1,100 00
do Delarie & Canut, 907 25
do Joe. Thebaud, 1,370 00
Feb. 6. do J. D. Staggs, 301 00
12. do Samuel Lord, 573 00
16. do B. Labarte, 800 00
Mar. 3. do Thomas Elmes, 5,000 00
do do 5,000 00
10. do Francis Depau, 6,000 00
do J. Paul Poutz, 691 60
20. do Thomas Elmes, 5,000 00
do do 5,000 00
Demurrage ship Mac, commencing 5th June, to the 16th Sept., being 103 days, at \$50 per day, 5,150 00
May 2. 1 junk cable from ship Mac, 25 24
Balance due Paul Lanusse, 12,251 28
\$50,469 48

The plaintiff further proved, that in the suit first above mentioned, which had been depending between him and the defendant in the Supreme Court of the state of New York, the plaintiff suffered a nonsuit, on the nineteenth of December, 1808, after the judge had charged the jury in favor of the defendant. And the plaintiff further proved, that he did, on the 30th of January, 1809, draw two new sets of bills upon the defendant, which were produced and read in evidence by the plaintiff's counsel, and are in the words and figures following:

133*] *NEW ORLEANS, 30th January, 1809.
Exchange for \$10,055.85.

Sixty days after sight of this, my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, ten thousand and fifty-five dollars thirty-five cents, value received, which place to account of
PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

NEW ORLEANS, 30th January, 1809.

Exchange for \$2,195.93½.

Sixty days after sight of this, my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, two thousand one hundred and ninety-five dollars ninety-three and a half cents, value received, which place to account of

PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

That the said bills were protested for non-

352

acceptance on the 11th of March, 1809, and for non-payment on the 13th of May, 1809. The notary also proved, that at the time of presenting the said bills, he offered to the defendant the account and letters herein next stated, which the defendant refused to accept, and desired the notary to take them away, who refused, and threw them on his, the defendant's, counter. The bills were accompanied with a letter of advice, mentioning that the first bill was for the balance due for the purchase of the 500 bales of cotton, and the other for disbursement of the ship *Mac, and \$1,500 damages paid [*134 on the two drafts of \$5,000 each on Taber & Son, returned protested for non-payment.

The plaintiff further proved, that all the bills of exchange drawn by plaintiff on the defendant, and contained in the above account, amounting to \$23,042.96 had been paid by the defendant after the same had been protested for non-payment, excepting the last-mentioned bill for \$5,000 each, drawn in favor of Thomas Elmes, and forwarded as aforesaid to Corp, Ellis & Shaw. It was also admitted that the plaintiff had received no part of the freight of the Mac's cargo, although it is mentioned in a letter of his that he had received the freight or a part of it.

The plaintiff then proved that the ordinary interest of money in New Orleans was ten per cent. per annum, and the lawful interest in New York was seven per cent.

The plaintiff having made the proofs on his part, here rested his cause. Whereupon the defendant then produced in evidence the following account, forwarded to him by the plaintiff, in his letter of the 20th of May, 1807:

Wheat. 3

135*] *Dr. *Messrs. J. Taber & Son, in Portland, in account current with Paul Lanusse.* CR.

1807.	
April 13. To amount of 500 bales of cotton as per invoice,	\$33,098 31
24. Disbursement of ship Mac, as per account,	5,943 69½
My commission on freight procured for the Mac, \$5,974.60 @ 5 per cent.	298 73
Do. on demurrage collected, \$5,150 @ 2½ per cent.	128 75
	<u>\$39,469 48½</u>
April 24. To balance per contra due, Errors and omissions excepted.	\$1,276 42¾

1807.		
Jan. 22. By my draft fav. Brazier,	\$1,800	
do Stephen Zacharie,	1,100	
do Delaire & Canut,	607 25	
do Joseph Thebaud,	1,370	
Feb. 6. do Jacob D. Stagg,	301 21	
12. do Samuel Lord,	573	
16. do Labarte,	600	
Mar. 3. do Thomas Elmes,	5,000	
do do	5,000	
do Francis Depau,	6,000	
do J. Paul Poutz,	691 50	
20. do Thomas Elmes,	5,000	
do do	5,000	
Demurrage of ship Mac, commencing 5th of June, to 16th Sept., being 103 days, @ \$50,	5,150	
April 24. Balance due me,	1,276 52¾	
	<u>\$39,469 48½</u>	

New Orleans, April 24, 1807.

(Signed)

PAUL LANUSSE.

DR.	<i>Messrs. J. Taber & Son, of Portland, in account with Paul Lanusse.</i>		CR.
1807.		1807.	
April 24. To balance per contra,	\$1,276 52½	May 2. By 1 junk cable,	25 24
		20. Balance,	1,251 28½
	<u>\$1,276 52½</u>		<u>1,276 52½</u>
1807.			
May 20. To balance due me,	\$1,251 28½		
		E. & O. E.	
New Orleans, May 20th, 1807.		(Signed)	For Paul Lanusse, P. & H. AMELUNG.

The defendant then proved, by Gabriel Shaw, of the house of Corp, Ellis & Shaw, of New York, that the two bills of exchange drawn by Paul Lanusse on John Taber & Son, dated the 20th of March, 1807, were received by Corp, Ellis & Shaw, from Thomas Elmes, of New Orleans, in whose favor they were drawn, about the 27th or 28th day of April in the same year, and were immediately forwarded by him to 136*] John Taber & Son, of Portland, *for acceptance; that they were protested on the 30th of the same month at Portland, for non-acceptance, and were received by the witness with the protests about the 5th or 6th of May, about which day, and after the receipt of the said bills, he either met the defendant in the street or called at his house, but which he cannot recollect, and showed him, he believed, the said bills and protest, having understood the said defendant had, in some way, some concern in the business. That the said bills at maturity were protested in New York, for non-payment, and were afterwards remitted to the said Thomas Elmes at New Orleans. From the protest it appeared that the two bills of \$5,000 each were protested for non-payment on the 2d day of July, 1807, in New York, and that the limited time mentioned in the said bills with the days of grace, were then expired, since the bills were protested for non-acceptance in Portland.

The defendant then rested his cause; upon which the plaintiff claimed a verdict for the sum of \$17,908.02, if the court and jury were

of opinion that interest was allowable at the rate of ten per cent.; but if they were of opinion that interest at the rate of seven per cent. only was allowable, then the plaintiff claimed a verdict for the sum of \$15,910.94; and the plaintiff exhibited the following statement, showing the manner in which the said several sums were calculated, viz.:

1st. 1807.	
April 13. To amount of 500 bales of cotton, as per invoice,	\$33,098 31
24. To disbursements for ship, with commissions at 5 per cent.,	5,913 60
To commissions on freight, \$5,974.60, at 5 per cent.,	298 73
To do. on demurrage collected, \$5,150, at 2 1-2 per cent.,	128 75
	<u>\$39,469 39</u>
*Cr.	[*137
By bills paid,	\$23,042 96
By demurrage received	5,150 00
By one junk cable	25 24
	<u>28,218 20</u>
	\$11,251 19
To interest on \$11,251.19, from 13th of May, 1809 (protest of new bills), to 13th of April, 1815 (day of verdict), at 10 per cent.,—5 years, 11 months,	6,650 83
	<u>\$17,908 02</u>
2d.	
To amount of damages as above, \$11,251 19	
To interest on the above sum of \$11,251 19, for the same period, at 7 per cent.,	4,650 75
	<u>\$15,910 94</u>

The plaintiff then prayed the judge of the Circuit Court to charge and deliver his opinion to the jury, that the plaintiff was entitled to the aforesaid sum of \$17,908.02, if the interest was to be calculated at the rate of 10 per cent., or to the sum of \$15,910.94, if the interest was to be calculated at the rate of seven per cent. The defendant insisted that the plaintiff was not entitled to any damages; and the judge so charged the jury, *pro forma*. A verdict was thereupon taken for the defendant, and a bill of exception tendered. An agreement was entered into by the counsel for both parties, that the cause should be carried to the Supreme Court by writ of error, and that if the Supreme Court should be of opinion that the plaintiff was entitled to a judgment for the principal sum of \$11,251.19 with interest at the rate of 10 per cent., then the judgment should be rendered for the sum of \$17,908.02, with costs. Or if the court should be of opinion that he was entitled to interest at the rate of 7 per cent. only, [138*] that judgment should be rendered for the sum of \$15,910.94 with costs; or if the court should be of opinion that any other sum, different from either of the above sums, is recoverable by the plaintiff, that judgment should be rendered for such other sum as the court might direct. But if it should be of opinion that the plaintiff is not entitled to recover any damages, then the judgment for the defendant should be affirmed.

Mr. Pendleton, for the plaintiff, argued that the defendant was liable, both for the bills drawn by the plaintiff on *Taber & Son*, and, also, for the bills drawn in January, 1809, on the defendant. That the original undertaking of the defendant was a guaranty that all bills drawn by the plaintiff, on account of the ship *Mac*, should be paid, whether drawn on the defendant or an *Taber & Son*. The learned counsel entered into a critical analysis of the opinion of the Supreme Court of the state of New York in this cause,¹ and contended that the rules for construing contracts extend to all parties alike, whether sureties or principals. That they must be construed according to the intention of the parties, not according to the mere literal meaning of the words. If these are ambiguous, the intention must be ascertained by the context, by contemporaneous declarations, writings, and transactions, and, above all, by the purposes and objects to be answered. This principle is applicable to the undertaking of a surety.² It is by no means a well-established rule that the [139*] contract of a surety is to be construed more favorably than that of the principal.³ The law knows no favorites. The obligation of the surety is the inducement for the creditor to trust the principal, with whose affairs and circumstances the surety is presumed to be best acquainted. Formerly, nothing could discharge

this liability at law but performance. If the creditor had discharged the principal, or extended the time of payment by a new contract with the principal, without the surety's consent, the surety had no remedy. In latter times, the courts of law have interposed to protect the surety; but there is much contrariety in the numerous cases that have been decided, upon the question what transactions between the creditor and the principal shall discharge the surety. There is no doubt that an absolute discharge of the principal will discharge the surety also. But it is contended that no new contract or transaction between the creditor and principal shall discharge the surety, unless it deprives him of the right he always possesses of placing himself in the creditor's situation by paying the debt according to the original contract, and thus getting into his own hands the means of securing himself. This principle is founded on the nature of the contract of suretyship, and is supported by the authorities, except one or two cases, which it will be found difficult to reconcile with principle.⁴ All the cases decided in England in favor of sureties have been where the creditor has taken away this right by discharging the principal, or by giving [*140] him a new extended credit.⁵ Mere delay and want of notice have been uniformly held insufficient to discharge a surety.⁶ But even if the law were otherwise, there has been no unnecessary delay or want of notice in the present case.

The *Attorney-General* and *Mr. Jones*, contra, contended, that the defendant was to be considered in the character of a surety merely; that this was evinced by every part of the correspondence; and that consequently he was bound only according to the literal terms of his contract. That by the well-established doctrine of law and equity a different rule was to be applied, in the construction of the contract of the surety, from that which was applicable to the contract of the principal. In regard to the principal, a liberal interpretation is to be indulged, to reach the substance and equity of the contract; whilst the undertaking of the surety is to be limited to its precise terms. The reasons of this distinction are, that there is a valuable consideration moving from the creditor, which creates an equitable obligation, on the part of the principal, independent of the express contract; whilst, in respect to the surety there is nothing but his express promise, according to that of the principal debtor. An- [*141] other reason is one of legal policy, to encourage suretyship for the benefit of commerce, and the extension of credit, and at the same time to protect the sureties by every means consistent with morality. All the cases at law are consonant with this distinction.⁷ The aid of the courts of equity has been invoked in vain to

1.—10 Johns. R. 325.

2.—*Barclay et al. v. Lucas*, 1 T. R. 291, note a.

3.—*Mason v. Pritchard*, 12 East, 227.

4.—*Bishop v. Church*, 2 Ves. 371; *Woffington v. Sparks*, *Id.* 569.

5.—*Nesbitt v. Smith*, 2 Bro. Ch. Cas. 579; *Rees v. Barrington*, 2 Ves., Jun., 540; *Smith v. Lewis*, 3 Bro. Ch. Cas. 1; *Phillips v. Astling*, 2 Taunt. 206; *Deming v. Norton, Kirby*, 307.

6.—*Cartlidge v. Eales*, 2 Com. R. 557; *Peel v. Tat-*

lock, 1 Bos. & Pull. 419; *Trent Navigation Co. v. Harley*, 10 East. 34; *Warrington v. Turbor*, 8 East. 242; *O'Kelly v. Sparks*, 10 East. 377; *Barnard v. Norton, Kirby*, 193; *Meade v. M'Donnell*, 5 Binney, 195.

7.—*Lord Arlington v. Merick*, 2 Saund. 411, and *Sergeant Williams's* notes 5, p. 415; *Wright v. Russell*, 3 Wils. 530; S. C. 2 W. Bl. 934; *Meyers v. Edge*, 7 T. R. 254; *Barker v. Parker*, 1 T. R. 247; *Ludlow v. Simond*, 2 Calnes' Cas. in Er. 1; *Walsh v. Baillie*, 10 Johns. Rep. 180; *Russell v. Clark*, 7 Cranch, 90.

effect a more enlarged construction of the undertaking of sureties.¹ Besides, whatever was the undertaking of the defendant in the present case, the plaintiff considered the order contained in the letter of the 9th of January as completely abrogated by the letter of the 13th of February, after which date the principals step in, and the plaintiff acts under their orders, and corresponds with them only. By the last-mentioned letter, the defendant promises to answer bills drawn on himself only, which was a new undertaking, on his part, under which he could not be liable for bills drawn on Taber & Son. Nor did the plaintiff give the defendant any notice of those bills being drawn, which omission would alone be sufficient to discharge him from his liability.

Mr. D. B. Ogden, in reply, insisted, that though the surety could not be made responsible beyond the tenor of his engagement, he could not be discharged *by implication, still less by studied ambiguity of language and artifice of conduct. That the great fundamental principle, in the interpretation of contracts, is to carry into effect the intention of the parties, and that this principle was peculiarly applicable to commercial contracts. That where there is a doubt arising from the ambiguity of expressions, the acts of the parties may be resorted to as supplementary evidence of their intention. That even supposing there had been a revocation, or modification of the original contract, on the part of the defendant, he is still liable under his subsequent undertaking. No case can be found, where a mere attempt to recover of the principal will discharge the surety. All the authorities are the other way. The drawing the bills on Taber & Son was not a waiver of the defendant's liability. Nor was any notice to the defendant necessary, any more than on a bill of exchange, where the want of funds in the drawee's hands dispenses with the necessity of notice. So, in this case, the defendant having no funds in the hands of Taber & Son, notice to him would not have enabled him to get into his own hands the means of securing himself.

JOHNSON, J., delivered the opinion of the court: This case comes up on a bill of exceptions. This charge of the judge was given *pro forma*, generally against the plaintiff, and the verdict conforms to it. There are many counts in the declaration, and if on any one of those counts the plaintiff was entitled to recover, the judgment below must be reversed.

143*] *The first count is on a refusal to pay two sets of bills drawn on Taber & Son, of Portland, payable in New York. These bills were duly protested and returned, and the amount, with damages, refunded by the plaintiff.

In defense to this count it is contended: That the undertaking of Barker, as expressed in his letter of the 9th of January, 1806, relates to a different transaction from that upon which this cotton was purchased; that this transaction originated in the letters of the 26th of January, or 24th of July, 1806, or of the 20th February, 1807, and in neither of those letters is the undertaking, on bills to be drawn on Taber & Son, reiterated. That the letters alluded to contain,

in fact, an implied revocation of the undertaking in the letter of the 9th, of which the plaintiff was bound to take notice.

To the correctness of these positions, this court cannot yield its assent. Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract on the construction of a correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, contained in the letter of the 9th, at any time prior to its execution, but it was incumbent on him to have done so avowedly, and in language that could not be charged with equivocation. In this case, we discover nothing from which such an intention can fairly be inferred. The whole correspondence refers to the same subject, and has in view the same object. The expediting of the ship Mac *on freight, if freight could be obtained. [*144 ed, and if not, to be filled up (at least to the quantity of cotton here purchased), on owners' account. This agency the plaintiff undertakes expressly on the credit of Barker, for a house, with whose credit, except on his introduction, he is unacquainted; and so far from restricting the order contained in the letter of the 9th, there is not one from the defendant, in the subsequent correspondence, that does not enlarge the order as to quantity, upon the contingency of the ship not getting freight.

But, it is contended, although the original assumption may not have been revoked, it was not complied with, according to the terms in which it was expressed, and, therefore, was not binding to the defendant. And on this ground, so far as relates to the bills in this count, the court is of opinion that the defense is supported on legal principles. The assumption is to guaranty bills, "drawn on Taber & Son, Portland, or me, at 60 days sight." These bills are drawn on Taber & Son, Portland, payable in New York. Now, although we cannot see why an honorable discharge of his contract did not prompt the defendant to accept these bills for the honor of the drawer, when they were returned to New York for non-acceptance, yet, as it is our duty to construe the contracts of individuals, and not to make them, we are of opinion that these bills were not drawn in conformity to the assumption of the defendant. Merchants well understand the difference between drawing bills upon a specified place and drawing them upon one place payable in another. We are not to inquire into the *reasons which gov- [*145 ern them in forming such contracts, or competent to judge whether any other mode of complying with a contract may not be as convenient to them as that which they have consented to be governed by. But it will be perceived that this opinion can only affect the right of the plaintiff to recover the damages paid by him on the return of those bills, and has no effect, in this view of the case, upon the plaintiff's right to recover, upon the original guaranty of this debt, when legally demanded.

It is, however, contended, that the election to draw in this form was conclusive upon the plaintiff, and he could not afterwards resort to a draft upon the defendant himself. And this brings up the question upon the plaintiff's right to recover upon the second count. This count

1.—*Maxims in Equity*, 71; *Simpson v. Field*, 2 Ch. Cas. 22; *Rees v. Barrington*, 2 Ves. Jun., 540. *Wheat*, 8.

is on a refusal to pay a bill drawn on Barker himself, for the exact balance of the invoice of the cotton, after crediting the defendant with the bills that he had paid. This bill was not negotiated and returned, but drawn in favor of an agent of the plaintiff, and of course no damages are demanded on it.

The defense set up to this count, to wit, that the plaintiff, by making his election to draw upon Taber & Son, is thereby precluded from resorting to Barker, we think cannot be sustained. It is in vain that we look for any passage in the correspondence that holds out this idea, nor is there anything in the nature of the transaction that will sanction this court in attaching such a restriction to Barker's undertaking. It was in effect a promise to furnish the funds necessary to carry into execution this adventure. [146*] *Had it contained a mere guaranty of bills to be drawn on Taber & Son, there might have been some ground for this argument; but where the defendant confers the right to draw upon himself, and, in fact, clearly recommends a preference to such bills, he makes himself the paymaster, and we consider it an original substantive undertaking. In this view of the case, the law quoted on the subject of securityship undertakings cannot be applicable, and we think the plaintiff ought to recover on this count.

There are other items in the plaintiff's demand, on which, as the case will be sent back, it is necessary to express an opinion. The first is the charge of about \$1,200 for services and expenses incident to this agency; the other is the charge of interest.

The first of these items, we are clearly of opinion, the plaintiff is entitled to, and that it is recoverable under the counts for services performed, and money expended in the discharge of this undertaking. And as to the second, we are equally satisfied that interest is recoverable under the second count in nature of damages. But some difficulty has arisen on the question whether the plaintiff is entitled to recover the interest of New Orleans or of New York. The former the bill of exceptions states to be ten per cent.; the latter seven per cent.

Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place. Had this bill on Barker

been negotiated and returned under protest, the holder would have been entitled to demand of the drawer the interest of *New Or- [*147] leans, and thus, incidentally at least, the defendant would have been compelled to pay the plaintiff that interest. But it may be contended that as the letter of the 26th appears to restrict the order for this purchase so as to make it depend on the condition of the practicability of negotiating bills on New York, the undertaking of Barker was limited to payments to be made in New York. On this point the court are of opinion that, even though we attach this condition to Barker's undertaking, the liability to replace the money at New Orleans still continued; and any necessary loss on the bills on account of the difference of exchange, would have been chargeable to the defendant; but we think, further, that the restrictive words in the letter alluded to may justly be considered as enlarged into a general order in his subsequent correspondence.

The court is therefore of opinion that as the money was advanced at New Orleans, and to be replaced at New Orleans, the plaintiff may claim the legal interest at that place.

This court is of opinion that there is error in the judgment below, and that it must be reversed. But this court can do no more than order a *venire facias de novo*.

An attempt has been made to obtain from this court a mandate to the Circuit Court, to enter a judgment in conformity to an agreement of parties entered on the transcript, which states the amount to be adjudged to the plaintiff upon several alternatives. But we are of opinion that this court can take no notice of that consent. The verdict presents no alternative; *and the consent entered on the tran- [*148] script or on the minutes of the Circuit Court, forms no part of the record brought up by this writ of error. Nor will this court be led into the exercise of a power so nearly approaching the province of a jury in assessing damages.

*Judgment reversed.*¹

Rev'g.—10 John. 312.

Cited—6 Pet. 644; 7 Pet. 127; 11 Pet. 412; 5 How. 314; 1 Otto, 411; 3 Sumn. 525; 1 Biss. 187, 295; 1 Wood. & M. 136; 3 Wood. & M. 377; 1 Bald. 302; 3 Cranch, C. C. 147.

1.—Although contracts of guaranty are very familiar in the practice of the commercial world, comparatively few cases have been subjected to judicial decision in the English and American tribunals. It may not, however, be without use to the learned reader to collect the principal adjudications on this subject, especially as no attempt has yet been made to bring them before the public in a connected view.

Contracts of guaranty, like all commercial contracts, have received a liberal interpretation in furtherance of the intention of the parties. But at the same time, they are not extended beyond the obvious import of the terms in their reasonable interpretation. Where, in a letter of introduction of a mercantile firm, the defendants used the following terms, "We do ourselves the pleasure of introducing them to your correspondence, as a house on whose integrity and punctuality, the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you," it was held that the letter did not import a guaranty of such engagements; and that parol evidence was not admissible to explain the terms so as to affect their import, with regard to the sup-

posed guaranty. *Russell v. Clarke*, 3 Dall. 415; 8 C. 7 Cranch, 69. So, where B wrote to C, "as I understand Messrs. A & Co. have given you an order for rigging, &c., which will amount to £4,000. I can assure you, from what I know of A's honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guaranty you against any loss from giving them this credit;" it was held, that the writing did not import a perfect and conclusive guaranty, but only a proposition or overture tending to a guaranty; and that to make it a guaranty, B ought to have had notice that it was so regarded and meant to be accepted, or there should have been a subsequent consent on his part to convert it into a conclusive guaranty. *M'Iver v. Richardson*, 1 Maule and Selwyn, 557. But it is said that the words are to be taken as strongly against the party giving the guaranty as the sense of them will admit of. Therefore, where the defendant wrote to the plaintiff, "I hereby promise to be responsible to T. M. (the plaintiff,) for any goods he hath or may supply my brother W. P. to the amount of £100," it was held that this was a standing or continuing guaranty to the extent of £100, which might at any time become due, for goods supplied, until the credit was recalled. At the time the letter was

159*]

*[COMMON LAW.]

HUGHES

v.

THE UNION INSURANCE COMPANY.

Insurance on a vessel and freight "at and from Teneriffe to the Havanna, and at and from thence to New York, with liberty to stop at Matanzas," with a representation that the vessel was "to stop at Matanzas to know if there were any men-of-war off the Havanna." The vessel sailed on the voyage insured, and put into Matanzas to avoid British cruisers, who were then off the Havanna, and were in the practice of capturing neutral vessels trading from one Spanish port to another. While at Matanzas she unloaded her cargo, under an order from the Spanish authorities; and afterwards proceeded to Havanna, whence she sailed on her voyage for New York, and was afterwards lost, by the perils of the seas. It was proved that the stopping and delay at the Havanna was necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished.

Held, that the order of the Spanish government was obtained under such circumstances as took from it the character of a *vis major* imposed upon the master, and was, therefore, no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unloading the cargo was not a deviation. This case distinguished from that of the Maryland Ins. Co. v. Le Roy et al., 7 Cranch, 26.

ERROR to the Circuit Court for the District of Maryland.

written, goods had been supplied to the amount of £200, and afterwards another parcel was delivered, amounting together with the former to £124, all which had been paid for, and the sum now in dispute (and which, by the judgment of the court, the plaintiff recovered), was for a further supply to W. P. Mason v. Pritchard, 2 Camp. N. P. 438; S. C. 12 East, 227. So, where the defendant wrote to the plaintiff, "I have been applied to by my brother, W. W., to be bound to you for any debts he may contract, not to exceed £100 (with you), for goods necessary in his business as a jeweler; I have wrote to say by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweler, not exceeding £100 after this date;" Lord Ellenborough said, that the defendant was answerable for any debt not exceeding £100, which W. W. might from time to time contract with the plaintiff in the way of business; that the guaranty was not confined to one instance, but applied to debts successively renewed; and that if a party meant to be a surety only for a single dealing, he should say so. Merle v. Wells, 2 Camp. N. P. R. 413. So, where the defendant wrote, "I hereby undertake and engage to be answerable to £150* the extent of *£300 for any tallow or soap supplied by Mr. B. (the plaintiff) to F. & B., provided they shall neglect to pay in due time;" Lord Ellenborough held it to be a continuing guaranty while the parties continued to deal on the footing established when it was given; but that goods supplied after new arrangements were made, were not within the scope of the guaranty; and he relied on the word "any," without which he thought it might perhaps be confined to one dealing to the amount of £300. *Boston v. Bennett*, 3 Camp. N. P. 220. But in debt on a bond entered into by A and B with the plaintiffs, reciting, that it was to enable A to carry on his trade, and conditioned for the payment of all such sum or sums of money not exceeding £3,000 with lawful interest, which should or might at any time or times thereafter be advanced, and lent by the plaintiffs to A, or paid to his use, by his order and direction," it was held that it was a guaranty for the definite amount of £3,000, and when an advance was made to that amount, the guaranty became *functus officio*, and was not a continuing guaranty. *Kirby v. Duke of Marlborough*, 2 Maule and Selwyn, 18. And, where the defendants wrote to the plaintiff, "If W. & B., our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish," the court held that it was not a continuing

Wheat, 3.

This was an action of *assumpsit* brought on a policy insuring the ship Henry and her freight, "at and from Teneriffe to the Havanna, and at and from thence to New York, with liberty to stop at Matanzas." At the trial the plaintiff gave in evidence the representation on which the policy was made, which contained this expression: "We are to stop at Matanzas to know *if there are any men-of-war off the [*160 Havanna." The vessel sailed from Teneriffe on the 7th of April, 1807, and on the 7th of June following, put into Matanzas, in the Island of Cuba, to avoid British cruisers, who were then cruising on her way to, and off the port of, Havanna, and who were then in the practice of capturing American vessels sailing from one Spanish port to another. On the 6th of July, as soon as the passage was clear, she proceeded to the Havanna, whence, on the 14th of July, she sailed on her voyage to New York. On the 28th of that month she foundered at sea, and was totally lost. The action was for the insurance on the vessel and freight from the Havanna. The underwriters gave in evidence, that while at Matanzas she unloaded her cargo, and insisted that this was a deviation, by which they were discharged. To repel this evidence, the plaintiffs showed that the stopping and delay at Matanzas were necessary to avoid capture, and, therefore, allowed by the policy; that no delay was occasioned by dis-

guaranty, but was confined to the first parcel of goods sold to W. & B.; that it gave an unlimited credit as to amount, but was silent as to the continuance of the credit to future sales, and *expressio unius, est exclusio alterius*. *Rogers v. Warner*, 8 Johns. Rep. 119. And in a very recent case, where the defendants wrote to the plaintiff, "our friends and connections, S. & H. H., contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished a letter of credit from us to increase their means, and to be used or not as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would *be [*151 disposed to furnish them with funds under our guaranty. The object of the present letter is, therefore, to request you, if convenient, to furnish them with any sum they may want, as far as \$50,000, say, \$50,000. They will re-imburse you the amount they receive, together with interest, as soon as arrangements can be made to do it. We shall hold ourselves answerable to you for the amount;" it was held, that this was a guaranty for a single advance to the amount of \$50,000, and not a continuing guaranty, *toties quoties*, to that amount, and that as soon as \$50,000 were once advanced, the guaranty ceased to operate upon future advances, although by intermediate payments the sum due at the time of such new advances were below \$50,000. *Cremier v. Higginson*, Circuit Court U. S. Mass. Oct. T. 1817. MSS. Where A requested B to give C any assistance in the purchase of goods, by letter, or otherwise, adding, "you may consider me accountable with him to you, for any contract he may make;" it was held that A was to be considered as a guarantor, and not a joint debtor, and that a contract by C with B to pay him a premium for guaranteeing a contract of C with a third person was within A's promise. *Meade v. M'Dowell*, 5 Binney, 195.

A guaranty to the plaintiffs, "that if they will credit D a sum not exceeding \$500, in case he shall not pay it in twelve months, the guarantee will pay it," does not imply a condition that the plaintiff may not advance more than \$500, if the additional advance be on the general credit of D. *Sturges v. Robins*, 7 Mass. Rep. 301.

A guaranty, "we jointly and severally promise to guaranty a payment of £500 at 5 per cent. say, by a bill drawn on G. H. by D. and F. for £500,

357

charging the cargo; that the risk was not increased, but diminished by it; and that an order from the Spanish government had made this act necessary.

The court instructed the jury, that unlading the cargo at Matanzas was a deviation which discharged the underwriters, unless it was rendered necessary by the order of the Spanish government at the Havana. That in this case the order did not justify such unlading, and that the underwriters were, consequently, discharged. Under these directions the jury found a verdict for the defendants. The plaintiff having excepted to the opinion of [161*] the court, the judgment *which was rendered in favor of the defendants was brought before this court on writ of error.

Mr. Harper, for the plaintiff, argued that the unlading at Matanzas was by a mandate, and not a permission from the Spanish government, which, being a *vis major*, excused the master. That in this case the risk was not increased, but diminished, by stopping at Matanzas. Neither party is at liberty to vary the risk; but this rule applies to cases where the change may produce some inconvenience to the insurer, not where it does actually produce it merely. Unnecessary deviation always discharges the underwriters, because it may increase the risk. But here the policy permitted the stopping and delay at Matanzas; and the risk not only could

not be increased, but was actually diminished by discharging the cargo and proceeding with the vessel close along the shore to the Havana. This doctrine is not impugned in *The Maryland Insurance Co. v. Le Roy et al.*¹ That case went on the ground of variation from the terms of the policy. The taking on board the jackasses might have increased the risk; but whether in point of fact it did, or not, the court said was immaterial. But in the present case there is no variation from the terms of the contract; the risk neither was, nor could be, increased by unlading the cargo. In *Raine v. Bell*,² the Court of K. B. determined that a ship may *trade at a port where she has liberty to [*162 touch and stay, provided this occasions no delay, nor any increase or alteration of the risk. It has also been held, in the courts of our own country, that selling a part of the cargo during a necessary detention does not discharge the insurers.

Mr. Winder and Mr. Jones, contra, argued, that the proceedings of the Spanish authorities were a mere permission, which the party might use or not at his pleasure, and not an imperious mandate which he was compelled to obey. It is an elementary principle of insurance law, that

1.—7 Cranch, 26.

2.—9 East., 185; Marshall on Ins. App. No. VIII. 284, a.

dated 10th of January, 1808," is to be construed as a general guaranty of the bill, not (as usual) a guaranty that the acceptor should pay, but a contract that either the drawer or the acceptor should pay. *Philips v. Astling*, 2 Taunt. Rep. 208. But upon such a guaranty (if it is to be construed as limiting the bill to the specific sum of £500) the guarantee would not be liable to the extent even of the £500, if the bill be drawn for [152*] a larger sum; for the terms of the contract must be strictly complied with. *Id.* And a guaranty to A for goods to be sold by him on credit to B will not enure to the benefit of a third person, who shall actually furnish the goods to B although at the request of A, for a surety is not to be held beyond the scope of his own engagement. *Robbins v. Bingham*, 4 Johns. Rep. 478; *Walsh v. Baile*, 10 Johns. Rep. 180. And see 1 Maule & Selw. 557. So, if a letter of credit be addressed to A, and part of the goods are delivered by A, and part by C and D, the latter cannot recover on the guaranty. *Robbins v. Bingham*, 4 Johns. Rep. 478. So, a letter of guaranty, addressed to J. & A. N. by mistake, for J. & J. N., will not cover advances made by the latter on the faith of the letter. *Grant v. Naylor*, 4 Cranch, 224. Many cases analogous to this have been decided. As where A became surety by bond that B should truly account to C for all sums of money received by B for C's use, and afterwards B took a partner with C's knowledge, it was ruled that the guaranty did not extend to sums received by B and his partner, for C's use, after the formation of the partnership. *Bellairs v. Ellsworth*, 3 Camp. N. P. 53. So, a bond conditioned to repay all sums advanced by five persons, or any of them, was held not to extend to sums advanced after the decease of one of them by the four survivors, the four then acting as bankers. *Weston v. Barton*, 4 Taunt. 674. And to the same effect will be found the following cases, *Arlington v. Merritt*, 2 Saund. 44; *Wright v. Russell*, 2 W. Bl. 684; *S. C.* 3 Wils. 539; *Barker v. Parker*, 1 T. R. 287; *Myers v. Eje*, 7 T. R. 254; *Strange v. Lee*, 3 East, 484. But if a bond be given to trustees conditioned for the faithful service of a person during his continuance in the service of a fluctuating or successive body of persons, not incorporated, as the *Globe Insurance Company*, it will extend to the whole time the party is in the service of such company, although the members may be continually changing. *Metcalf v. Bruin*, 12 East, 400. An agent in England for merchants, the vendors of goods in Russia, who guaranties "that

the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment *shall arise upon the importation thereof, or [*153 that in default the consequence shall rest with the sellers," makes himself personally responsible to the vendee. *Readhead et al. v. Cator*, 1 Starkie's N. P. R. 14. An impediment arising from non-compliance with the navigation act, is an impediment within the terms of the guaranty. And such a guaranty is not within the statute of frauds, if the terms of the agreement can be collected from the written correspondence between the parties. *Id.* A engages to guarantee the amount of goods supplied by B to C, provided 18 months' credit be given; if B give credit for 12 months only, he is not entitled at the expiration of 6 months more to call upon A, or his guaranty. But B, having, after the commencement of the action, delivered an invoice from which it appears that credit was given for 12 months only, is at liberty to show that this was a mistake, and that, in fact, 18 months' credit was given. *Bacon v. Chesney*, 1 Starkie's N. P. R. 182.

In cases of guaranty, it has been made a question, whether notice ought to be given to the guaranteee of the advances made, and of the non-payment by the debtor. In *Oxley v. Young*, 2 H. Bl. 613, where the defendant, upon an undertaking of D to indemnify him, guarantied to the plaintiff an order sent to him by A for certain goods, and the plaintiff informed the defendant that the goods were preparing, but did not give him notice of the actual shipment, the court thought that the right to sue on the guaranty attached when the order was put in a train for execution, subject to its being actually executed; and that the notice of such intended execution was sufficient; and the court further thought that that right could not be divested even by a willful neglect of the plaintiff, though, perhaps, he might be liable to an action on the case at the suit of the defendant, if any such neglect could be shown contrary to all good faith, and by which a loss had been incurred. In *Peel v. Tutlook*, 1 Bos. & Pull. 419, Chief Justice Eyre appears to have been of opinion, that at least in guaranties for good behavior, notice of any embezzlement or fraud ought to be given within a reasonable time; but the case finally went off upon narrower grounds. In *Russell v. Clarke*, 7 Cranch 60, 62, it was distinctly held by the court, that if the contract in that case had been a guaranty, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant of the extent of his engagement. And the same doctrine was as-

Wheat. 3.

whether the deviation increase the risk or not, it discharges the underwriters.¹ The case of *The Maryland Insurance Co. v. Le Roy et al.* illustrates the rule, and the jury there found that taking on board the jackasses did not increase the risk. Discharging the cargo at a place where permission is only given to touch, is a deviation.² It is immaterial whether the risk be increased or diminished, or remain the same *in quantum*. In *Ruine v. Bell* the jury found that the vessel would have otherwise been necessarily detained while she was taking in the cargo; and that case proves nothing more than that, while so detained, the master may take in cargo, but not break bulk. Staying to to unlade increases the risk; but taking cargo on board, while necessarily detained, does not increase or alter the risk.

163*] *Mr. D. B. Ogden*, in reply, contended that the question was whether during the necessary detention of the vessel the master had a right to land the cargo. The authority of *Kine v. The Columbian Insurance Co.* is conclusive to show that he had. If, according to *Ruine v. Bell*, it be not a deviation to take on board a cargo at a port of necessity, neither is it a deviation to land the cargo at a port of ne-

cessity. The case of *The Maryland Insurance Co. v. Le Roy et al.* is distinguishable. Where the master deviates from necessity, his subsequent conduct, if *bona fide*, cannot discharge the insurers. But in this case he acted in good faith for the benefit of all parties.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

At the trial the cause seems to have turned principally on the necessity to unlade the cargo at Matanzas produced by the order of the Spanish government at the Havanna. As this court concurs with the circuit judge in the opinion that this order was obtained under circumstances which take from it the character of a force imposed on the master, and compelling him to discharge his cargo, and is, therefore, no excuse for such discharge, it will be unnecessary farther to notice that part of the case. The question to be considered is that part of the opinion which declares that unlading the cargo at Matanzas, although it occasioned no delay, and did not increase, but did diminish the risk, was a deviation which discharged the underwriters.

*In considering this question, it is to [*164 be observed that the *termini* of the voyage were not changed. The Henry did sail from Teneriffe to the Havanna, and was lost on the voy-

1.—1 Emerigon, *Des Assurances*, 558, 1 Marshall on Ins. 185, *et infra*.

2.—Marshall on Ins. 208, 275, and the cases there collected.

serted in the Circuit Court in *Cremerv. Higginson*, already cited.

Where there is a guaranty of advances or supplies, it is necessary in the first instance to make a demand of payment from the original debtor, or at least to use reasonable diligence in endeavoring to make such a demand, and notice of non-payment must be given in a reasonable time to the guarantor. This may be collected as the general result of the cases on this subject. But where an agent in England, for merchants the vendors of goods in Russia, who guarantees "that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that in default the consequence shall rest with the sellers," it was held that the agent made himself personally responsible to the vendee, and that in a declaration upon such a guaranty against the agent, it is unnecessary to allege any application for indemnity to the principals. *Readhead et al. v. Cator, 1 Starkes N. P. R. 14*. And it is not necessary to sue the debtor before the right attaches to sue on the guaranty. *Bank of New York v. Livingston, 2 Johns. Cas. 409*. And where the guaranty is of a note or bill payable at a future time, although it is not necessary to pursue the same strictness in order to charge a guaranty as to charge the drawer; yet a due demand and notice of non-payment ought to be given to the drawer and guarantor; and if the necessary steps are not taken to obtain payment from the parties who are liable on the bill, and solvent, the guaranty is discharged. *Phillips v. Astling, 2 Taunt. 208*; *Warrington v. Furber, 8 East, 245*. But it is a sufficient excuse for not making a demand, that the debtor cannot be found, or that he is insolvent. *Warrington v. Furber, 8 East 245*; *Phillips v. Astling, 2 Taunt. 208*. And if there be gross laches in securing the debt (*Duval v. Trask, 13 Mass. R. 154*; *The People v. 155 Jansen, 7 Johns. R. 332*; *Hunt v. United States, 1 Gallis, 34*); or if the creditor undertake to do anything whereby to lessen or postpone the responsibility of the debtor (Commissioners of Berks v. Ross, 3 Binney, 520); or if the right of the parties be altered, as if any new debt have been incurred; or if the demand have been enlarged to the prejudice of the guaranty (*Peel v. Tatlock, 1 Bos. & Pull, 419*; *King v. Baldwin, 2 Johns. Chan. R. 554*; *Boulbee v. Stubbs, 18 Ves. 20*); or if the creditor give time to his debtor without the knowledge of the guaranty (*Skip v. Huey, 3 Atk. 91*; 6 Ves. 408, note a; *Rees v. Berrington, 2 Ves., Jun., 540*; *Wheat, 3*.

Nisbit v. Smith, 2 Bro. Ch. Cas. 579; *Moore v. Bowmaker, 6 Taunt. 379, 8. C. 2 Marshall's R. 81*); or if upon a guaranty of a partnership debt the partnership debt is discharged by carrying the proportions of each partner to his separate account without any notice to the guarantor (*Cremerv. Higginson, MSS. above cited*); or if there be a fraudulent concealment to the injury of the guarantor. *Oxley v. Young, 2 H. Bl. 613*; *Semble Eyre C. J.* In all these cases the guaranty is discharged. And it has been held in a recent case, that if the holder of a note is requested by the surety (being one of the joint makers) to proceed without delay and collect the money of the principal, who is solvent, and he omits to do it until the principal becomes insolvent, the surety will be exonerated at law. *Palne v. Packard, 13 Johns. R. 174*. But this decision has been questioned by very high authority. *King v. Baldwin, 2 Johns. Chan. R. 553, 554*. Where there are several debts due, some of which are guaranteed and some not, and payments are made by one debtor, the same general rule applies in this as in other cases, that where the debtor makes no application of any payment the creditor may apply it to any account he pleases. *Kirby v. Duke of Marlborough, 2 Maule & Selwyn, 18*; *Dawson v. Remnant, 6 Esp. R. 26*; *Field v. Holland, 6 Cranch, 8*; *Hutchinson v. Bell, 1 Taunt. 558*; *Sturgis v. Robbins, 7 Mass. R. 301*.

Pothier, in his treatise on obligations, has discussed with great learning and ingenuity the whole doctrine of suretyship and guaranty. *Traite des Obligations* part 2, ch. 6, sect. 1 to 8. Among [*156 other things, he remarks that care should be taken not to take for a promise to become surety what one says or writes, unless there be a well-marked intention to do so. Therefore, he adds, if I wrote or said to you that a man who asked you to lend you money was solvent, this could not be taken for an agreement to become a surety, for I might well have no other intention than to inform you of what I believed to be the case, and not to bind myself. On this principle it was adjudged in a case reported in Papon X. 4, 12, that these words in a letter to the keeper of a boarding-house, "A. B. intends to send his son to board with you. He is an honest man and will pay you well," did not include an obligation. On the same principle, if I accompany a person to a woollen draper's where he buys cloth, the draper ought not to conclude that I am security for him. The following distinctions and principles stated by this learned writer seem

age from the Havanna to Baltimore. The policy permitted her to stop at Matanzas, and the purpose of stopping was to know if there were any men-of-war off the Havanna. It would be idle to stop for the purpose of making this inquiry if it were not intended that the Henry might continue at Matanzas so long as the danger continued. The stopping and delay at Matanzas is then expressly allowed by the policy.

But, admitting this, it is contended, that unlading the cargo is a deviation.

And why is it a deviation? It produced no delay, no increase of risk, and did not alter the voyage. The vessel pursued precisely the course marked out for her in the policy. In reason nothing can be found in this transaction which ought to discharge the underwriters. If, however, the case has been otherwise decided, especially in this court, those decisions must be respected.

In *Stitt v. Wardel* (1 Esp. N. P. Rep., 610), it was determined that liberty to touch and stay at any port did not give liberty to trade at that port; and in *Sheriff v. Potts* (5 Esp. N. P. Rep., 96), it was decided that liberty to touch and discharge goods did not authorize the taking in of other goods. These cases certainly bear with considerable force on that under consideration, but they were decided at *nihi prius*, and seem to have been in a great degree overruled by the court in the case of *Raine v. Bell*, reported

*in 9th East. In that case, under a policy [*165] to touch and stay at any place, goods were taken on board during a necessary stay at Gibraltar. The court was of opinion that as this occasioned no delay nor any increase or alteration of the risk, the plaintiff was entitled to recover. Between the case of *Raine v. Bell* and this case, the court can perceive no essential difference.

In the Supreme Court of Pennsylvania (*Kingston v. Gerard*, 4 Dal., 274), a similar question occurred, and it was there held that unlading and selling part of her cargo by a captured vessel during her detention, would not avoid the policy.

But it is contended, that this point has been settled in this court, in the case of *The Maryland Insurance Company* against *Le Roy and others*. In that case, a liberty was reserved in the policy "to touch at the Cape de Verd Islands for the purchase of stock, such as hogs, goats, and poultry, and taking in water." The vessel stopped at Fago, one of the Cape de Verd Islands, and took in four bullocks and four jackasses, besides water and other provisions, unstowed the dry goods, and broke open two bales, and took 40 pieces out of each, for trade. The vessel remained at the island from the 7th to the 24th of May, although the usual delay at those islands for taking in stock and water, when the weather is good, is from two to three days. The weather was good during this de-

worthy of notice, in reference to the subject of this note: 1. Where the surety has expressed the sum and cause for which he became surety, his obligation does not extend beyond the sum and cause expressed. As if one become bound for the principal debt he will not be liable for interest. 2. On the other hand, when the words of the suretyship are general and indeterminate, the surety is presumed to have bound himself for all the obligations of the debtor resulting from the contract to which he acceded; and, therefore, a surety in general terms is bound not only for the principal sum, but for interest; and not only for the interest due *ex re natura*, but for that occasioned by the delay of the debtor. And this is conformable to the doctrine of the Roman law. 3. And in general, however unlimited the suretyship may be, it does not extend to the penalties to which the debtor may be condemned, *officio judicis propter suam contumaciam*. 4. The obligation of suretyship is extinguished by an extinction of the principal debt; by the creditor's disabling himself by his own act from ceding his action against his principal debtor, which the surety has an interest in having assigned to him; by the creditor's accepting in payment property, the title to which afterwards proves to be invalid. 167*] at least if the principal debtor in the meantime becomes insolvent. 5. And the principal debt may be extinguished not only by payment or a set-off or release, but also by a novation of the debt, that is, by accepting a new obligation in discharge of the old one. 6. Pothier then puts the case, whether the surety be discharged by the creditor's granting to the debtor a delay for the payment, and agrees with Vinnius in holding the negative, for he says, the simple delay, not making the debt appear discharged, deprives the surety of no means of providing for his own safety, and the surety cannot pretend that the delay prejudices him, since he himself derives an advantage from it. 7. According to the principles of the ancient civil law, the creditor could demand payment from the surety without first resorting for payment to the principal debtor. But Justinian altered that rule, and gave to the surety an exception or plea, which is called an exception of discussion or of order, by which he may require the creditor to proceed in the first instance against the principal debtor. And this rule, with some exceptions, was adopted into the ancient jurisprudence of France. But at no time, either in the civil or French law, did the bringing of a suit by the creditor against his prin-

cipal debtor discharge the surety, who, therefore, remained bound until payment. And the omission of the creditor to institute a suit of discussion against the principal debtor, notwithstanding a request of the surety, until after the debtor becomes insolvent, is not thought to discharge the surety. But if a surety had contracted only to pay what the creditor could not obtain from the principal debtor, an omission to sue for a long time, and until after an insolvency, may discharge the surety. 8. To entitle the surety, after payment, to recover over against the principal debtor, it is necessary that the surety should not have neglected, by his own fault, to plead any proper plea in bar of the creditor; that the payment should have been valid, and should have discharged the principal debtor; and that the principal debtor should not have paid a second time by the fault of the surety. See Pothier, *Traite des obligations*, part 2, ch. 6, s. 1 to 8. The Code Napoleon, or civil code, adopts, for the most part, the doctrine stated in Pothier. [*168] Liv. 3, tit. 14, art. 2011, &c., to 2043. It declares that a guaranty or suretyship (*cautionnement*), ought not to be presumed; it ought to be express; and ought not to be extended beyond the limits of the contract itself. An indefinite guaranty of a principal obligation extends to all the accessories of the debt. The guarantee is not bound to pay but upon the default of the debtor, who ought, in the first instance, to be sued by discussion, against his goods. In a suit against the guarantee, he may enter the same exceptions to the debt (except they are purely personal) as the principal debtor may. The surety is discharged, when by the act of the creditor the guarantee cannot have the benefit of a substitution to the rights, hypothecation, and privileges of the creditor. A simple postponement of the time granted by the creditor to the debtor does not discharge the guarantee, who may, however, in that case, pursue the debtor to enforce payment. Code Napoleon, *ubi supra*. See also, the Digest of the Civil Laws of Louisiana, p. 429; Erskine's Institutes of the Laws of Scotland, 10th ed., 326. The coincidences between the doctrines of the common law and those of the civil law, and the codes derived from it, are very striking; and the differences in particular cases seem to result rather from the difference of the remedies, of guaranties and sureties, under the various systems (which, of course, require a corresponding change as to their liability), than from any theoretical opposition in principles.

lay; and the bullocks and jackasses encumbered the deck of the vessel more than small stock would have done. The court left it to the **166*** jury to determine whether the risk was increased by taking the jackasses on board, and directed them to find for the plaintiffs, unless the risk was thereby increased. The jury found for the plaintiffs; and this court reversed the judgment rendered on that verdict, because the taking in the jackasses was not within the permission of the policy.

It is perfectly clear that the case of *The Maryland Insurance Company v. Le Roy and others* differs materially from this. In that case, articles were taken on board which encumbered the deck of the vessel, and which were not within the liberty reserved in the policy. In that case too, the insured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. The judge, therefore, ought not to have left it to the jury on the single point of increase of risk by taking in the jackasses. Although the risk might not be thereby increased, the unauthorized delay and unauthorized trading during that delay, connected with taking on board unauthorized articles, discharged the underwriters according to the settled principles of law; and the court does not say in that case that these circumstances were immaterial or without influence. The court does not feel itself constrained by the decision in *The Maryland Insurance Company v. Le Roy et al.* to determine that in this case also, which differs from that in several important circumstances, **167*** the underwriters are discharged. *The judgment is reversed, and the cause remanded, with directions to issue a *venire facias de novo*.

*Judgment reversed.*¹

168*

*[COMMON LAW.]

SWAN

v.

THE UNION INSURANCE COMPANY OF
MARYLAND.

To entitle the plaintiff to recover in an action on a policy of insurance, the loss must be occasioned by one of the perils insured against. The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial whether the loss, so produced, occurred during the continuance of the barratry or afterwards.

ERROR to the Circuit Court for the District of Maryland.

This was an action on a policy of insurance

upon the schooner *Humming-Bird*, at and from New York to Port au Prince, and at and from thence back to New York. The policy was dated on the 21st of July, 1810, and the vessel sailed on the voyage insured on the 5th of that month. About the 5th of August following she arrived at Port au Prince, and was there stripped of her sails and a considerable part of her rigging by one James Gillespie, to whom she had been chartered for the voyage. This was done with the knowledge and acquiescence of the master, either for the purpose of procuring the loss of the vessel, or of fitting up another vessel, which Gillespie wished to dispatch to the United States. On her return voyage she was sunk by Gillespie, but whether with or without the knowledge of the master, did not appear. The plaintiff insisted at the trial, that as barratry had been committed at Port au Prince, *the subsequent loss, however occasion- ***169** ed, was to be ascribed to that cause, and he was entitled to recover. But the court directed the jury that, admitting the act at Port au Prince to be barratry, the plaintiff could not recover on account of it, unless the jury should be of opinion that it produced the loss. Under this direction, to which the plaintiff excepted, the jury found a verdict for the defendants.

Mr. Harper, for the plaintiff, argued that the loss, though not immediately consequent upon the act of barratry, was a ground of recovery; the insured ought to be protected against the incidental consequences of that act; and could not else have the benefit of his contract of indemnity. In the case of *Vallejo v. Wheeler*,² the smuggling which was the barratrous act, was not the immediate and direct cause of the loss; yet the insured recovered, because the loss was sustained in consequence of the alteration of the voyage. Sergeant Marshall deduces from that case this corollary, that if barratry be once committed, every subsequent loss or damage may be ascribed to that cause; and the underwriters are liable for it as for a loss by a barratry.³

Mr. Winder, contra, contended that it did not appear that the act of the master at Port au Prince was barratrous, or anything more than gross neglect, or that he had any interest in the consequences of his supposed misconduct. The case of *Vallejo v. Wheeler* does not ***170** support the inference of Marshall, and his opinion is not authority any further than it is borne out by the case. It has been doubted by the most enlightened jurists whether barratry ought to be the subject of insurance, and certainly it ought not to be extended beyond its direct and immediate consequences.

MARSHALL, *Ch. J.*, delivered the opinion of

1.—In the case of *Urquhart v. Barnard* it was held by the English Court of K. B. that if a ship has liberty to touch at a port, it is no deviation to take in merchandise during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there. And that if liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose. 1 Taunt. 450. Liberty to touch at a port for any purpose whatever includes liberty to touch for the purpose of taking on board part of the goods in-
Wheat. 3.

sured. *Violet v. Allnutt*, 2 Taunt. 419. Under a liberty to touch and stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. Whether the purpose is within the scope of the policy, is a question for the court. The policy not limiting the time of stay, whether a ship has staid a reasonable time for the purpose, is purely a question for the jury. *Langhorn v. Allnutt*, 4 Taunt. 511.

2.—Cowp. 143, 2 Marshall on Ins. 528.

3.—*Id.* 531.

the court, and after stating the facts, proceeded as follows:

The general principle unquestionably is, that to entitle the plaintiff to recover, the loss must be occasioned by one of the perils in the policy. This is equally the rule of reason and the rule of law. But the plaintiff contends that the case of *Vallejo v. Wheeler* denies the application of this principle to a loss in a case in which barratry has been committed. This court is not of that opinion. The case of *Vallejo v. Wheeler* declares it to be immaterial whether the loss occurred during the continuance of the barratry or afterwards, not whether the loss was produced by the barratry. In that case the court was of opinion that the loss was produced by the barratry.

*Judgment affirmed.*¹

Cited—2 Wood. & M. 320.

[COMMON LAW.]

DUGAN ET AL., EXECUTORS OF CLARKE,
v.
THE UNITED STATES.

Where a bill of exchange was indorsed to T. T. T., treasurer of the United States, who received it in that capacity, and for account of the United States, and the bill had been purchased by the Secretary of the Treasury (as one of the commissioners of the sinking fund, and as agent of that board) with the money of the United States, and was afterwards *indorsed by T. T. T., treasurer of the United States, to W. & S., and by them presented to the drawees for acceptance, and protested for non-acceptance and non-payment, and sent back by W. & S. to the Secretary of the Treasury; held, that the indorsement to T. T. T. passed such an interest to the United States as enabled them to maintain an action on the bill against the first indorser.

1.—The cases on the subject of barratry are collected in Condry's edition of *Marshall on Insurance*, Vol. II., p. 515, *et infra*, and note (84) p. 534. To which add the following: Where the owner of a vessel chartered her to the master for a certain period of time, the master covenanting to victual [171*] and man her at his own expense, he was held to be owner *pro hac vice*, and no act of his would amount to barratry. And if he committed an act, which, were he invested with no other character than that of master, would be barratrous, the insurer would not be liable even to an innocent owner of the goods laden on board the vessel. *Hallett v. The Columbian Ins. Co.*, 8 Johns. Rep. 272. Barratry may be committed by the master, in respect of the cargo, although the owner of the cargo is, at the same time, owner of the ship, and although the owner is, also, supercargo or consignee for the voyage. *Cook et al. v. The Commercial Ins. Co.* 11 Johns. Rep. 40. *Quere*, Whether information or facts, known to the assured, as to the carelessness, extravagance, and want of economy in the master, be material, and ought to be disclosed to the insurer at the time of effecting the policy. *Walden v. The Firem. Ins. Co.*, 12 Johns. Rep. 128, 513. A vessel was insured, among other risks, against fire; during the voyage a seaman of the crew carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up, and wholly lost; it was held that the insurers were not liable for the loss. A loss occasioned by the mere negligence or carelessness of the master or mariners, does not amount to barratry, which is an act done with a fraudulent intent, or *ex maleficio*. *Grim v. The United Ins. Co.*, 13 Johns. Rep. 451; see 8 Mass. Rep. 308. A sentence condemning as enemy's

Quere, whether when a bill is indorsed to an agent, for the use of his principal, an action on the bill can be maintained by the principal in his own name.

However this may be between private parties, the United States ought to be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject-matter of the controversy.

Held, that the United States might recover in the present action, without producing from W. & S. a receipt or a re-indorsement of the bill; that W. & S. were to be presumed to have acted as the agents or bankers of the United States; and that all the interest which W. & S. ever had in the bill was devested by the act of returning it to the party from whom it was received.

If a person who indorses a bill to another, whether for value or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of such bill, and is entitled to recover thereon, notwithstanding there may be on it one or more indorsements in full, subsequent to the indorsement to him, without producing any receipt or indorsement back to him from either of such indorsees, whose names he may strike from the bill or not as he thinks proper.

ERROR to the Circuit Court for the District of Maryland.

By the special verdict in this cause, it appeared that on the 22d of December, 1801, Aquila Brown, at Baltimore, drew a bill of exchange on Messrs. Van Staphorst & Co., at Amsterdam, for 60,000 guilders, payable at 60 days' sight, to the order of James Clarke, the defendants' testator. James Clarke indorsed *the bill to Messrs. Brown & Hack- [*174 man, who afterwards indorsed it to Beale Owings, who indorsed the same to Thomas T. Tucker, Esq., Treasurer of the United States, or order, and delivered it to him as Treasurer as aforesaid, who received it in that capacity, and on account of the United States. It further appeared that this bill had been purchased with money belonging to the United States, and under the order, and by an agent of

property a cargo, which the master had barratrously carried into an enemy's blockaded port, although conclusive evidence that the cargo was enemy's property at the time of capture and condemnation, does not disprove an averment that the cargo was lost by the captain's barratrously carrying it to places unknown, whereby the goods became liable to confiscation, and were confiscated. *Goldschmidt v. Whitmore*, 3 Taunt. 508. Where the plaintiff declared on a policy from Jutland to Leith, and averred a loss by seizure; the master testified that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway. The defendant *produced a Swedish sentence of condemnation- [*172 tion for breaking the blockade of Norway. Held, that this was conclusive evidence of the breach of blockade, but that it was not sufficient evidence to fix the master with barratry. That cannot be done, unless he act criminally; and to say that he broke the blockade in disobedience to the instructions of his owners, from some private interests of his own, was too strong an inference from the evidence as it stood. The ship might have been bound for Leith, and yet might have received instructions to touch at Norway; and for other reasons she might have gone thither, without any imputation of barratry. But the court did not decide whether the plaintiff could have recovered without a count for barratry, nor whether, upon a count for barratry, the sentence for a breach of blockade would be conclusive. *Everth et al. v. Hannam*, 2 Marshall's Rep. 72, S. C.; 6 Taunt. 375. Improper treatment of the vessel by the master will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown that he acted against his own judgment. *Todd v. Ritchie*, 1 Starkie's N. P. 240.

Wheat. 3.

the then Secretary of the Treasury of the United States, for the purpose of remitting the same to Europe, for the government of the United States, who, in ordering the purchase of this bill acted as one of the commissioners of the sinking fund, and as agent for that board. The bill was afterwards indorsed to Messrs. Wilhem & Jan Willink & N. & J. & R. Van Staphorst, by Thomas Tucker, Treasurer of the United States, and appears, by an indorsement thereon, to have been registered by the proper officer, at the treasury of the United States, on the 28th of December, 1801, before it was sent to Europe. The bill having been regularly presented for acceptance by the last indorsees to the drawees, was protested for non-acceptance. It was afterwards protested for non-payment, and then returned by them to the Secretary of the Treasury of the United States, for and on their behalf, who directed this action to be brought. Of these protests due notice was given to the drawer of the bill.

On this state of facts, the Circuit Court rendered judgment for the United States, to reverse which this writ of error was brought. 175*] **Mr. Winder, and Mr. D. B. Odgen*, for the plaintiffs in error, argued, 1. That the finding of the jury that Tucker indorsed the bill to Messrs. Willinks and Van Staphorst, which indorsement was filled up at the time by Tucker, and so remained at the trial and judgment below, showed the legal title to this bill out of the United States, and defeated their right to maintain the action. The transfer to the last indorsees being in full, a recovery could not be had in the name of the United States, without producing from the indorsees a receipt or indorsement of the bill; and the indorsement not being in blank could not be struck out at the trial, so that the court and jury were bound to believe that the title was not in the United States, but in the persons to whom Tucker had indorsed the bill. If a bill be indorsed in blank, and the indorsee fills up the blank indorsement, making it payable to himself, the action cannot be brought in the name of the indorser, which, otherwise, it might.¹ Every indorsement subsequent to that, to the holder or plaintiff, must be struck out of the bill, before or at the trial, in order to render the evidence correspondent to the declaration.² Value received is implied in every bill of indorsement, and a transfer by indorsement or delivery vests in the assignee a right of action on the bill against all the preceding parties to it. An indorser having paid a bill must, when he sues the acceptor, drawer, or preceding indorser, prove that it was 176*] returned to him, and he paid it.³ *The special verdict does not find that the indorsement to Willinks, &c., was as agents; but that by the indorsement the contents of the bill were directed to be paid to them. The finding that the bill was afterwards returned by them to the Secretary of the Treasury of the United States, for and on behalf of the United States, is not finding that they were agents; nor can the court

infer it; and if they did, still the outstanding indorsement shows the legal title in the last indorsee. It has been determined by the court that the mere possession of a promissory note by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee.⁴ 2. The United States cannot be the indorsees of a bill so as to entitle them to bring an action on it in their own name. It is essential to a bill of exchange that it should be negotiable. The government of the United States, as such, are incapable of indorsing a bill; of receiving and giving notice of non-acceptance and non-payment. It is essential to the very nature of this species of instrument that all the parties should be compelled to respond according to the several liabilities they may contract in the course of the negotiation. But the United States cannot be sued, and, consequently, cannot be made answerable as the drawers or indorsers of a bill. The national legislature is, probably, competent to provide for the case and to designate some public officer who shall be authorized to negotiate bills for the United States. But until some [*177 statutory provision on the subject is made, the existence of such an authority in any particular officer of the government cannot be inferred. 3. But even supposing that any indorsement whatever can vest the legal title to a bill of exchange in the United States, so as to render them capable of maintaining an action on it in their own name, the indorsement to Tucker under the circumstances of this case, did not vest such a title in them. The Treasurer of the United States has no authority, *ex officio*, to draw, or indorse, or otherwise negotiate bills. The only officers of the government who possess the power of drawing bills are the commissioners of the sinking fund. To them it is expressly given by law. But a power to draw or indorse bills as an agent cannot be delegated to another, unless the power of substitution be expressly given.⁵ Besides, the agent constituted by the commissioners was the Secretary of the Treasury, who employed, not Tucker, but another person, to purchase the bill. Where a bill is payable to A for the use of B, the latter has only an equitable, not a legal, interest. The right of assignment is in the former only.⁶ Here the action ought to have been brought in the name of the trustee, and not of the *cestui que trust*.

The *Attorney-General*, contra, contended, that the position on the other side as to agency in the negotiation of bills was not law. An action could not be *maintained in the [*178 name of Tucker for want of interest in him. According to the doctrine on the other side, he alone is suable, as well as empowered to sue. But all the authorities show that an agent contracting on the behalf of government is not personally liable;⁷ and the other alternative of the proposition, that he is personally capable of maintaining an action, cannot be supported. A

1.—Chitty on Bills, 148, American ed. of 1817.

2.—Chitty on Bills, 378, American ed. of 1817.

3.—Mendez v. Cameron, 1 Ld. Raym. 742.

4.—Welch v. Lindo, 7 Cranch, 159.

5.—Chitty on Bills, 39, American ed. of 1817.
Wheat. 3

6.—*Id.* 139, Price v. Stephens; 3 Mass. Rep. 225.

7.—Macbeath v. Haldimand, 1 T. R. 172; Unwin v. Woelsely, *Id.* 674; Myrtle v. Beaver, 1 East, 135; Rice v. Chute, *Id.* 579; Hodgson v. Dexter, 1 Cranch, 363; Jones v. Le Tombe, 3 Dall. 384; Brown v. Austin, 1 Mass. Rep. 208; Sheffield v. Watson, 3 Calnes' Rep. 69; Freeman v. Otis, 9 Mass. Rep. 272.

person may become a party to a bill, not only by his own immediate act, but by procuration; by the act of his attorney or agent; and all persons may be agents for this purpose, whether capable of contracting on their own account, so as to bind themselves, or not.¹ An agent of the government who draws or indorses a bill will not be personally bound, even if he draws or indorses in his own name, without stating that he acts as agent.² But here Tucker subscribed the style of his office. It is sufficient to declare on a bill of exchange according to the legal intendment and effect, and an averment that the indorsement was to the party interested is satisfied by showing an indorsement to his agent.³ The United States, though not natural persons engaged in commerce, may be parties to a bill of exchange. The United States are a body politic and corporate; and it has long **179*** since ceased to be necessary in a declaration on a bill of exchange to state the custom of merchants, and that the parties to it were persons within the customs. Consequently, they have the same right to sue on a bill as any other persons; and that they are not reciprocally liable to be sued, is an attribute of sovereignty. Individuals contracting with them rely on their dignity and justice. But the power of suing on their part is essential to the collection of the public revenue, to the support of government, and to the payment of the public debts.

LIVINGSTON, *J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

The first question which will be disposed of, although not the first in the order of argument, will be, whether the indorsement of this bill to Mr. Tucker, under the peculiar circumstances attending the transaction, did not pass such an interest to the United States as to enable them to sue in their own name. In deciding this point, it will be taken for granted that no doubt can arise on the special verdict as to the party really interested in this bill. It was purchased with the money of the United States. It was indorsed to their Treasurer; it was registered at their treasury; it was forwarded by their Secretary of the Treasury; to whom it was returned, after it had been dishonored, for and on behalf, as the jury expressly find, of the United States. Indeed, without denying the bill to be the property of the United States, it **180*** is supposed that the action should have been in the name of Mr. Tucker, their treasurer, and not in the name of the *cestui que trust*. If it be admitted, as it must be, that a party may in some cases declare according to the legal intendment of an instrument, it is not easy to conceive a case where such intendment can be stronger than in the case before the court. But it is supposed, that before any such intendment can be made, it must appear that Mr. Tucker acted under some law, and that his conduct throughout comported with his duties as therein prescribed. It is sufficient for the present purpose that he appears to have acted in his official character, and in conjunction with other

officers of the treasury. The court is not bound to presume that he acted otherwise than according to law, or those rules which had been established by the proper departments of government for the transaction of business of this nature. If it be generally true, that when a bill is indorsed to the agent of another for the use of his principal an action cannot be maintained in the name of such principal (on which point no opinion is given), the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone were interested in the subject-matter of the controversy. There is a fitness that the public, by its own officers, should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light, when weighed against those ***181** which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but set-offs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and if they can do this to prevent a set-off, which courts of law have done, why not at once permit an action to be instituted in the name of the United States? An intimation was thrown out that the United States had no right to sue in any case without an act of Congress for the purpose. On this point the court entertains no doubt. In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law, which is not pretended to be the case here. It would be strange to deny to them a right which is secured to every citizen of the United States.

It is next said by the plaintiff in error, that if the indorsement to Mr. Tucker as Treasurer of the United States, passed such an interest to the latter as to enable them to sue in their own name, yet such title was divested by Mr. Tucker's indorsing the bill to the Messrs. Willinks and Van Staphorst, which indorsement appeared on the bill at the trial and is still on it.

The argument on this point is, that the transfer to the last indorsees being in full, a recovery cannot be had in the name of the United States without producing from them a receipt, or a re-indorsement of ***the bill**, and that ***182** this indorsement not being in blank could not be obliterated at the trial, so that the court and jury were bound to believe that the title to this bill was not in the United States, but in the gentleman to whom Mr. Tucker had indorsed it.

The mere returning of this bill, with the protest for non-acceptance and non-payment by the Messrs. Willinks and Van Staphorst to the Secretary of the Treasury of the United States, for their account, is presumptive evidence of the former having acted only as agents or as bankers of the United States. When that is not the case, it is not usual to send a bill back to the last indorser, but to some third person, who may give notice of its being dishonored and ap-

Wheat. 3.

1.—Chitty on Bills, 34, Am. ed. of 1817.

2.—*Id.* 40.

3.—*Id.* 365, 367, App. 523, 530.

ply for payment to such indorser, as well as to every other party to the bill. In the case of an agency, then so fully established, it would be vain to expect either a receipt or a re-indorsement of the bill. The first could not be given consistent with the truth of the fact, and the latter might well be refused by a cautious person who had no interest whatever in the transaction. In such case, therefore, a court may well say that all the title which the last indorsee ever had in the bill, which was a mere right to collect it for the United States, was devested by the single act of returning it to the party of whom it was received. But if this agency in the Messrs. Willinks and Van Staphorst were not established, the opinion of the court would be the same. After an examination of the cases on this subject (which cannot, all of them, be reconciled), the court is of opinion, that if any person who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper.

Judgment affirmed.

Cited.—5 Pet. 123; 10 Pet. 360; 11 How. 231; 12 How. 107; 10 Wall. 407; 10 Otto, 12; 3 Cranch. C. C. 307; 1 McLean, 423; 5 McLean, 280; 4 Ben. 205; Blatchf. Pr. 335; 1 Wood. & M. 81; 1 Blatchf. 339; 1 Sumn. 430.

[COMMON LAW.]

OLIVERA

v.

THE UNION INSURANCE COMPANY.

A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against the "arrests, restraints and detentions of kings," &c., for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful.

A blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted.

A technical total loss must continue to the time of abandonment. *Quere*, as to the application of this principle to a case where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of abandonment.

ERROR to the Circuit Court for the District of Maryland.

On the 29th day of December, in the year 1812, the plaintiffs, who are Spanish subjects, caused insurance to be made on the cargo of the brig called the *St. Francis de Assise*, "at and from Baltimore to the Havanna." Beside the other perils insured against in the policy, according to the usual formula, were "all un-

lawful arrests, restraints, and detentions of all kings," &c. The cargo and brig were Spanish property, and were regularly documented as such. The vessel sailed from Baltimore, and was detained by ice till about the 8th day of February, in the year 1813, when, being near the mouth of the Chesapeake Bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron. He, however, endeavored to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and indorsed on one of them the words following: "I hereby certify that the bay of Chesapeake, and ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and upon no account whatever attempt quitting or going out of the said port." The brig returned; after which the master made his protest, and gave notice to the agent of the owners in Baltimore, who abandoned "in due and *reasonable time." [*185] The underwriters refused to pay the loss on which this suit was brought. It appeared, also, on the trial, that the vessel had taken her cargo on board, and sailed on her voyage before the blockade was instituted. On this testimony the plaintiff's counsel requested the court to instruct the jury, that if they believed the matters so given to them in evidence, the plaintiffs were entitled to recover. The court refused to give this instruction, and the jury found a verdict for the defendants; the judgment on which was brought before this court on a writ of error.

Mr. Harper, for the plaintiffs, argued, that a right of abandonment accrued on the original restraint or obstruction of the voyage by the blockade without an actual attempt to pass. Upon reason and authority the interposition of the blockade was a prevention of the prosecution of the voyage, and, consequently, a loss within the policy. To constitute a technical total loss, which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk, or actual manucaption. It was sufficient that there was a moral impossibility of prosecuting the voyage. But here was an actual restraint by the *cis major* in indorsing the vessel's papers, and ordering her back to Baltimore, which would unquestionably justify the abandonment. The restraint was "unlawful," according to the true intent of this qualification of the usual terms of the policy; because the blockade was instituted after the cargo was taken on board, and the vessel had a legal *right to proceed with [*186] it, notwithstanding the blockade.¹ The case of *Barker v. Blakes*² supports the doctrine that the insured may abandon upon a mere proclamation of blockade, although under the peculiar circumstances of that case the party was held to have delayed his abandonment too long. The decisions of our own courts concur to support this doctrine.³

Mr. Jones and *Mr. Winder*, contra, contend-

1.—*The Betsey*, 1 Rob. 83; *The Vrow Judith*, Id. 150; *The Potsdam*, 4 Rob. 89.

2.—2 East, 283, S. C. 2 Marshall on Ins. App. No. VIII., p. 85.

3.—*Schmidt v. The United Ins. Co.* 1 Johns. Rep. 249; *Symonds v. The United Ins. Co.* 4 Dall. 417.

ed, that the decisions of this court laid the true foundation for the determination of the present case. The loss did not fall within the peculiar clause or the policy as to "unlawful arrests, restraints, and detentions." The case of *M'Call et al. v. The Marine Insurance Company* determines that the qualification "unlawful," extends to all the perils mentioned, to arrests and restraints, and detentions; and that a blockade is not an unlawful restraint.¹ Whether egress in the present case was unlawful or not is immaterial, unless the vessel had been actually detained and carried in for adjudication. The manner in which the blockade is to be enforced is of military discretion, and a neutral vessel, with a cargo taken on board after the commencement of the blockade, may be turned back, though she may not be liable to condemnation as prize. Had the vessel been [187*] sent in *for adjudication, the captors would have been excused from costs and damages, though she might have been acquitted, and pursued her voyage. Consequently, the restraint was not unlawful. This is a claim for indemnity on account of a technical total loss, consequential on some of the perils insured against; a loss breaking up the voyage, or rendering it not worth pursuing. But there is no proof on the record that the blockade still continued at the time of the abandonment. Besides, the voyage must be completely and entirely broken up. The authorities have settled it that mere apprehension is no ground of abandonment; no loss, *quia timet*, is known to the law. In *Barker v. Blakes* the two circumstances of capture and the supervening blockade were combined and connected together to render the voyage not worth pursuing, and to justify the abandonment. The elementary writers have collected the cases concurring to establish the doctrine that a blockade, or embargo, or any other inhibition of trade will not authorize an abandonment.²

Mr. Harper, in reply. The case of *M'Call et al. v. The Marine Insurance Company* went on the ground that the blockade was lawful, and therefore the insured was held not entitled to recover. But in this case, it is contended that the blockade was unlawfully applied to a neutral vessel attempting to depart with a cargo taken on board before the commencement of the blockade. The right of the neutral [188*] *to depart is inconsistent with the pretended right of the belligerent to prevent his egress. The supposed exemption from costs and damages on the part of the blockading squadron would not show that the neutral had no right to proceed, but only that his right was not so manifest and apparent as to subject the captors to costs and damages. It was unnecessary for the insured to prove that the blockade continued after the vessel was turned back. The legal presumption is, that it still continued; and it is a public, notorious, historical fact, that it did continue. In *Barker v. Blakes*, the Court of K. B. merely state the previous detention by the capture, in order to show that the party was not in fault, in not reaching Havre before the blockade commenced. But the main stress of the opinion tends to show that the in-

stitution of a blockade may afford a ground of abandonment, without an actual attempt to enter the blockaded port. The cases cited by Marshall and Park are not cases of blockade, but of municipal edicts interdicting trade with the ports of the sovereign by whom they were established.

MARSHALL, *Ch. J.*, delivered the opinion of the court, and after stating the facts, proceeded as follows:

On the part of the plaintiff in error, it has been contended, that the assured have sustained a technical total loss, by a peril within that clause in the policy which insures "against all unlawful arrests, restraints, and detentions of kings," &c.

*He contends: 1st. That a blockade is [*189 "a restraint" of a foreign power. 2d. That, on a neutral vessel, with a neutral cargo, laden before the institution of the blockade, it is "an unlawful restraint."

The question, whether a blockade is a peril insured against, is one on which the court has entertained great doubts. In considering it, the import of the several words used in the clause has been examined. It certainly is not "an arrest," nor is it "a detention." Each of these terms implies possession of the thing by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and, if a blockade be a "restraint," the insured are protected against it, although it be neither an "arrest" nor detention."

What, then, according to common understanding, is the meaning of the term "restraint?" Does it imply that the limitation, restriction, or confinement, must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out, they are forced back, would it be inaccurate to say that they are restrained within those limits? The court believes it would not; and, if it would not, then with equal propriety may it be *said, when a port is blockaded, that [*190 the vessels within are confined, or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, "a restraint" of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties entered into it without a particular consideration of its terms. Con-

1.—8 Cranch, 59.

2.—1 Marshall on Ins. 219; Park on Ins. 223, 6th ed.

sequently, no received construction of those terms ought to be varied.

It is, however, remarkable that the industrious researches of the bar have not produced a single case, from the English books, in which this question has been clearly decided. In the case of *Barker v. Blakes*, which has been cited and relied on at the bar, one of the points made by the counsel for the underwriters was, that the abandonment was not made in time, and the court was of that opinion. Although, in this case, it may fairly be implied, from what was said by the judge, that a mere blockade is not a peril within the policy, still this does not appear to have been considered, either at the bar or by the bench, as the direct question in the cause, nor was it expressly decided. The [191*] opinion of the court was, that the blockade constituted a total loss, which was occasioned by the detention of the vessel; but that the abandonment was not made within reasonable time after notice of that total loss. In forming this opinion, it had not become necessary to inquire whether the blockade, unconnected with the detention, was, in itself, a peril against which the policy provided. The judgment of the court could not be, in the most remote degree, influenced by the result of this inquiry; and, consequently, it was not made with that exactness of investigation which would probably have been employed, had the case depended on it. It is also to be observed that the vessel did not attempt to proceed towards the blockaded port, but lay in Bristol when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain that such a circumstance might not have materially affected the case. This court, therefore, does not consider the question as positively decided in *Barker v. Blakes*.

The decisions of our own country would be greatly respected, were they uniform; but they are in contradiction to each other. In New York, it has been held, that a blockade is, and in Massachusetts, that it is not, a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar to that now before this court. The opinion that a blockade was not a restraint was held by the courts of Massachusetts, but was [192*] expressed by the very eminent judge who then presided in that court, in a case where the vessel was not confined within a blockaded port by the direct and immediate application of physical force to the vessel herself.

Believing this case not to have been expressly decided, the court has inquired how far it ought to be influenced by its analogy to principles which have been settled.

It has been determined in England that if the port for which a vessel sails be shut against her by the government of the place, it is not a peril within the policy. In *Hudkinson v. Robinson*, a vessel bound to Naples was carried into a neighboring port by the master in consequence of information received at sea that the port of Naples was shut against English vessels. In an action against the underwriters the jury found a verdict for the defendants, and, on a motion

for a new trial, the court said "a loss of the voyage to warrant the insured to abandon must be occasioned by a peril acting upon the subject-matter of the insurance immediately, and not circuitously, as in the present case. The detention of the ship at a neutral port, to avoid the danger of entering the port of destination cannot create a total loss within the policy, because it does not arise from any peril insured against."

It will not be denied that this case applies in principle to the case of a vessel whose voyage is broken up by the act of the master on hearing that his port of destination is blockaded. The peril acts directly on the vessel not more in the one case than in the other. But if, in attempting to pass the blockading *squadron, [193*] the vessel be stopped and turned back, the force is directly applied to her, and does act directly and not circuitously.

Without contesting or admitting the reasonableness of the opinion, that the loss of the voyage occasioned by the detention of the ship by her master in a neutral port is not within the policy, it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against.

Lubbock v. Rotecroft, which was decided at *nisi prius*, is in principle no more than the case of *Hudkinson v. Robinson*. Having heard that his port of destination was blockaded by or in possession of the enemy, the master stopped in a different port, and the insured abandoned. The loss was declared to be produced by a peril not within the policy. It is unnecessary to repeat the observations which were made on the case of *Hudkinson v. Robinson*.

An embargo is admitted to be a peril within the policy. But, as has been already observed, the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as great as the danger of [194*] attempting to violate an embargo. The voyage is as completely broken up in one case, as in the other, and in both the loss is produced by the act of a sovereign power. There is as much reason for insuring against the one peril as against the other; and if the word *restraint* does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage. If so, the blockade is in such a case a peril within the policy.

The next point to be decided is the unlawfulness of this restraint.

That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also

admitted that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful. The *St. Francis de Assise* was so restrained, and her case is within the policy.

It has been contended that it was the duty of the neutral master to show to the visiting officer of the belligerent squadron his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board before the institution of the blockade.

This is admitted; and it is believed that the bill of exceptions shows satisfactorily that these facts were proved to the visiting officer. It is [195*] stated that the vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage before the institution of the blockade.

There is, however, a material fact which is not stated in the bill of exceptions with perfect clearness. The loss, in this case, is technical, and the court has decided that such loss must continue to the time of abandonment.¹ It is not necessary that it should be known to exist at the time of abandonment, for that is impossible; but that it should actually exist; a fact

which admits of affirmative or negative proof at the trial of the cause. Upon the application of this principle to this case, much diversity of opinion has prevailed. One judge is of opinion that the rule, having been laid down in a case of capture, is inapplicable to a loss sustained by a blockade. Two judges are of opinion that proof of the existence of the blockade having been made by the plaintiff, his case is complete; and that the proof that it was raised before the abandonment ought to come from the other side. A fourth judge is of opinion that, connecting with the principle last mentioned, the fact stated in the bill of exceptions that the abandonment was "in due and reasonable time," it must be taken to have been made during the existence of the technical loss. Four judges, therefore, concur in the opinion that the plaintiffs are entitled to recover; but as they form this opinion on different principles, nothing but the case itself is decided: That is, that a vessel within a port *blockaded [*196 after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy; and if the vessel so prevented be a neutral, having on board a neutral cargo received before the institution of the blockade, the restraint is unlawful.

*Judgment reversed.*²

Cited—3 Mason, 21; Blatchf. Pr. 19.

1.—See *Rhineland v. The Ins. Co. of Pennsylvania*, 4 Cranch, 29; *Marshall v. Delaware Ins. Co.*, Id. 202; *Alexander v. The Baltimore Ins. Co.*, Id. 370.

2.—On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2d, the knowledge of the party; and, 3d, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade. *The Betsey*, 1 Rob. 93.

The government and courts of the United States have constantly maintained "that ports not actually blockaded by a present, adequate, stationary force, employed by the power which attacks them, shall not be considered as shut to neutral trade in articles not contraband of war; that, though it is usual for a belligerent to give notice to neutral nations, when he intends to institute a blockade, it is possible that he may not act upon his intention at all, or that he may execute it insufficiently, or that he may discontinue his blockade, of which it is not customary to give any notice; that consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade at any given period, in like manner as the actual investment of a besieged place is the evidence by which we decide whether the siege, which may be commenced, raised, recommenced, and raised again, is continued or not; that of course a mere notification to a neutral minister shall not be relied upon as affecting with knowledge of the actual existence of the blockade, either his government or its citizens; that a vessel cleared or bound to a blockaded port, shall not be considered as violating in any manner the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it; that this view of the law, in itself [197*] perfectly correct, is peculiarly important to nations, situated at a great distance from the belligerent parties, and therefore incapable of obtaining other than tardy information of the actual state of their ports; that whole coasts and countries shall not be declared (for they can never be more than declared) to be in a state of blockade, and thus the right of blockade converted into the means of extinguishing the trade of neutral nations; and lastly, that every blockade shall be impartial in its operation, or, in other words, shall not open and shut for the convenience of the party that institutes it, and at the same time repel the

commerce of the rest of the world, so as to become the odious instrument of an unjust monopoly, instead of a measure of honorable war." For the conduct of the government in this respect, see the documents in the Appendix to this volume, note I. The decisions of the courts are collected in Mr. Condry's edition of *Marshall on Insurance*, Vol. I., p. 81, note 3. To the cases there cited, add the following: *Williams v. Smith*, 2 Caines' Rep.; 1 Haddcliffe v. The United Insurance Company, 7 Johns. Rep. 38.

In the case of *Fitzsimmons v. The Newport Insurance Company*, (4 Cranch, 185, 186), it was laid down by this court, that the 18th article of the treaty of 1794, between the United States and Great Britain, seems to be a correct exposition of the law of nations, and is admitted by the parties to the treaty, as between themselves, to be a correct exposition of the law, or to constitute a rule in that place of it. "Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade." "It is impossible to [*198 read that instrument (the treaty) without perceiving a clear intention in the parties to it, that after notice of the blockade an attempt to enter the port must be made in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt to enter the port must be made in order to subject the vessel to confiscation." "It is agreed," says that instrument, "that every vessel so circumstanced" (that is, every vessel sailing for the blockaded port, without knowledge of the blockade) "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter."

As to violating a blockade by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after

Wheat. 3.

200*]

*[COMMON LAW.]

SHEPHERD ET AL.

v.

HAMPTON.



In an action by the vendee for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article at the time of the breach of the contract, and not at any subsequent period.

Quere. How far this rule applies to a case where advances of money have been made by the purchaser under the contract.

ERROR to the District Court of Louisiana.

The plaintiffs filed their petition or libel in the court below, stating, that on the 12th day of December, 1814, they entered into a contract with the defendant for the purchase of 100,000 pounds weight of cotton, to be delivered by the defendant to the plaintiffs on or before the 15th day of February, ensuing the date of said contract, the said cotton to be of prime quality, and in good order, and for which the plaintiffs stipulated to pay at the rate of ten cents per French pound; and in case the price of cotton, at the time of delivery, should exceed the above limited price, then the petitioners were to allow the common market price on 50,000 pounds of said cotton; and alleging a breach of the agreement on the part of the defendant in not delivering the cotton, &c.

The case agreed stated the contract as set forth in the petition, and that 49,108 pounds of cotton were delivered by the defendant under the contract about the time mentioned therein, to wit, on the 15th day *of February, [*201 1815, when the highest market price of cotton at New Orleans was 12 cents per pound; that the defendant refused to deliver the remaining 50,892 pounds of cotton; that for some days after the said 15th day of February, 1815, the price of cotton remained stationary at about 12 cents; that it then began to rise, and continued gradually to rise until the commencement of this suit, when the market price was 30 cents per pound, and that the plaintiffs frequently called upon and demanded of the defendant the execution of said contract between the said 15th day of February, 1815, and the time of bringing the present suit, and were ready and offered to comply with all the stipulations on their part, which was refused by the defendant.

Upon this state of the case the defendant contended, that the rule of damages for the breach of the contract must be the market price of cotton on the day the contract ought to have been executed.

The plaintiffs contended, that they were entitled to the difference between the price stipulated and the highest market price up to the rendition of the judgment.

It was agreed, that if the court should be of opinion that the law is with the defendant, then

the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. *The Betsey*, 1 Rob. 93; *The Frederick Molke*, *Id.* 72; *The Neptunus*, *Id.* 170. A neutral ship departing can only take away a cargo *bona fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. *The Vrow Judith*, *Id.* 1 Rob. 150; *the Rolla*, 6 Rob. 384. Where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. *The Potsdam*, 4 Rob. 89; *The Juffrow Maria Schreder*, *Id.* note a. But a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed from thence on a voyage to the neutral country, was held liable to condemnation. *The General Hamilton*, 6 Rob. 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods which had become the property of neutral merchants before the date of the blockade, she was held liable to condemnation. The rule of 1809* blockade permits an egress to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress, there is not the same reason for indulgence; there can be no surprise upon the parties, and, therefore, nothing short of a physical necessity is admitted as an adequate ex-

cuse for making the attempt of entry. *The Comet, Edwards*, 32. A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. *The Ocean*, 3 Rob. 287; *The Stert*, 4 Rob. 65. But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, and under charter-party with the ship proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. *The Maria*, 6 Rob. 201. The penalty for a breach of blockade is remitted by the raising of the blockade between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken in *delicto*. The *delictum* completed at one period is by subsequent events entirely done away. *The Lisette*, 6 Rob. 387. A neutral ship coming out of a blockaded port in consequence of a rumor that hostilities were likely to take place between the enemy and the country to which the ship belongs is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. *The Drel Vrienden*, *Dodson*, 269. But the danger of seizure and confiscation by the enemy must be immediate and pressing. The mere apprehension of possible and remote danger will not justify bringing a cargo out of a blockaded port. *The Wasser Hundt*, *Id.* 270, note.

NOTE.—On the failure of the seller to deliver the goods called for by the contract, the buyer is entitled to receive the difference between the contract price and the market price at the place of delivery. *Halsey v. Hurd*, 6 McLean, 102.

If the market price at the place of delivery was a low, or lower than the price agreed to be paid in the contract, the plaintiff will be entitled to no damages. *Barnard v. Conger*, 6 McLean, 497.

In an action at law by the vendee, against the vendor, for a breach of the contract, in not delivering the thing sold, the proper measure of damages is the price of the thing sold at the time of the breach. *Hopkins v. Lee*, 6 Wheat. 109.

The rule applies to the sale of real as well as personal property. *Id.*

Wheat. 3.

U. S., Book 4.

When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the agreement, it seems to be well settled that as a general rule the measure of damages is the difference between the contract price and the value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor, and it follows from this rule, that, if at the time fixed for delivery the article has fallen in value, the vendee having lost nothing can recover nothing. *Sedgwick on the Measure of Damages*, 200.

But when the purchaser has paid the price in advance, or has otherwise, as in the loan of stocks,

judgment should be entered for the plaintiffs for the sum of \$100 damages; but if the court should be of opinion that the law was with the plaintiffs, then judgment should be entered for the plaintiffs for the difference between ten cents, the stipulated price, and thirty cents per pound, the present market price on the said 202*] *50,892 pounds of cotton, amounting to \$10,178.40.

The cause was heard, according to the practice in the state of Louisiana, by the court below, on the case agreed, neither party demanding a jury.¹ Whereupon, *after argu-

ment, judgment was entered up for the plaintiff for the sum of \$100 damages, with costs, and the cause was brought by writ of error to this court.

Mr. Winder, for the plaintiffs, contended, that they were entitled to recover the difference between the stipulated price of the cotton and the highest market price at any time after the contract was made, up to the rendition of the judgment. He cited the authorities in the margin.²

No counsel appeared to argue the cause on the other side.

1.—Louisiana, being a French colony, was originally governed by the custom of Paris, and such royal ordinances as were applicable. In August, 1769, when Louisiana passed under the dominion of Spain, the Spanish Governor, O'Reilly, published a collection, or, rather, an abstract of the administrative regulations adopted in the Spanish colonies, and a few leading principles contained in the Spanish laws, referring for further elucidations to the text in the *Partidas*, the *Recopilacion* of the Indies, &c., but at the same time, retaining in full force, until further orders (which have never been given), the French laws such as they were at the time Spain took possession of the country. In the meantime, the administration of justice being chiefly in the hands of Frenchmen (except in the city of New Orleans), they continued to be governed altogether by the French laws, save only in cases where the few rules contained *verbatim* in O'Reilly's ordinance positively applied. Things remained in this situation until the government of the United States took possession of the province in 1808, when the increasing commerce of New Orleans brought into action the whole body of the Spanish laws, and especially the laws of Toro and the ordinance of Bilbao, which last is regarded as the text law in commercial matters. Everything in the ancient laws repugnant to the constitution of the United States was taken away, and all other subsisting laws were confirmed by the act of Con-

gress of the 26th of March, 1804, ch. 301; which also gave the right of trial by jury in all criminal cases of a capital nature, and in all civil and criminal cases, if required by either of the parties. In 1808, the civil code was adopted, which is principally a transcript of the Code Napoleon, or civil code of France. Where that is silent, its omissions are supplied by a resort to principles derived from the Roman law, and the codes founded on it, including the laws of Spain, France, and the commentaries upon them. The works of elementary writers, and the English and American reporters are cited in the courts, not as binding authority, but as the opinions of learned men entitled to respect and attention. A regular series of reports of the decisions of the Supreme Court of the state is published by Mr. Martin, one of the judges. A civil suit is commenced by a petition or libel setting forth briefly the nature of the demand, to which the defendant answers; and the cause is set down for hearing without any special or dilatory pleadings. The trial is by jury, only when required by either of the parties.

2.—*Bussey v. Donaldson*, 4 Dall. 306; *Douglas et al. v. M'Allister*, 9 Cranch, 298; *Nelson et al. v. Morgan*, 2 Martin's New Orleans Rep. 256; *Coit v. Lansing*, 2 Caines' Cases, 215; *Shepherd v. Johnson*, 2 East, 211; *Fisher v. Prince*, 3 Burr, 1363; *Whitten v. Fuller*, 2 W. Bl. 902.

been deprived of the use of his property, a doubt exists whether the purchaser is limited to the value of the article at the time of delivery or shall have the advantage of any rise in the market value of the article which may have taken place up to the time of trial, and different and conflicting decisions have, on this point, been made. In England and in New York the latter rule is laid down, on the ground that the purchaser, having been deprived of the use of his property, is entitled to the best price he could have obtained up to the time of the settlement of the question for the article, the delivery of which has not been made according to the vendor's agreement. *Sedgwick on Meas. of Dam.* 280.

In *Dutch v. Warren* (2 Burr. 1010, 1 Stra. 406), where plaintiff had paid £232 10s. for five shares of stock to be delivered when the books were opened, at which time the value of the stock was only £175, this latter sum was held the measure of recovery, and the plaintiff only recovered that sum. But this action being in form for money had and received has been held in New York to decide nothing on the rule of damages where the action is not for money had and received, but is brought for breach of the contract. *Clark v. Pinney*, 7 Cow. 681, 689.

In *Shepherd v. Johnson* (2 East, 211), and in *Donner v. Back* (1 Starkie, 818), the price of the stock, on the day of the trial, it having risen, was held the true rule of damages. In *McArthur v. Seaforth* (2 Taunt. 257), the same principle was laid down. Also in *Harrison v. Harrison* (1 Car. & P. 412; 11 Eng. Com. L. R. 436.)

In an action to recover damages for the breach of an executory contract to deliver a certain quantity of tallow in all December, it was held that the price on 31st December should regulate the verdict. *Leigh v. Patterson*, 8 Taunt. 540; S. C. 2 Moore, 588. The principle of this case was in a more recent decision in which the distinction between contracts altogether executory and those where payment has been made is clearly taken. An action was brought for non-performance of contract for delivery of bacon, and the jury were directed to calculate damages according to the price of the bacon on the

day of the execution of the writ of inquiry, and that the difference between that and the contract price was the measure of damages. On a rule *nisi* to set this inquisition aside, the court said that the cases of *Shepherd v. Johnson* and *McArthur v. Seaforth* did not apply, and held that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered, on the ground that the plaintiff here had the money in his possession, and might have purchased other bacon of the like quality the very day after the contract was broken, and if he sustained any loss by neglecting to do so, it was his own fault. *Gainsford v. Carroll*, 2 B. & Cress. 624.

The principle of the English cases has been followed, in New York. *Cortelyou v. Lansing*, 2 Caines' Cas. 300. In a suit in a contract to deliver goods, which have been paid for, the measure of damages is the highest price at any time between the period fixed by the contract for delivery and the day of trial. *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 Cow. 681.

Where the contract price has not been paid or no money advanced by the vendee, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered. *Dey v. Dox*, 9 Wend. 129; *Davis v. Shields*, 24 Wend. 322. This latter case was reversed in error, 26 Wend. 341, on a question growing out of the statute of fraud; but the rule of damages was not touched.

In the other courts of the Union, the decisions, while agreeing upon the general rule that in a suit by vendee for a breach of contract on the part of vendor, for not delivering goods sold, the measure of damages is the price of the article at the time of the breach, are not harmonious as to whether the payment of the price alters the rule and gives plaintiff a right to greater damage. *Sedg. on Meas. of Dam.* 287; *Gray v. Pres't of F. Bank*, 3 Mass. 364; *Swift v. Barnes*, 16 Pick. 194; *Shaw v. Nudd*, 8 Pick. 9; *Quarles v. George*, 23 Pick. 400; *Gilpins v. Consequa*, Peters C. R. 85.

In Connecticut, where a man contracts to deliver Wheat, 3-

204*] *MARSHALL, *Ch. J.*, delivered the opinion of the court: The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article at the time it was to be delivered is the measure of damages. For myself only, I can say that I should not think the rule would apply to a case where advances of money had been made by the purchaser under the contract; but I am not aware what would be the opinion of the court in such a case.

Judgment affirmed.

Cited—2 Cranch, C. C. 208.

[COMMON LAW.]

PATTON v. NICHOLSON.

One citizen of the United States has no right to purchase of, or sell to, another, a license or pass from the public enemy, to be used on board an American vessel.

ERROR to the Circuit Court of the District of Columbia for the county of Alexandria.

The plaintiff in error declared in *assumpsit* for that the defendant, &c., was indebted to the plaintiff in the sum of \$750 for a certain 205* document or paper *called a Sawyer's License by the plaintiff, &c., sold and delivered to the defendant, &c., and being so indebted, the defendant, &c., afterwards, &c., promised,

&c. Plea, *non assumpsit*. Evidence was offered to the jury to show that both parties were citizens of the United States, and that the license in question was sold by the plaintiff to the defendant in Alexandria, to be used for the protection of the schooner Brothers, an American vessel, during the late war, against enemy's vessels, on a voyage from Alexandria to St. Bartholomews, to be cleared out for Porto Rico. The license was as follows:

"Copy of a letter from His Excellency H. Sawyer, His Britannic Majesty's Vice-Admiral on the Halifax station, to His Excellency the Chevalier de Onis, His Catholic Majesty's Envoy Extraordinary, and Minister Plenipotentiary near the United States of America.

His Majesty's ship Centurion at Halifax, }
the 10th of August, 1812. }

Excellent Sir:

I have the honor to acknowledge the receipt of your excellency's letter of the 26th ultimo, and have fully considered the subject of it, as being of the greatest importance to the best interests of Great Britain, and those of His Catholic Majesty, Ferdinand VII. and his faithful subjects; and in reply, I have great satisfaction in informing your excellency that I will give directions to the commanders of His Majesty's squadron on this station not to molest American *vessels, or others under neutral flags, unarmed and laden with flour and other dry provisions, *bona fide* bound to Portuguese and Spanish ports, whose papers shall be accompanied with a certified copy of this letter from your excellency, with your seal affixed or imprinted thereon, which I doubt not will be respected by all.

I beg leave to assure your excellency of the

any article, besides money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, and the interest for the delay. *Bush v. Cunfield*, 2 Conn. 465; *Wells v. Abernethy*, 5 Conn. 222; *West v. Pritchard*, 19 Conn. 212; *Clark v. Pinney*, 7 Cow. 681. But to this general rule an exception has been made, where the price of the goods is paid in advance, and the vendor subsequently refuses to deliver them, the purchaser is not confined to their value at the time when they should have been delivered, but if the goods have risen in value, he may recover the value at the time of the trial, but if they have fallen after the contract he can recover only their value at the time of the demand, in a case where they were to be delivered when ordered. *West v. Pritchard*, 19 Conn. 212. In *Smethurst v. Woolston*, 5 Watts & Serg. (Pa.) any difference resulting from the payment of the price was distinctly rejected.

Sedgwick, in his work on damages, says (p. 278): "In this perplexing conflict of opinion I am admonished to refrain from any dogmatical declaration of the existing rule; and this especially as it cannot be denied that some doubt has been thrown on the entire subject by a late decision of the Court of Exchequer in England. *Startup v. Cortazzi*, 2 Cr. Mees. & Roscoe, 165.

Where the price of goods purchased has been paid in advance, a distinction has been made in some cases, and it has been held that if the vendee brings his suit within a reasonable time, he may recover according to the highest price in the market, at any time between the period fixed for delivery and the day of trial. *Story on Sales*, sec. 412, note 2; *Clark v. Pinney*, 7 Cow. 681; *West v. Pritchard*, 19 Conn. 212; *Calort v. McFadden*, 13 Texas, 324; *Randon v. Barton*, 4 Texas, 289; *Davis v. Shield*, 24 Wend. 322. Especially where the articles are intended by the vendee for the purposes of trade. *Clark v. Pinney*, 7 Cow. 681. See also *Williamson v. Dillon*, 1 Harr. & Gill. 144; *Shepherd v. Hampton*, 3 Wheat. 200, 204; *West v. Wentworth*, 8 Cow. 82; *Snydam v. Jones*, 3 Sandf. 639. In other cases

Wheat. 8.

this distinction has been disregarded, and the value of the property at the time and place of delivery has been taken as the measure of damages without reference to the previous payment of the price. See *Smith v. Dunlap*, 12 Illinois, 184; *Wells v. Abernethy*, 5 Conn. 222; *Senethurst v. Woolson*, 5 Watts & S. 106; *Startup v. Cortazzi*, 2 Cramp. Mees. & R. 165; *Sargent v. Frank*, Ins. Co., 8 Pick. 90; *Bush v. Cunfield*, 2 Conn. 465; *Vance v. Tourne*, 18 Louis. 225; *Swift v. Barnes*, 16 Pick. 104; *Gray v. Port. Bk.*, 8 Mass. 364.

Chancellor Kent, speaking of the above distinction, in note to 2 Kent, Comm. 480, says: "I do not regard the distinction above alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damages is the value of the articles at the time of the breach, or when it ought to have been delivered. This is the plain, stable, and just rule within the contract of the parties." In *Shaw v. Nedd*, 8 Pick. 13, 14, *Parker, C. J.*, says: "As to bringing down the damages to the time of trial, that would be so fluctuating and uncertain, it cannot be a good rule." This distinction is discussed by *Shaw, C. J.*, in *Parks v. Boston* (15 Pick. 206, 208), and he comes to the same conclusion. In *Worthen v. Wilmot* (30 Verm. 555, 557), Justice Aldis, delivering the judgment of the court, discusses the same distinction, but does not decide upon its validity, holding that the payment of a small sum as earnest, and that repaid before a tender of the balance, is not such a payment in advance as would bring the case within the rule, even if it were a sound one.

See also further on this subject, *Dana v. Fiedler*, 12 N. Y. 40; *Booth v. Powers*, 56 N. Y. 22, 28, note; *Baker v. Drake*, 53 N. Y. 211; *Cohen v. Platt*, 60 N. Y. 348. In *Baker v. Drake* (53 N. Y. 223), the distinction above stated is thus referred to by the court: "It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this state in respect to contracts for the sale and delivery of goods."

high consideration with which I have the honor to be your excellency's most obedient humble servant,

(Signed)

H. SAWYER,
Vice-Admiral.

His Excellency,

Don Luis de Onís Gonzalez Lopez y Vara,
His Catholic Majesty's Envoy Extraordinary,
and Minister Plenipotentiary to the United
States, &c., &c., &c.

Philadelphia."

The court below, upon this evidence, charged the jury, that on the evidence so offered, if believed by the jury, they ought to find a verdict for the defendant. To which charge the plaintiff excepted. A verdict was taken, and judgment rendered for the defendant; whereupon the cause was brought to this court by writ of error.

Mr. Swann, for the plaintiff, cited *Coolidge v. Inglee* (13 Mass. Rep., 26), to show that an action might be maintained upon the sale of such a license.

Mr. Lee, on the other side, was stopped by the court.

207*] *MARSHALL, *Ch. J.*, delivered the opinion of the court, that the use of a license or pass from the enemy, by a citizen, being unlaw-

ful, one citizen had no right to purchase of, or sell to, another, such a license or pass to be used on board an American vessel.

*Judgment affirmed.*¹

Cited—4 Pet. 437; 14 Pet. 626.

[CONSTITUTIONAL AND LOCAL LAW.]

ROBINSON v. CAMPBELL.

By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared that all claims and titles to lands derived from Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles, both of the plaintiff and defendant in ejectment, were derived under grant from Virginia, to lands which fell within the limits of Tennessee, it was held that a prior settlement right thereto which would, in equity, give the party a title, could not be asserted as a sufficient title in an action of ejectment brought in the Circuit Court of Tennessee.

Although the state courts of Tennessee have decided that, under their statutes declaring an elder grant founded on a junior entry, to be void, a junior patent founded on a prior entry shall prevail at law

1.—In the several cases, during the late war, of *The Julia*, 8 Cranch, 181; *The Aurora*, Id. 208; *The Hiram*, Id. 444, S. C. ante, Vol. I, p. 440, and *The Ariadne*, ante, Vol. II, p. 143, the court determined, that the use of a license or passport of protection from the enemy constitutes an act of illegality which subjects the property sailing under it to confiscation in the prize court. The act of the 2d of August, 1812, ch. 585, and of the 6th of July, 1812, ch. 452, s. 7, prohibiting the use of licenses or passes granted by the authority of the government of the United Kingdom of Great Britain and Ireland, repealed by the act of 3d of March, 1815, ch. 768, were merely cumulative upon the pre-existing law of war. It follows, as a corollary from this principle, that a contract for the purchase or sale of such a license is void as being founded on an illegal consideration. That no contract whatever, founded upon such a consideration, can be enforced in a court of justice, is a doctrine familiar to our jurisprudence, and was also the rule of the civil law. It is upon the same principle that every contract, whether of sale, insurance, or partnership, &c., growing out of a commercial intercourse or trading with the enemy, is void. Thus it has been held by the Supreme Court of New York that a partnership between persons residing in two different countries, for commercial purposes, is, at least, suspended, if not *ipso facto* determined by the breaking out of war between those countries; and that if such partnership expire by its own limitation during the war, the existence of the war dispenses with the necessity of giving public notice of the dissolution. 208*] *Griswold v. Waddington, 15 Johns. Rep. 51.

It is, perhaps, almost superfluous to add that the use of a license from the government of the country itself, to which the person using it belongs, is lawful; and, consequently, any contract between the citizens or subjects of that country respecting such license is also lawful. Thus, by the act of the 6th of July, 1812, ch. 452, s. 6, the President was authorized to give, at any time within six months after the passage of the act, passports for the safe protection of any ship or other property belonging to British subjects, and which was then within the limits of the United States. And such licenses are by no means, as has been commonly supposed, an invention of the present time. For Valin, speaking of the frauds by which the commerce and property of the enemy were screened from capture, during the war in which France and England were allied against Holland and Spain, not only on the high seas, but even in the ports of France, remarks, that previous to the ordinance on which he was

commenting, no other means of counteracting these frauds had been discovered, than that of delivering passports to the vessels of the enemy, permitting them to trade with the ports of the kingdom upon the payment of a duty of a crown per ton, which was done by an edict of 1673, Valin Sur l'Ord.

But, in order to protect a citizen in the use of a license from his own government to trade with the enemy, it is indispensably necessary that he should conform to the terms and conditions under which it is granted; otherwise, the trading, and all contracts arising out of it, will be illegal. See the cases collected in Chitty's Law of Nations, ch. VIII. To which add the following: *The Byfield*, Edwards' Adm. Rep. 188; *The Goede Hoop*, Id. 327; *The Catharina Maria*, Id. 337; *The Carl*, Id. 339; *The Europa*, Id. 342; *The Speculation*, Id. 343; *The Cousine Mariane*, Id. 346; *The Vrou Cornelia*, Id. 348; *The Johan Pieter*, Id. 354; *The Jonge Frederick*, Id. 357; *The Europa*, Id. 358; *The Cornelia*, Id. 359; *The Sarah Maria*, Id. 361; *The Henrietta*, Id. 363; *The Nicoline*, Id. 364; *The Wolfarth*, Id. 365; *The Emma*, Id. 366; *The Frau Magdalena*, Id. 367; **The [?209] Hoppet*, Id. 369; *The Bourne, alias Gute Erwagung*, Id. 370; *The Jonge Clara*, Id. 371; *The Minerva*, Id. 375; *The St. Ivan*, Id. 376; *The Hector*, Id. 379; *The Edel Catharina*, 1 Dodson's Adm. Rep. 55; *The Vrouw Deborah*, Id. 100; *The Henrietta*, Id. 168; *The Bennet*, Id. 175; *The Dankebarheit*, Id. 183; *The Seyerstadt*, Id. 241; *The Manly*, Id. 257; *The Xolus*, Id. 300; *The Wohlforth*, Id. 305; *The Louise Charlotte de Guldenerond*, Id. 308; *The Freundschaft*, Id. 316; *Feise v. Thompson*, 1 Taunt. 121; *Feise v. Waters*, 2 Taunt. 249; *Miller v. Gernon*, 3 Taunt. 304; *Fayle v. Bourdillia*, Id. 546; *Moran v. Oswald*, Id. 554; *Feise v. Bell*, 4 Taunt. 4; *De Fastet v. Taylor*, Id. 231; *LeCheminant v. Pearson*, Id. 367; *Freeland v. Walker*, Id. 478; *Waring v. Scott*, Id. 605; *Siffkin v. Glover*, Id. 717; *Edurth v. Smith*, 5 Taunt. 329; *Flindt v. Scott*, 5 Taunt. 674; *Schnakoneg v. Andren*, Id. 716; *Robertson v. Morris*, Id. 730; *Stanforth v. Souha*, Id. 626; *Siffkin v. Almut*, 1 Maule & Selwyn, 39; *Robinson and others v. Touray*, Id. 217; *Hagedorn v. Reid*, Id. 567; *Hagedorn v. Bazett*, 2 Maule & Selwyn, 100; *Hullman and another v. Whitmore*, 3 Maule & Selwyn, 337; *Gibson and others v. Mair*, 1 Marshall's Rep. 39; *Gibson v. Service*, Id. 119; *Darby v. Newton*, 2 Marshall's Rep. 252. Such licenses, when issued to the citizens or subjects of the state only, in order to legalize a limited commercial intercourse with the enemy, which is tolerated from political motives, of which every government is the exclusive judge, have nothing in them contrary to the law of nations.

Wheat. 3.

against a senior patent founded on a junior entry; this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee, and could not apply to the present case of titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states.

The general rule is, that remedies in respect to real property are to be pursued according to the *lex loci rei sitæ*. The acts of the two states are to be construed as giving the same validity and effect to the titles in the disputed territory as they had, or would have, in the state, by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

The remedies in the courts of the United States, at common law and in equity, are to be, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this doctrine it may be admitted, that where, by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be valid at law, is, under circumstances of an equitable nature, declared void, the right of the parties in such case may be as fully considered in a suit at law, in the courts of the United States, as in any state court.

A conveyance by the plaintiff's lessor during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease. The existence of such lease is a fiction; but it is upheld for the purposes of justice. If it expire during the pendency of a suit, the plaintiff cannot recover his term at law without procuring it to be enlarged by the court, and can proceed only for antecedent damages.

But when granted to neutrals, in order to enable them to carry on a trade which they have a right to pursue, independently of the license, or to the subjects of the belligerent state, in order to enable them to carry on a trade which is forbidden to neutrals under the pretext of a proclamation of blockade, they are manifestly an abuse of power, and a violation of the law of nations. In both these cases they would subject the property to capture and to condemnation in the prize courts of the other belligerent, and if issued to the subjects of *210** that belligerent by **the enemy*, would also render it liable to confiscation as being a breach of their allegiance.

The licenses granted by the officers of the British government, &c., during the late war, to American vessels have been pronounced by this court, to subject the property sailing under them to confiscation, when captured by American cruisers; and it has been decided to be immaterial whether the licenses would or would not have saved the property from confiscation in the British prize courts (8 Cranch, 200), but it has been made a question in those courts how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of *The Hope* (1 Dodson's Adm. Rep. 226), which was that of an American ship laden with corn and flour, captured whilst proceeding from the United States to the ports of Spain and Portugal, and claimed as protected by an instrument on board, granted by Alden, the British consul at Boston, accompanied by a certified copy of a letter from Admiral Sawyer, the British commander on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed, that if there was nothing further in the way of safeguard than what was to be derived from these papers, it would certainly be impossible to hold, that the property was sufficiently protected. "The instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection; but these papers come from persons who are vested with no such authority. To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*, or by persons in whom such a power is vested, in virtue of any official situation to which it may be considered incidental. It is quite clear, that no consul in any

In the above case, it was held that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run until it was ascertained by the compact of 1802 that the land fell within the jurisdictional limits of Tennessee.

ERROR to the District Court of East Tennessee.

This was an action of ejectment brought by the defendant in error (the plaintiff's lessor in the court below), against the present plaintiff and S. Martin, on the 4th of February, 1807, in the District Court for the District of East Tennessee, which possessed circuit court powers. The defendant in that court pleaded separately the general issue, as to 400 acres, and disclaimed all right to the residue of the tract specified in the declaration. A verdict was **214* given for the plaintiff in October term, 1812. From the statement contained in the bill of exceptions, taken at the trial of the cause, it appears that the land for which the action was brought, is situate between two lines, run in 1779 by Walker and Henderson, as the boundary lines of Virginia and North Carolina. The former state claimed jurisdiction to the line run by Walker, and the latter to the line run by Henderson. After the separation of Tennessee from North Carolina, the contro-

country, particularly in an enemy's country, is vested with any such power, in virtue of his station. *Et rei non præponitur*, and, therefore, **211* his acts relating to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility, but he cannot go beyond that; he cannot grant a safeguard of this kind, beyond the limits of his own station. The protections, therefore, which have been set up, do not result from any power incidental to the situation of the persons by whom they were granted; and it is not pretended that any such power was specially entrusted to them, for the particular occasion. If the instruments which have been relied upon by the claimants are to be considered as the naked acts of these persons, then they are, in every point of view, totally invalid. But the question is, whether the British government has taken any steps to ratify and confirm these proceedings, and thus to convert them into valid acts of state; for persons not having full powers, may make what in law are termed *sponsiones*, or in diplomatic language, *traités sub sperati*, to which a subsequent ratification may give validity; *ratihabito mandato æquiparatur*. He proceeds to show that the British government had confirmed the acts of its officers by the order in council of the 26th of October, 1812, and accordingly decrees restitution of the property. In the case of *The Reward*, before the Lords of Appeal, the principle of this judgment of Sir Wm. Scott was substantially confirmed. But in the case of *The Charles*, and other similar cases, certificates, or passports of the same kind, signed by Admiral Sawyer, and also by Don Luis de Onís, the Spanish minister to the United States, had been used for voyages from America to certain Spanish ports in the West Indies, and the lords held that these documents not being included within the terms of the confirmatory order in council did not afford protection, and accordingly condemned the property. 1 Dodson, Appendix, (D.) In the cases of *The Venus* and *The South Carolina*, a similar question arose on the effect of passports granted by Mr. Forster, the British minister in the United States, per **212* mitting American vessels to sail with provisions from the ports of the United States to the island of St. Bartholomews, but not confirmed by an order in council. The lords condemned in all the cases in which the passports were not within the terms of the orders in council by which certain descriptions of licenses granted by Mr. Forster had been confirmed. *Ib.*

versy between Virginia and Tennessee, as to boundary, was settled in 1802, by running a line equidistant from the former lines. The land in dispute fell within the state of Tennessee. Both the litigant parties claimed under grants issued by the state of Virginia, the titles to lands derived from the said state having been protected by the act of Tennessee, passed in 1803, for the settlement of the boundary line.

The plaintiff rested his title on a grant, (founded on a treasury warrant) to John Jones, dated August the 1st, 1787, for 3,000 acres; 1,500 acres of which were conveyed to the lessor by Jones, on the 14th of April, 1788; and proved possession in the defendant when the suit was commenced.

The defendant, to support his title to the said 400 acres, offered in evidence a grant for the same to Joseph Martin, dated January 1st 1788, founded on a settlement right, and intermediate conveyances to himself. He also offered in evidence, that a settlement was made on said land in 1778, by William Fitzgerald, who assigned [215*] his settlement-right to the "said Joseph Martin; that a certificate in right of settlement was issued to Martin by the commissioners for adjusting titles to unpatented lands; on which certificate, and on the payment of the composition money, the above grant was issued. This evidence was rejected by the court below. The defendant also offered in evidence a deed of conveyance from the plaintiff's lessor to Arthur L. Campbell, dated January 2d, 1810, for the land in dispute; but the same was also rejected. He also claimed the benefit of the statute of limitations of the state of Tennessee, on the ground that he, and those under whom he claims, had been in continued and peaceable possession of the 400 acres since the year 1788.

The court decided that the statute did not apply. The cause was then brought before this court by writ of error.

Mr. Law, for the plaintiff in error, argued: 1. That the defendant below ought to have been permitted to give evidence showing that his grant had preference in equity over the plaintiff's grant. By the law, as settled in Tennessee, the prior settlement-right of the defendant, though an equitable title, might be set up as a sufficient title in an action at law. The opinion of the judge below proceeds on the idea that the Virginia practice must prevail, under which such a title could only be asserted in equity. The acts for carrying into effect the compact settling the boundary, declare that the claims and titles derived from Virginia shall not be [216*] affected or prejudiced by the change of jurisdiction. But are the claims and titles less secure if the forms of legal proceedings of Tennessee be adopted? Is there any difference whether the plaintiff's grant be vacated on the equity side of the court or rendered inoperative in an action of ejectment? It is admitted, that as to the nature, validity, and construction of contracts, the *lex loci* must prevail. But the tribunals of one country have never carried their courtesy to other countries so far as to change the form of action, and the course of judicial proceedings, or the time within which the action must be commenced.¹ 2. The deed

from the plaintiff's lessor, pending the suit, showed an outstanding title in another, and ought to have prevented the plaintiff from recovering.² 3. It is a universal principle that the statute of limitations of the place where the suit is brought is to govern in determining the time within which a suit must be commenced.³ 4. New exceptions to the operation of the statute of limitations as to real property cannot be constructively established by the courts.⁴ The statute of limitations of Tennessee ought to be applied to suits commenced in the courts of Tennessee for lands which were always within the jurisdiction of that state as claimed by her, and which fell within her territory upon the final settlement of the boundary. The title to such lands may be determinable only by the law of Virginia, *but the mode of pursuing the remedy on that title must depend upon the *lex fori*.

The *Attorney-General*, contra, insisted, that by the compact between the two states, the law of Virginia was made the law of the titles to these lands. By the settled practice of that state, as well as the established doctrine of the common law, the legal title must prevail in a court of law. The case of real property is an exception to the general rule, as to applying the statute of limitations according to the *lex fori*, and not according to the *lex loci*. Generally speaking, suits for such property must be commenced in the courts of the country where the land lies, and, consequently, both the right and the remedy are to be determined by one and the same law. But this is an anomalous case depending upon the peculiar nature and provisions of the compact of 1802, between the two states. The statute of limitations of Tennessee could not operate upon these lands until they were ascertained to lie in Tennessee; and the peculiar rule established by the courts of Tennessee, permitting an equitable title to be asserted in an action at law, would not apply to a controversy concerning titles wholly depending on the law of Virginia. The proceedings in ejectment are fictitious in form, but for all the purposes of substantial justice they are considered as real. If the term expire pending the action, the court will permit it to be enlarged, and no conveyance by the lessor of the plaintiffs while the suit is going on can operate to extinguish the prior lease. The court below, *therefore, committed no [218 error in refusing to permit the deed of conveyance from the plaintiff's lessor to be given in evidence in order to establish the existence of an outstanding title.

TODD, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

The first question is, whether the Circuit Court were right in rejecting the evidence offered by the defendant to establish a title in himself under the grant of Joseph Martin, that grant being posterior in date to the grant under which the plaintiff claimed; and this depends upon the consideration, whether a prior settlement-right, which would, in equity, give the

2.—1 Cruise on Real property, 503, 537.

3.—Chitty on Bills, 1b.

4.—M'Iver v. Ragan, 2 Wheat. 25.

1.—Chitty on Bills, 111, note h, American ed. of 1817, and the authorities there cited.

party a title to the land, can be asserted also as a sufficient title in an action of ejectment.

By the compact settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands derived from the governments of Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof as if derived from the government within whose line they have fallen, and shall not be in any wise prejudiced or affected in consequence of the establishment of the said line. The titles, both of the plaintiff and defendant in this case, were derived under grants from Virginia; and the argument is, that as in Virginia no equitable claims or rights antecedent to the grants could be asserted in a court of 219*] law in an ejectment, but were matters cognizable in equity only, that the rule must, under the compact between the two states, apply to all suits in the courts in Tennessee, respecting the lands included in those grants.

The general rule is, that remedies in respect to real estates are to be pursued according to the law of the place where the estate is situate. 220*] Nor do the court *perceive any reason to suppose that it was the intention of the legislatures of either state, in the acts before us, to vary the application of the rule in cases within the compact. Those acts are satisfied by construing them to give the same validity and effect to the titles acquired in the disputed territory, as they had, or would have, in the state by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

The question then is, whether in the circuit courts of the United States, a merely equitable title can be set up as a defense in an action of ejectment. It is understood that the state 221*] courts of Tennessee have *decided that under their statutes, declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law; and that a junior patent founded on a prior entry, shall prevail in an action of ejectment against a senior patent founded on a junior entry. But

this doctrine has never been extended beyond the cases which have been construed to be within the express purview of the statutes of Tennessee. The present case stands upon grants of Virginia, and is not within the purview of the statutes of Tennessee; the titles have all their validity from the laws of Virginia, and are confirmed by the stipulations of the compact. Assuming, therefore, that in the case of entries under the laws of Tennessee, the priority of such entries is examinable at law, this court do not think that the doctrine applies to merely equitable rights derived from other sources.

There is a more general view of this subject, which deserves consideration. By the laws of the United States the circuit courts have cognizance of all suits of a civil nature at common law, and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the judiciary act of 1789 it is provided, that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used in suits at common law in the courts of the United States, and declares that the modes of proceeding in *suits of [222 equity shall be "according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of common law," except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress, by these provisions, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only, when according to such practice, a plain, adequate, and complete remedy could not be had

1.—The foundation of this doctrine, and of all the other principles concerning the *lex loci*, are laid down by Huberus, in his *Praelectiones*, with that admirable force and precision which distinguish the works of the writers who have been formed in the school of the Roman juriconsults, and which justify the eulogium pronounced upon that school by Leibnitz. "Fundamentum universae hujus doctrinae diximus esse, et tenemus, subjectionem hominum infra leges ejusque territorii, quamdiu illic agunt, quae facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed haec ratio non convenit rebus, immobilibus, quando ille spectantur, non ut dependentes a libera dispositione ejusque patrisfamilias, verum quatenus certae notae leges ejusque Reip. ubi sita sunt, illis impressae reperiuntur; hae notae manent indelebiles in ista Reipubl. quicquid aliarum Civitatum leges aut privatorum dispositiones, secus aut contra stant; nec enim sine magna con fusione praedictioque Reipubl. ubi sitae sunt res soli, Leges de illis late, dispositionibus istis mutari possent. Hinc Frisius habens agros et domos in provincia Groningensi, non potest de illis testari, quia Lex prohibuit ut ibi de bonis immobilibus testari, non valente Jure Frisico adficere bona, quae partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit Testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis ubi de illis testari licet? Non obstat; quia

legum diversitas in illa specie non afficit res soli, neque de illis loquitur, sed ordinatum testandi; quo recte celebrato, Lex Reipubl. non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus laeditur aut immulatur.* Haec observatio locum etiam in contractibus habet: quibus in Hollandia venditae, res soli Frisici, modo in Frisia prohibito, licet, ubi geestus est, valido, recte venditae intelliguntur; idemque in rebus non quidem immobilibus, at solo coherentibus; utisi frumentum soli Frisici in Hollandia secundum lastas, ita dictas, sit venditum, non valet venditio, nec quidem in Hollandia secundum eam jus dicitur, etsi tale frumentum ibi non sit vendi prohibitum; quia in Frisia interdictum est; et solo cohaeret ejusque pars est. Nec aliud juris erit in successione ab intestato; si defunctus sit Patrisfamilias, cujus bona in diversi loci imperii sita sunt, quantum attinet ad immobilia, servatur jus loci, in quo situs eorum est; quoad mobilia servatur jus, quod illic loci est, ubi testator habuit domicilium, quae de re, vide Sandium, lib. 4, de decs. tit. VIII., def. 7.* Huberus, Praelectiones, tom. 2, lib. 1, tit. 3, De Conflictu Legum. See Erskine's Institutes of the Law of Scotland, 10th ed. 309; Pothier, de la Prescription, 207; Code Napoleon, art. 8.

* Sed quare. See The United States v. Crosby, 7 Cranch, 115.

at law. In some states in the Union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in 223*] equity, not *according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that where by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is under circumstances of an equitable nature declared by such statutes to be void; the rights of the parties, in such a case, may be as fully considered in a suit at law in the courts of the United States as they would be in any state court.

In either view of this first point, the court is of opinion that the Circuit Court decided right in rejecting the evidence offered by the original defendant. It was matter proper for the cognizance of a court of equity, and not admissible in a suit at law.

The next question is, whether the Circuit Court decided correctly in rejecting the deed of conveyance from the plaintiff's lessor to Arthur L. Campbell, for the land in controversy, made during the pendency of the suit. The answer that was given at the bar is deemed decisive;

although an action of ejectment is founded in fictions, yet to certain purposes it is considered in the same manner as if the whole proceedings were real; for all the purposes of the suit the lease is to be deemed a real possessory title. If it expire during the pendency of the suit, the plaintiff cannot recover his term at law, without procuring it to be enlarged by the court, and can proceed only for antecedent damages. In the present case the lease is to *be [*224 deemed as a good subsisting lease, and the conveyance by the plaintiff's lessor during the pendency of the suit could only operate upon his reversionary interest, and, consequently, could not extinguish the prior lease. The existence of such a lease is a fiction; but it is upheld for the purposes of justice, and there is no pretense that it works any injustice in this case.

The last question is, whether the statute of limitation of Tennessee was a good bar to the action. It is admitted that it would be a good bar only upon the supposition that the lands in controversy were always within the original limits of Tennessee; but there is no such proof in the cause. The compact of the states does not affirm it, and the present boundary was an amicable adjustment by that compact. It cannot, therefore, be affirmed by any court of law, that the land was within the reach of the statute of limitations of Tennessee until after the compact of 1802. The statute could not begin to run until it was ascertained that the land was within the jurisdictional limits of the state of Tennessee.

*The judgment of the Circuit Court is affirmed with costs.*¹

Cited—6 Pet. 210; 6 Pet. 658; 9 Pet. 655, 657; 12 Pet. 727, 745; 14 Pet. 410, 412, 415; 5 How. 475; 8 How. 465; 12 How. 148; 13 How. 272, 563; 19 How. 336; 20 How. 22, 565; 21 How. 484, 604; 2 Black 509; 6 Wall. 137; 7 Wall. 430; 8 Wall. 323; 13 Wall. 248; 9 Otto, 381; Bald. 411, 558; 1 Wood. & M. 80, 373; 2 Wood. & M. 22, 215; 1 Blatchf. 486; 2 Blatchf. 27; 14 Blatchf. 325; McAll. 288, 362, 444; 3 Dill. 265; 2 Curt. 472; 4 Wash. 356; Deady 363.

1.—In Buller's *Nisi Prius*, 110, it is laid down, that in ejectment, "if the defendant prove a title out of the lessor, it is sufficient, although he have no title himself; but he ought to prove a subsisting title out of the lessor, for producing an ancient lease for 1,000 years will not be sufficient, unless he likewise prove possession under such lease within twenty years." The same doctrine is stated in *Runnington on Ejectments*, 343, and the case of *England v. Slade* 225*] (4 T. R. 682), is relied on to support it. But this case only shows that the tenant may prove that the lessor's title has expired, and, therefore, that he ought not to turn him out of possession.

It is unquestionable law, that in ejectment "the plaintiff cannot recover but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a right against every man who cannot show a good title." *Haldam v. Harvey*, 4 Burr. 2484, S. P.; *Martin v. Troynonwell*, 5 T. R. 107, note. But this doctrine was asserted in a case where the plaintiff sought to recover upon a title, which she had conveyed away to a third person; and nothing can be clearer than that the plaintiff cannot recover without showing a subsisting title in himself. If the position in Buller's *Nisi Prius* were confined to cases of this sort, there could not be the slightest ground to question its validity. But it is supposed to establish the doctrine that if the plaintiff has a title which is not an indefeasible possessory title, but is, in fact, better than that of the defendant, he is not entitled to recover, if the defendant can show a superior title in a third person, with whom the defendant does not claim any privity.

It is the purpose of this note to show that the authorities do not justify the doctrine to this extent; and if it be true in any case (which may be doubted), it is liable to a great many exceptions, which destroy its general applicability. Speaking upon this subject Lord Mansfield is reported to have said, "there is another distinction to be taken, whether supposing a title superior to that of the lessor of the plaintiff exists in a third person, who might recover the possession, it lies in the mouth of the defendant to say so, in answer to an ejectment brought against himself, by a party having a better title than his own. I found this point settled before I came into this court, that the court never suffers a mortgagee to set up the title of a third person against his mortgagee." *Doe v. Pegge*, 1 T. R. 758, note. The point, as to a mortgagee, has been long established. In *Lindsey v. Lindsey* (Bull. N. P. 110), on an ejectment by a second mortgagee against the mortgagee, the court [*226 would not suffer the latter to give in evidence the title of the first mortgagee in bar of the second, because he was barred by his own act from averring that he had nothing in the land at the time of the second mortgage. And the principle of this decision has been repeatedly recognized, both in the English and American courts. *Doe v. Pegge*, 1 T. R. 758, note; *Doe v. Staple*, 2 T. R. 684; *Lade v. Holford*, 3 Burr. 1416; *Newhall v. Wright*, 8 Mass. Rep. 188, 153; *Jackson v. Dubois*, 4 Johns. Rep. 216.

Indeed, the mortgagee, notwithstanding the mortgage, is now deemed seized, and the legal owner of the land, as to all persons except the mortgagee, and those claiming under him, and he

Wheat. 3.

231*]

*[CHANCERY.]

DUNLOP v. HEPBURN ET AL.

Explanation of the decree in this cause (reported ante, Vol. I, p. 179), that the defendants were only to be accountable for the rents and profits of the lands, referred to in the proceedings, actually received by them.

A PPEAL from the Circuit Court for the District of Columbia.

WASHINGTON, J., delivered the opinion of the court: By the decree of this court made in this cause at February term, 1816, the defendants were ordered "to make up, state, and settle, before a commissioner or commissioners, to be appointed by the Circuit Court of the District of Columbia for the county of Alexandria, an account of the rents and profits of the tract of land referred to in the proceedings, since the 27th day of March, 1809, and that they pay over the same to the complainants, John Dunlop & Co., or to their lawful agent or attorney." The commissioners appointed by the Circuit Court to execute this part of the decree of this court made a report, in which they state, "that it did not appear to them that the said William Hepburn and John Dundas, or the legal representatives of the said Dundas, ever received any rents or profits of the land from the 27th day of March, 1809, until the date of the re-232*] port; but *that the reasonable rents and profits of the said land in its untenable situation from the said 27th day of March, 1809, to the 27th day of March, 1816, with due care, would be equal to \$2,077.60."

The cause coming on to be heard in the court below on this report, and that court being of opinion that under the decree of this court the defendants were only to be accountable for the rents and profits actually received, it was de-

NOTE.—See note to Hepburn v. Dunlop, 1 Wheat. 179.

may maintain an ejectment or real action upon such seizure. *Hitchcock v. Harrington*, 6 Johns. R. 290; *Sedgwick v. Hallenbach*, 7 Johns. Rep. 376; *Collins v. Torrey*, 7 Johns. Rep. 277; *Willington v. Gale*, 7 Mass. Rep. 138; *Porter v. Millet*, 9 Mass. Rep. 101. And, upon the same principle, in an ejectment by the lessor against his own lessee, the latter is not permitted to set up or take advantage of a defect in the lessor's title, or to show a subsisting title in a third person to defeat the lessor's right. *Driver v. Lawrence*, 2 W. Bl. 1259, 2 Salk. 447; *Menhall v. Wright*, 3 Mass. Rep. 138, 153; *Jackson v. Reynolds*, 1 Caines' Rep. 444; *Jackson v. Whitford*, 2 Caines' Rep. 215; *Jackson v. Vosburgh*, 7 Johns. Rep. 186; *Brant v. Livermore*, 10 Johns. Rep. 358. So, a person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in a third person. *Jackson v. Stewart*, 6 Johns. Rep. 34; *Jackson v. De Walts*, 7 Johns. Rep. 157; *Jackson v. Hinman*, 10 Johns. Rep. 202; *Doe v. Clarke*, 14 East, 488. Nor can a person claiming the land under the tenant set up an outstanding title against the landlord (*Jackson v. Graham*, 3 Caines' Rep. 188); nor against a purchaser under an execution against the landlord or the tenant. *Jackson v. Graham*, 3 Caines' Rep. 188; *Jackson v. Bush*, 10 Johns. Rep. 223. And a person who has entered by permission of one tenant in common cannot, after a partition made, set up an 227*] adverse title in bar of an ejectment by the tenant in common, to whose share the premises had fallen. *Smith v. Burtis*, 9 Johns. Rep. 174; *Fisher v. Creel*, 13 Johns. Rep. 118. And where a person in possession of land covenants with another to pay him for the land, the covenantee is es-
Wheat. 3.

creed that the bill, so far as it seeks a recovery of rents and profits, should be dismissed, from which decree an appeal was prayed to this court.

I am instructed by the court to say, that the decree of the Circuit Court is in strict conformity with the decree and mandate of this court, and is therefore to be affirmed.

Decree affirmed.

[INSTANCE COURT.]

THE UNITED STATES

v.

150 CRATES OF EARTHENWARE.

Libel for a forfeiture of goods imported, and alleged to have been invoiced at a less sum than the actual cost at the place of exportation, with design to evade the duties, contrary to the 66th section of the collection law, ch. 128. Restitution decreed upon the evidence as to the cost of the goods at the place where they were last shipped; the form of the libel excluding all inquiry as to their cost at the place where they were originally shipped, and as to continuity of voyage.

A PPEAL from the District Court of [233 Louisiana.

This cause was argued by the Attorney-General for the United States, and by Mr. D. B. Ogden for the claimant.

MARSHALL, Ch. J., delivered the opinion of the court: In this case the libel alleges that the goods in question were exported from Bordeaux in France, and entered at the office of the collector of the customs at New Orleans, and that they were invoiced at a less sum than the actual cost thereof at the place of exportation, with design to evade the duties thereon, contrary to the provisions of the 66th section of the collection law of 1799, ch. 128. It ap-

topped from setting up an outstanding title to bar an ejectment by his covenantor, unless he shows fraud or imposition in the agreement. *Jackson v. Ayres*, 14 Johns. Rep. 224. Lord Eldon has declared that with regard to mortgagees and incumbrancers if they do not get in a term that is outstanding, but satisfied, in some sense, either by taking an assignment making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them against any person having means charges or incumbrances. *Maundrell v. Maundrell*, 10 Ves. 246, 271; see Peake's Evid. 341, 3d ed. And in cases where land has been sold by executors or administrators under a legal authority to sell, it has been settled, that strangers to the title, those who have no estate or privity of estate or interest, and who pretend to none, affected by the sale, shall not be entitled to set up the title of the heirs, or to call on the executor or administrator for strict proof of the regularity of all his proceedings in the sale. *Knox v. Jenks*, 7 Mass. Rep. 488. And a stranger to a mortgage is not permitted to set it up to defeat a legal title in the plaintiff. *Collins v. Torrey*, 7 Johns. Rep. 278; *Jackson v. Pratt*, 10 Johns. Rep. 381.

Those cases clearly show that the doctrine has been very much narrowed down. It remains to consider whether the doctrine has ever been established, that a mere superior outstanding title in a third person, with whom the defendant has no privity, can be given in evidence in an ejectment, to defeat a possessory title in the plaintiff, which is superior to that of the defendant. It is manifest, that at the time when Lord Mansfield delivered his opinion in *Doe v. Pegge*, 1 T. R. 758, note, he did

pears in the case, that the goods were originally shipped from Liverpool, and were landed at Bordeaux. All question as to continuity of voyage, and as to whether Liverpool or Bordeaux ought to be deemed the place of exportation, is out of the case, because the information charges the goods to have been exported from Bordeaux. Upon the evidence, it appears that the goods were invoiced at sixty or seventy per cent. below the price in New Orleans; which, it is supposed, was at least as high as the price would have been in Liverpool; but it also appears that goods of this kind, at the time of their exportation from Bordeaux, were depreciated in value to an equal degree; and it is proved that the same goods were offered to a witness at 50 per cent. below their cost at Liverpool. The court is, therefore, not satisfied that the goods were invoiced below

their true value at Bordeaux, with a design to evade the lawful duties; and the inquiry as to their value in the port from which they were originally shipped is excluded by the form in which the libel is drawn. The decree of the District Court, restoring the goods to the claimant, is therefore affirmed.

Decree affirmed.

[CONSTITUTIONAL LAW.]

HAMPTON v. M'CONNEL.

A judgment of a state court has the same credit, validity, and effect, in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good

not consider any such doctrine as established, for he confines his opinion to the mere case of a mortgagee as against his mortgagee, although he states [*228*] "the question in the broadest terms; and if the decisions had then gone the whole length, he would certainly have so stated. Nor is there any subsequent case in England in which the point has been decided. The case of Doe v. Reade (8 East, 363), turned upon the circumstance that the defendant, being lawfully in possession, might defend himself upon his title, though 20 years had run against him before he took possession, the plaintiff in ejectment not claiming under the prior adverse possession; and the case of Goodtitle v. Baldwin (11 East, 488), turned upon the distinction, that the premises were crown lands, which by statute could not be granted, and that the possession of the plaintiff and the defendant was to be presumed by the license of the crown.

Undoubtedly the plaintiff must show that he has a good possessory title; and, therefore, if the defendant shows that he has conveyed the land, unless the conveyance was void by reason of a prior disseizin, the plaintiff cannot recover. Gould v. Newman, 6 Mass. Rep. 239; Wolcott v. Knight, 6 Mass. Rep. 418; Everenden v. Beaumont, 7 Mass. Rep. 76; Williams v. Jackson, 5 Johns. Rep. 490; Phelps v. Saxe, 2 Day's Rep. 151. So a tenant may show that the title of his landlord has expired. England v. Slade, 4 T. R. 682. So in an ejectment by a *cestui que trust* the tenant may set up in his defense the legal outstanding title in the trustee. Doe v. Staples, 2 T. R. 684. For in all these cases the evidence shows that the plaintiff has no subsisting possessory title at law, and, therefore, he ought not to be permitted to disturb the tenant's possession. The general rule is, that possession constitutes a sufficient title against every person not having a better title; and, therefore, the tenant may stand upon his mere naked possession until a better title is shown. "*In aequali jure melior est conditio possidentis*"; he that hath possession of lands, though it be by disseizin, hath a right against all men but against him that hath right." Doct. & Stud. 9, 3 Shep. Abridg. 28; and the rule of the civil law is the same. *Non possumus in incumbit necessitas probandi possessionem ad se pertinere.* Cod. lib. 4, cited 229* [*229*] 2 Bro. Adm. & Civ. Law, 371, note. And possession, although it be merely a naked possession, or acquired by wrong, as by disseizin, is also a title upon which a recovery can be had. For as Blackstone justly observes, "in the meantime, till some act be done by the rightful owner to divest the possession and assert his title, such actual possession is *prima facie* evidence of a legal title in the possession; and it may, by length of time and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title." 2 Bl. Com. 196. So Jenkins, in his Centuries of Reports, 42, states that the first possession, without any other title, serves in an assize for land. In Bateman v. Allen (Cro. Eliz. 437), it was held that the plaintiff was entitled to recover in ejectment, where it was found by special verdict that the defendant had not the first possession, nor entered under title, but upon the plaintiff's possession. And in Allen v. Hivington (2 Saund. R. 111), where, upon a special verdict in ejectment, it appeared that the plaintiff had a priority of possession, and no title was found

for the defendant. Saunders says, the matter in law was never argued, for the priority of possession alone gives a good title to the lessor of the plaintiff against the defendant, and all the world, excepting against the rightful owner. And in a late case, it was held that mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover, as plaintiff, against all the world, except such as can prove an older and better title in themselves. Catteris v. Cooper, 4 Taunt. 547. See also, 8 East, 363. And this doctrine has been frequently recognized in the American courts. Jackson v. Hazen, 2 Johns. Rep. 22; Jackson v. Harder, 4 Johns. Rep. 202. The last case, 4 Johns. Rep. 202, goes further, and decides that a mere intruder upon lands shall not be permitted to protect his intrusion in a suit by the person upon whom he has intruded, by setting up an outstanding title in a stranger. And in Smith v. Lorillard, 10 Johns. Rep. 338, all the authorities were reviewed, and it was held that it is not necessary for the plaintiff in ejectment to show, in every case, a possession of twenty years, or a paper title; [*230*] that a possession for a less period will form a presumption of title sufficient to put the tenant upon his defense; and that a prior possession short of twenty years, under a claim, or assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. In respect to real actions, it is said by Chief Justice Parsons, that under the general issue the defendant cannot give in evidence a title under which he does not claim, unless it be to rebut the defendant's evidence of seizin; but that he may plead in bar a conveyance by the defendant to a third person, under whom he does not claim; for if the tenant have no right, yet if the defendant have no right, he cannot, in law, draw into question the tenant's seizin, whether acquired by right or by wrong. Wolcott v. Knight, 6 Mass. Rep. 418; Gould v. Newman, 6 Mass. Rep. 239.

It is remarkable that in none of the foregoing cases the point is stated to have been ever decided upon the naked question whether a better subsisting title in a third person can be given in evidence by a defendant who has no privity with that title, to defeat a title in the plaintiff, which is yet superior to that under which the defendant holds the land. Blackstone puts a case in point: "If tenant in tail enfeoffs A in fee simple and dies, and B disseizes A, now B will have the possession, A the right of possession, and the issue in tail the right of property. A may recover the possession against B and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property." 2 Bl. Com. 199. Here B is an intruder, and, therefore, comes within the reach of the case of Jackson v. Harder (4 Johns. Rep. 202). But if B had conveyed to C, and then A had brought an ejectment against C, could the latter have set up the title of the issue in tail, with which he had no privity, although that were a good subsisting superior title to defeat the recovery of A? It becomes not the annotator to express any opinion on this point; his only object is to bring the authorities in review before the learned reader, and to suggest that it may yet be considered as subject to judicial doubt.

to a suit thereon in such state, and none others, can be pleaded in any other court within the United States.

ERROR to the Circuit Court for the District of South Carolina.

The defendant in error declared against the plaintiff in error, in debt, on a judgment of the Supreme Court of the state of New York, to which the defendant below pleaded *nul debet*, and the plaintiff below demurred. The Circuit Court rendered a judgment for the plaintiff below, and thereupon the cause was brought by writ of error to this court.

Mr. Hopkinson, for the plaintiff in error, suggested, that if, under any possible circumstances, the plea of *nul debet* could be a good bar to the action, a general demurrer was insufficient. He [235*] cited *Mills v. Duryee*,¹ *and stated that the present case might, perhaps, be distinguished from that, as it would seem that in *Mills v. Duryee* the defendant had actually appeared to the suit upon which the original judgment was recovered; but that in the present case there was no averment in the declaration to that effect, and the proceeding in the former suit might have been by attachment *in rem*, without notice to the party.

Mr. Law, for the defendant in error, relied upon the authority of *Mills v. Duryee* as conclusive to show that *nul tiel record* ought to have been pleaded. He also cited *Armstrong v. Carson's executors*.²

MARSHALL, Ch. J., delivered the opinion of the court. This is precisely the same case as that of *Mills v. Duryee*. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.

Judgment affirmed.³

1.—7 Cranch, 481.

2.—2 Dall. 302.

3.—In *Mills v. Duryee*, 7 Cranch, 481, the following points were adjudged: 1st. That the act of 1790, ch. 38, prescribing the mode in which the public acts, records, and judicial proceedings, in each state, shall be so authenticated as to take effect in every other state, declaring that the record of a judgment duly authenticated shall have such faith [236*] and "credit as it has in the state court from whence it was taken; if in such court it has the effect of record evidence, it must have the same effect in every other court within the United States. 2d. That in every case arising under the act, the only inquiry is, what is the effect of the judgment in the state where it was rendered. 3d. That whatever might be the effect of a plea of *nul debet* to an action on a state judgment, after verdict, it could not be sustained on demurrer. 4th. That on such a plea the original record need not be produced for inspection, but that an exemplification thereof is sufficient. 5th. That the act applies to the courts of the District of Columbia, and to every other court within the United States.

In the argument of *Borden v. Fitch* (15 Johns. Rep. 121), in the Supreme Court of New York, it seems to have been supposed that this court had decided, in *Mills v. Duryee*, that *nul tiel record* was the only proper plea to an action upon a state judgment. But it is conceived that as to the pleadings,

Cited—13 Pet. 314, 326; 5 Wall. 308; 18 Wall. 463; 21 Wall. 428; 1 Otto, 361; 2 Otto, 251; 1 Wood. & M. 175, 178; 2 Wood. & M. 4; 3 Wood. & M. 117; 2 Paine, 222, 508; 2 McLean, 120, 513; Hemp. 51; 9 Blatch. 277; 12 Bank. Reg. 168; 13 Bank. Reg. 390; 3 Woods 7.

[PRIZE.]

THE FORTUNA. KRAUSE ET AL., Claimants.

A question of proprietary interest and concealment of papers. Further proof ordered, open to both parties. On the production of further proof by the claimant, condemnation pronounced.

*Where a neutral ship-owner lends his [*237 name to cover fraud with regard to the cargo, this circumstance will subject the ship to condemnation.

It is a relaxation of the rules of the prize court to allow time for further proof in a case where there has been concealment of material papers.

THIS is the same case which is reported *ante*, Vol. II, p. 161, and which was ordered to further proof at the last term. It was submitted without argument, upon the further proof, at the present term.

JOHNSON, J., delivered the opinion of the court. Both vessel and cargo, in this case, are claimed in behalf of M. & J. Krause, Russian merchants, resident at Riga. The documents and evidence exhibit Martin Krause as the proprietor of the ship, but the captain swears that he considered her as the property of the house of M. & J. Krause, from their having exercised the ordinary acts of ownership over her; and in this belief he is supported by the fact that his contract is made with John Krause, by whom he appears to have been put in command of the ship.⁴ Martin *Krause, who appears in the grand bill [*238 of sale, is the same Martin Krause who is a member of the firm of M. & J. Krause.

In all its prominent features, this case bears a striking resemblance to the case of *The St. Nicholas*. A vessel documented as Russian is

it only decided that *nul debet* was not a proper plea; and that the court would hold that any plea (as well as *nul tiel record*) that would avoid the judgment, if technically pleaded, would be good. However this may be, it may safely be affirmed, that the question is still open in this court, whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained; for these might, in some cases, be pleaded in the state court to avoid the judgment.

4.—Translation of Exhibit, 287. A. "On the following conditions have I given to Captain Henry Behrens, the command of the ship *Fortuna*, under Russian colors, lying at present in Riga.

1. Captain Behrens shall have 25 Alberts dollars, monthly wages.

2. The whole cabin freight has been allowed him.

3. He is to receive 6 per cent. primage.

4. Traveling expenses for the benefit of the vessel, as likewise, victualing expenses for the use of the ship in port, consistent with moderation, have been allowed to the captain.

Captain Behrens, on his part, promises to watch the interest of his owner in every respect, and do the best he can for the benefit of the vessel.

For the fulfillment of the present contract I bind myself by my signature.

Riga, the 12th of August, 1813.

Per Proc. JOHN KRAUSE,
SCHULTZ."

(Signed)

placed under the absolute control of a British house, is despatched under the orders of that house to the Havanna, where she is loaded under the directions of an individual of the name of Muhlenbruck, who assumes the character of agent of the Russian owners; she is then ostensibly cleared out for Riga, but with express orders to call at a British port, and terminate her voyage under the orders of the same house, under the auspices of which the adventure had originated and been so far conducted.

Under these circumstances, it was certainly incumbent upon the claimant to show the previous correspondence of the British with the Russian house, and the immediate dependence of the agent at the Havanna upon the Russian house for authority, instructions, and resources. When we come to compare the correspondence of Muhlenbruck with that of Smith, the agent in *The St. Nicholas*, we find here, also, a striking similitude. In that case, the supposed correspondence with the Russian principle is in-
[239*] closed *under cover to the British house, with a request that they would forward it. In this case the letters covering the invoice and bill of lading, and directed to M. & J. Krause, is confided to the captain, but with express instructions to forward it to the British house, and await their orders.

The material facts on which the court relies, in making up its judgment on the claim of the cargo, are the following:

In the first place, there is a general shade of suspicion cast over the whole case, by the fact that all the material papers relating to the transaction were mysteriously concealed in a billet of wood. Had there been nothing fraudulently intended, these papers ought to have been delivered along with the documentary evidence. But they were not discovered until betrayed by one of the crew. It is upon the investigation of these papers, principally, that the circumstances occur which discover the true character of this voyage.

Second. There is no evidence that this adventure was ever undertaken under instructions from M. & J. Krause. But there is evidence that everything is set in motion at the touch of Bennet & Co., of London. And although they affect to act in the capacity of agents of the Russian house, even the rules of the common law would constitute them principals, in a case in which they cannot exhibit the authority under which they assume the character of agents. Again, there is no evidence that any funds were furnished by the Russian house for the purchase of this cargo. But there is evidence, and *we think conclusive evi-
[*240] dence, to show that it was purchased on funds of the British house, remitted through the medium of the cargo of the Robert Bruce, a ship loaded by Bennet & Co., and despatched about the same time for the Havanna. In the letter of instructions of the 18th of March, 1813,¹ the *captain is told to proceed to the Havan-
[*241] na and await the arrival of Muhlenbruck, in the Robert Bruce, for orders; and in case of any accidents befalling that vessel, to apply to the Spanish house of Ychazo & Carricabura, at the Havanna, for further instructions. And in a letter to the house of Lorent & Steinwitz, of Charleston, Bennet & Co. inform them that the Fortuna is despatched to the Havanna to the address of Ychazo & Carricabura to obtain a freight for the Baltic, and request Lorent & Steinwitz to advise that house, if they could obtain a freight for her to any port in Europe. This correspondence is explained thus: The cargo of The Robert Bruce would probably be sufficient to load this ship with colonial produce; if she arrives in safety, the original adventure can then proceed, but should she be captured or lost, some return freight must then be found for the Fortuna. And accordingly we find in the letter to Bennet & Co., of the 24th March,² Muhlenbruck solicits *a credit on Ja-
[*242] maica or Cadiz as he expresses it, "to be able to settle the surplus of the amount already

1.—"London, 18th November, 1813, Captain Henry Behrens.

As we have settled your ship's accounts by paying you a balance of £206 18 11 up to November 18th, we now agree that the arrangement made with Messrs. M. & J. Krause, when you were last at Riga, shall continue in force for the pending voyage, as far as relates to your pay and primage, and we agree to pay you a gratuity of one hundred pounds (£100) sterling, at the exchange current, whenever your voyage shall end, and likewise to allow you your cabin freight at the rate which the ship receives for her cargo. We have ordered Mr. J. F. Muhlenbruck to supply you with the cash necessary for your expenses in the Havanna when arrived out, which we beg may be as little as possible. And in case of your wanting any aid in Portsmouth, apply to Mr. Andrew Lindergreen, or in Plymouth to Messrs. Fuge & Son, or in Falmouth to Messrs. Fox & Son, who will supply you on showing this letter. We desire that you will, with your ship Fortuna, as speedily as possible, join the West India convoy now lying at Portsmouth taking sailing instructions, and proceed with the same convoy to the Havanna, where you will apply to Mr. J. F. Muhlenbruck, at Messrs. Ychazo & Carricabura, merchants there. You will receive at the Havanna, Mr. J. F. Muhlenbruck's instructions, which you will follow implicitly. Mr. J. F. Muhlenbruck goes out to the Havanna on board The Robert Bruce, or some other vessel in the convoy, if The Robert Bruce is too late. Should any accident befall him in the vessel on board of which he goes, so that it is ascertained that Mr. J. F. Muhlenbruck cannot arrive at the Havanna, or if he should not be arrived there sixty days (60) after you have arrived there,

you will consult with Messrs. Ychazo & Carricabura what is best to be done. Should the convoy be gone on your arrival at Portsmouth, you are at liberty to follow it without convoy. Wishing you a good voyage, we remain, &c.,

(Signed)

BENNET & CO."

On your arrival at Leith, apply to Ogrilvie & Paterson.

2.—

"HAVANNA, 24th March, 1814.

Messrs. Bennet & Co., London:

Gentlemen—I have the honor to refer you to my last letters of 21st of February, and the 1st of March, of which I have sent you by different opportunities triplicates. The first letter principally contained to request the favor of your opening me a credit in Jamaica or Cadiz to be able to settle the surplus of the amount already shipped, which may be left out of the proceeds of the outbound shipment of The Robert Bruce. I hope that the above letter has reached you in time to grant me as soon as possible the favor, and beg to be convinced that only the greatest necessity engages me to request it; not being able to draw on either America or England. I have now the greatest pleasure to inform you of the safe arrival of The Robert Bruce, James Chessel, master, on the 19th, under protection of His Majesty's ship, North Star, Captain Thomas Coe, from Jamaica. From Cork she sailed with convoy, consisting of His Majesty's ship Leviathan, 74, Captain Adam Drummond, The Talbot, 20, Captain Spelman Swaine, and The Scorpion, of 18 guns. Therefore, she has been the whole voyage under convoy, and the insurers have to pay the full returns of 6 per cent. The North Star, which sails to-morrow, takes all the ready vessels for Europe out to Bermuda; from

Wheat. 3.

shipped which may be left out of the proceeds of the outward-bound shipment of the Robert Bruce." Now, the only shipment he had then made was by the Fortuna; and this letter gives [243*] advice of that *shipment, as also of the arrival of the Robert Bruce, and the progress he had made in disposing of her cargo. The passage quoted means, therefore (although somewhat obscurely expressed), "It is possible that the outward cargo of the Robert Bruce may not be sufficient to pay for the shipment [244*] already *made by the Fortuna, and you must therefore furnish me with a credit to make up the deficiency." Ychazo & Carriabura no doubt advanced for the purchase of the cargo of sugars upon the credit of the cargo of the Robert Bruce, and accordingly we find that house charging a commission for advancing. On these facts we are satisfied that the cargo was purchased with British funds.

Lastly, there is no evidence that Muhlenbruck was the agent of M. & J. Krause, and there is abundant evidence of his being the avowed and confidential agent of the British house. We see in the midst of the greatest anxiety to keep up the character of agent to the Russian house, this gentleman, without being aware of it, does an act which at once shows to whom he holds himself accountable. In his letter to Bennett & Co. of the 24th of March, he requests them to inform the Russian house, that he has made certain advances on account of the ship. But why request Bennett & Co. to do this, if he was himself in immediate connection and correspondence with the Russian house? The fact is, his correspondence with the Russian house was fictitious, and his object was to inform Bennett & Co. in reality, whilst he feigned to address himself to M. & J. Krause, and thus the letters to the latter house, covering the invoice and bill of lading, although of the same date with that of Bennett & Co., omits this piece of information, which, in a real correspondence, would be groundwork

of a credit to himself, and contains nothing but the most general information, just enough, in fact, *to gloss over the transaction, [245 and give it the aspect of reality.]

With regard to the vessel, it would be enough to observe, that if a neutral ship-owner will lend his name to cover a fraud with regard to the cargo, this circumstance alone will subject him to condemnation. But in this case there are, also, many circumstances to maintain a suspicion that the vessel was British property, or at least not owned as claimed. Although this court, from extreme anxiety to avoid subjecting a neutral to condemnation, has relaxed its rules in allowing time for farther proof in a case where there was concealment of papers, yet nothing has been brought forward to support the neutral character *of the ship. [246 No charter-party, no original correspondence, nothing, in fact, but those formal papers which never fail to accompany a fictitious, as well as a real, transaction. On the contrary, we find the captain, without any instructions from his supposed owners, submitting implicitly to the orders of Bennett & Co. in everything; and the latter assuming even a control over the contract which he exhibits with his supposed owner in Riga, and expressing a solicitude about his expenses, which could only have been suggested by a consciousness that the house of B. & Co. would have to pay those expenses.

Upon the whole, we are satisfied that it is a case for condemnation both of ship and cargo.

Decree affirmed.

Aff'g—1 Brock. 200.

[CONSTITUTIONAL AND COMMON LAW.]

GELSTON ET AL. v. HOYT.

Under the judiciary act of 1789, ch. 20, s. 25, giving appellate jurisdiction to the Supreme Court of

thence another convoy will be granted to protect them to England, or at least as far as the latitude of Halifax. The Russian ship Fortuna, Captain Behrens, laden with 1520 boxes assorted sugars bound to Riga, and for account and risk of Messrs. M. & J. Krause at that place, is ready to join this convoy. I enclose you invoice and bill of lading, which you will be pleased to forward with the first opportunity to the above friends. The captain, Behrens, has got instructions from me to touch, according to the prevailing winds, either in Leith or in the channel. By the present circumstances on the continent of Europe, Messrs. M. & J. Krause may have been induced to send this cargo to a better market than it probably meets at Riga. Should they have given you any instructions concerning this vessel, the captain, Behrens, has orders to wait for your kind information in regard of the further destination, which orders from you I beg to send him as soon as you know at what port of the above mentioned he has arrived in England. Please to inform also, Messrs. M. & J. Krause, that I have advanced here the captain \$1,332.04, for the use of ship Fortuna. Next week the cargo of The Robert Bruce will be all delivered, and I endeavor to procure the highest prices possible. The Oznaburgs will sell as well as the Estopillas, but I am sorry you was not able to get more of the latter, and of a finer quality, being always the leading article of an assortment of linen. The prices of sugar are nearly the same, and the arrival of this convoy has brought them up $\frac{1}{2}$ to $\frac{1}{4}$ dollar higher. Coffee is lower, and I expect to buy and lay in good coffee at \$10 to \$11. Messrs. Hubberts, Taylor & Simpson inform me that I may not expect a convoy leaving Jamaica before the 30th of April. This Wheat. 3.

same convoy can arrive here the 10th or 15th of May, and all possible exertion shall be made on my side to get The Robert Bruce laden before this time. I have till now not received an answer of Messrs. Hibberts, respecting the bills on London. Your kind letter of the 18th of December I have duly received. I am happy that the sugars are bought within your limits, and wish to be as fortunate with those wanted for The Robert Bruce's cargo. I have the honor, &c.,

(Signed)

J. F. MUHLENBRUCK."

1.—

(Translation.)

"HAVANNA, 24th March, 1814.

Messrs. M. & J. Krause, Riga:

With the present I have the honor to send you the invoice and bill of lading of a cargo of sugars for your esteemed account in The Fortuna, Captain H. Behrens. The ship could not take more than 1,520 boxes white, and 600 brown, with Campeachy wood, which was necessary for stowing; together \$57,517.04, for which you will please give me credit. The sugars are of the new crop, bought at a moderate price, and of a very good quality. And I flatter myself you will be content with the fulfillment of your kind commission. As there is a convoy leaving this place to-morrow for Bermuda, I found it advisable for The Fortuna to join the same, and wish her a very quick and safe passage. Of the above documents I shall send you duplicates when I have the honor to write you again. The prices of Russian articles are at present—Raven's Duck, \$16, Canvas \$42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c.

(Signed)

J. F. MUHLENBRUCK."

the United States, from the final judgment or decree of the highest court of law or equity of a state, in certain cases, the writ of error may be directed to any court in which the record and judgment on which it is to act may be found; and if the record has been remitted by the highest court, &c., to another court of the state, it may be brought by the writ of error from that court.

The courts of the United States have an exclusive cognizance of the questions of forfeiture upon all seizures made under the laws of the United States, and it is not competent for a state court to entertain or decide such questions of forfeiture. If a sentence of condemnation be definitively pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be again litigated in any common law forum.

Where a seizure is made for a supposed forfeiture, under a law of the United States, no action of trespass lies in any common law tribunal, until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; for it depends upon the final decree of the court proceeding *in rem* whether such seizure is to be deemed rightful or tortious, and the action, if brought before such decree is made, is brought too soon.

If a suit be brought against the seizing officer for the supposed trespass while the suit for the forfeiture is depending, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action. If, after a decree of condemnation, then that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then that may be pleaded as a bar. If, after an acquittal without such certificate, then the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture in his defense without averring a *pendens*, or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture in a state court.

At common law any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified. By the act of the 18th of February, 1793, ch. 8, s. 27, officers of the revenue are authorized to make seizures of any ship or goods for any breach of the laws of the United States.

The statute of 1794, ch. 50, s. 8, prohibiting the fitting out any ship, &c., for the service of any foreign prince or states, to cruise against the subjects, &c., of any other foreign prince or state, does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new state belonged. And a plea which sets up a forfeiture under that act in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

A plea justifying a seizure under this statute need not state the particular prince or state by name, against whom the ship was intended to cruise.

A plea justifying a seizure and detention by virtue of the 7th section of the act of 1794, under the express instructions of the President, must aver that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed. The 7th section of the act was not intended to apply except to cases where a seizure or detention could not be enforced by the ordinary civil power, and there was a necessity, in the opinion of the President, to employ naval or military power for this purpose.

To trespass for taking, and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it by way of new assignment.

A plea alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that thereby the property became, and was actually, forfeited, and was seized as forfeited.

ERROR to the court for the trial of impeachments and correction of errors of the state of New York.

This cause had been removed into that court by the present plaintiffs in error, by writ of error directed to the Supreme Court of the said state. In January, 1818, the court of the state of New York for the correction of errors in all things, affirmed the judgment which had been rendered by the Supreme Court of the state of New York, in favor of Hoyt, the present defendant in error. And before the coming of the writ of error issued from this court, the said court for the correction of errors of the state of New York, according to the laws of the state of New York, and the practice of that court, had remitted the record, which had been removed from the Supreme Court of the state of New York to the said Supreme Court, with a mandate thereon requiring the Supreme Court of the state of New York to [*249 execute the judgment, which had been so rendered by it in favor of the defendant in error. And the said record having been so remitted, the Court of Errors of the state of New York, upon the coming of the said writ of error from this court, made the following return thereto: "State of New York, ss. The president of the senate, the senators, chancellor, and judges of the Supreme Court, in the court for the trial of impeachments and the correction of errors, certify and return to the Supreme Court of the United States, that before the coming of their writ of error, the transcript of the record in the cause, in the said writ of error mentioned, together with the judgment of this court thereon, and all things touching the same, were duly remitted in pursuance of the statute instituting this court, into the Supreme Court of judicature of this state, to the end that farther proceedings might be thereupon had, as well for execution as otherwise, as might be agreeable to law and justice; and in which Supreme Court of judicature, the said judgment, and all other proceedings in the said suit, now remain of record; and as the same are no longer before, or within the cognizance of this court, this court is unable to make any other or farther return in the said writ. All which is humbly submitted." Thereupon the counsel for the plaintiffs in error made an application to the Supreme Court of the state of New York, to stay the proceedings upon the said judgment, till an application could be made to this court in respect to the said writ of error. To avoid this delay, the counsel under the advice or suggestion of the judges of the said Su- [*250 preme Court of the state of New York, entered into the following agreement, viz: "It is agreed, between the attorneys of the above-named plaintiffs and defendant in error, that the annexed is a true copy of the record and bill of exceptions, returned by the Supreme Court of the State of New York, to the Court of Errors of the said state, and remitted by the said Court of Errors, in the affirmance of the judgment of the said Supreme Court to the said Supreme Court. And that the said copy shall be considered by the said Supreme Court of the United States as a true copy of the said record and bill of exceptions, and shall have the same effect as if annexed to the writ of error in the above cause from the said Supreme Court of the United States, and that the clerk of the Supreme Court of the State of New York transmit the same, with this agreement

Wheat. 3.

to the clerk of the Supreme Court of the United States, and that the same be annexed by the said clerk of the Supreme Court of the United States, to the said writ of error, as a true copy of the said record and bill of exceptions."

Record and Bill of Exceptions.

City and County of New York, ss. Be it remembered, that in the term of January, in the year of our Lord one thousand eight hundred and thirteen, came Goold Hoyt, by Charles Graham, his attorney, into the Supreme Court of judicature of the people of the state of New York, before the justices of the people of the state of New York, of the Supreme Court of judicature of the same people, at the capitol, in the city of Albany, and impleaded David Gelston and Peter A. Schenck, in a certain plea 251*) of trespass, *on which the said Goold Hoyt declared against the said David Gelston and Peter A. Schenck in the words following:

City and County of New York, ss. Goold Hoyt, plaintiff in this suit, complains of David Gelston and Peter A. Schenck, defendants in this suit, in custody, &c.: For that, whereas the said defendants, on the tenth day of July, in the year of our Lord one thousand eight hundred and ten, with force and arms, at the city of New York, in the county of New York, and at the first ward of the same city, the goods and chattels of the said plaintiff, of the value of two hundred thousand dollars, then and there found, did take and carry away, and other injuries to the said plaintiff, then and there did, to the great damage of the said plaintiff, and against the peace of the people of the state of New York. And, also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city and county, and ward aforesaid, with force and arms, to wit, with swords, staves, hands, and feet, other goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheds of water, one hundred and thirty barrels salted provisions, twenty hogsheds of ship-bread, of the value of two hundred thousand dollars, at the place aforesaid found, did take and carry away, and other wrongs and injuries to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of the people of the state of New York. And, *also, for that the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons stone ballast, one hundred hogsheds of water, one hundred and thirty barrels salted provisions, and twenty hogsheds of ship-bread, of the value of two hundred thousand dollars, then and there being and found, seized, took, carried away, damaged, and spoiled, and converted and disposed thereof, to their own use, and other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of the said people of the state of New York. And, also, for that the said defendants, on the same day and year aforesaid, with force and arms, to wit,

Wheat, 8.

with swords, staves, hands, and feet, to wit, at the city, county, and ward aforesaid, seized, and took a certain ship or vessel of the said plaintiff of great value, to wit, of the value of two hundred thousand dollars, and in which said ship or vessel the said plaintiff then and there intended, and was about to carry and convey certain goods and merchandises, for certain freight and reward, to be therefor paid to him the said plaintiff; and then and there carried away the said ship or vessel, and kept and detained the same from the said plaintiff, for a long space of time, to wit, hitherto, and converted and disposed thereof to their own use; and thereby the said plaintiff was hindered and prevented from carrying and conveying the said goods and merchandises as aforesaid, and thereby *lost, and was deprived of [*253 all the profit, benefit, and advantage which might and would otherwise have arisen and accrued to him therefrom, to wit, at the city, county, and ward aforesaid, and other wrongs and injuries to the said plaintiff then and there did, against the peace of the people of the state of New York, and to the great damage of the said plaintiff. And, also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city, county, and ward aforesaid, with force and arms, seized, and took possession of divers goods and chattels of the said plaintiff, then and there found, and being in the whole of a large value, that is to say, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheds of water, one hundred and thirty barrels of salted provisions, twenty hogsheds of ship-bread, of the value of two hundred thousand dollars, and staid and continued in possession of the said goods and chattels, so by them seized and taken as aforesaid, and the said goods and chattels afterwards took and carried away, from and out of the possession of the said plaintiff; whereby, and by reason, and in consequence of such said seizure, and of other the premises aforesaid, the said plaintiff not only lost and was deprived of his said goods and chattels, and of all profits, benefits, and advantages, that could have arisen and accrued to him from the use, sale, employment, and disposal thereof, but was also forced and obliged to, and did actually, lay out and expend large sums of money, and to be at further trouble and expense *in and about endeavoring [*254 to obtain restitution of the property so by the said defendants seized, as aforesaid, and other wrongs and injuries to the said plaintiff then and there did, against the peace of the people of the state of New York, and to the damage of the said plaintiff of two hundred thousand dollars; and, therefore, he brings suit, &c.

And the said David Gelston and Peter A. Schenck thereto pleaded in the words following:

1st Plea. And the said David Gelston and Peter A. Schenck, by Samuel B. Romaine, their attorney, come and defend the force and injury, when, &c., and say they are not guilty of the said supposed trespasses, above laid to their charge, or any part thereof, in manner and form as the said Goold Hoyt hath above thereof complained against them, and of this they put themselves upon the country.

And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth, and fifth counts in the declaration of the said plaintiff mentioned, to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the second count in the said declaration of the said plaintiff: **255*** in seizing, taking, *carrying away, damaging, spoiling, converting, and disposing to their own use, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the third count in the said declaration of the said plaintiff: in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff, and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said plaintiff, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff, above supposed to have been committed by the said David Gelston and Peter A. Schenck; they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said Goold Hoyt ought not to have or maintain his aforesaid action against them, because they say that the said ship or vessel, called the American Eagle, with **256*** her tackle, apparel and furniture, the five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the second, third, and fifth counts in the said declaration of the said plaintiff, are the same and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting, and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same and not other or different. And the said David Gelston and Peter A. Schenck further say, that the ship or vessel, mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts

in the said declaration of the said plaintiff, and not other or different; and that the seizing, carrying away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different. And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and ***257** twenty hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the general description of goods and chattels mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof mentioned in the said second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff, are the same trespasses, and not other or different. And the said David Gelston and Peter A. Schenck further say, that before the tenth day of July, in the year of our Lord one thousand eight hundred and ten, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, *called the American Eagle, should be ***258** employed in the service of a foreign state, to wit, of that part of the Island of St. Domingo, which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States of America were then at peace, to wit, of that part of the Island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided. And the President of the said United States, to wit, James Madison, who was then President of the said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did, afterwards, to wit, on the sixth day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, in-

struct, and direct the said David Gelston and Peter A. Schenck to seize, take, carry away, and detain, as forfeited to the use of the said United States, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread. And the said David Gelston and Peter A. Schenck further say, that they did, afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, by virtue of the said power **259*** and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston and Peter A. Schenck, by the said President of the said United States, and not otherwise, seize, take, carry away, and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, as forfeited to the use of the said United States, according to the form of the statute in such case made and provided. And the said David Gelston and Peter A. Schenck further say, that the seizing, taking, carrying away, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, by the said David Gelston and Peter A. Schenck, on the tenth day of July, one thousand eight hundred and ten, as aforesaid, is the same seizing, taking, carrying away, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the several counts in the said declaration of the said plaintiff, and not other or different. And this they, the said David Gelston and Peter A. Schenck, are ready to verify; wherefore they pray judgment if the said **260*** Goold Hoyt ought to have or maintain his aforesaid action thereof against them, &c.

And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth and fifth counts in the declaration of the said plaintiff mentioned, to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the second count in the said declaration of the said plaintiff; in seizing, taking, carrying away, damaging, spoiling, converting, and disposing to their own use, the goods and

chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the third count in the said declaration of the said plaintiff; in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff, and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said plaintiff, to wit, a **[*261]** ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff, above supposed to have been committed by the said David Gelston and Peter A. Schenck, they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said Goold Hoyt ought not to have or maintain his aforesaid action against them, because they say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, the five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting, and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different. And the said David Gelston and Peter A. Schenck further say, that the ship or vessel mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts ***in the said declaration of the** **[*262]** said plaintiff, and not other or different; and that the seizing, carrying away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different. And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the gen-

eral description of goods and chattels, mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof mentioned in the said second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff, are the same trespass, and not other or different. And the said David Gelston and Peter A. Schenck further say, that be-
263* fore *the tenth day of July, in the year of our Lord one thousand eight hundred and ten, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, called the American Eagle, should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. And the President of the said United States, to wit, James Madison, who was then President of the said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did afterwards, to wit, on the sixth day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, instruct, and direct the said David Gelston and Peter A. Schenck to take possession of, and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and
264* *furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided. And the said David Gelston and Peter A. Schenck further say, that they did afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, by virtue of the said power and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston and Peter A. Schenck, by the said President of the said United States, and not otherwise, take possession of, and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions,

and twenty hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided. And the said David Gelston and Peter A. Schenck further say that the taking possession of, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, by the said David Gelston and Peter A. Schenck, on the tenth day of July, one thousand *eight hundred and ten, [***265** as aforesaid, is the same seizing, taking, carrying away, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread mentioned in the several counts in the said declaration of the said plaintiff, and not other or different. And this they, the said David Gelston and Peter A. Schenck, are ready to verify: wherefore they pray judgment if the said Gould Hoyt ought to have or maintain his aforesaid action thereof against them, &c.

And to which the said foregoing pleas, was subjoined the following notice:

Sir:—Please to take notice that the defendants, at the trial of the above cause, will insist upon, and give in evidence, under the general issue above pleaded, that the ship or vessel called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord one thousand eight hundred and ten, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, and were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as *a part of her said equipment, [***266** with intent that the said ship or vessel, called the American Eagle, should be employed in the service of a foreign prince or state, to wit, of that part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens, and property of another foreign prince or state with which the United States were then at peace, to wit, of that part of the Island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided. And the said defendants will also insist upon, and give in evidence under the said plea, that the said ship or vessel, with her tackle, apparel and furniture, on the day and year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, was attempted to be fitted out and armed, and was fitted out and armed, and that the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and

thirty barrels of salted provisions, and twenty hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel should be employed in the service of some foreign prince or state, to cruise and commit hostilities upon the subjects, citizens, and property of some other foreign prince or state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. And the **267*** said defendants will also insist upon, and give in evidence under the said plea, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor of the customs for the District of the city of New York, on the 10th day of July, one thousand eight hundred and ten, and before that time, and that they have ever since continued to be collector and surveyor as aforesaid, and that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take, and detain the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested in them by the constitution and laws of the United States. Dated this 11th day of March, 1813.

And the said Goold Hoyt, to the said first plea, joined issue, and to the second and third pleas the said Goold Hoyt demurred as follows:

And as to the plea of the said David Gelston and Peter A. Schenck, by them first above pleaded, and wherof they have put themselves upon the country, the said Goold Hoyt doth the like, &c.

And as to the pleas by the said David Gelston **268*** and Peter A. Schenck, by them secondly and thirdly above pleaded in bar, the said Goold Hoyt saith, that the said second and third pleas of the said David Gelston and Peter A. Schenck, or either of them, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient, in law, to bar and preclude him, the said Goold Hoyt, from having and maintaining his action aforesaid, against the said David Gelston and Peter A. Schenck; and that he, the said Goold Hoyt, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said Goold Hoyt prays judgment, and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c.

And the said David Gelston and Peter A. Schenck, thereupon joined in demurrer as follows:

And the said David Gelston and Peter A. Schenck say, that their said pleas, by them secondly and thirdly above pleaded, and the mat-

ters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient, in law, to bar and preclude the said Goold Hoyt from having and maintaining his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck; and that they, the said David Gelston and Peter A. Schenck, are ready to verify and prove the same, when, where, and in such manner as the said court shall direct; wherefore, inasmuch as the said Goold Hoyt has not answered the said second and third pleas, nor hitherto, in any manner, denied the same, the said David Gelston and Peter A. Schenck pray judgment, and that the said Goold Hoyt may be barred from having, or maintaining, his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck, &c.

And, afterwards, the said demurrer was brought on to be argued before the said Supreme Court, at the city hall of the city of New York, and judgment was given against the said David Gelston and Peter A. Schenck upon the said demurrer.

Bill of Exceptions.

And afterwards, to wit, at the sittings of *Nisi Prius*, held at the city hall of the city of New York aforesaid, in and for the said city and county, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifteen, before the honorable Ambrose Spencer, Esq., one of the justices of the Supreme Court of Judicature of the people of the state of New York, assigned to hold pleas in the said sittings, according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York aforesaid, for that purpose empaneled, that is to say, Walter Sawyer, Edward Wade, William Prior, James M'Cready, Richard Loines, John Rodgers, Asher Marx, Benjamin Gomez, Samuel Milbanks, James E. Jennings, George Riker, and Jacob Latting, good and lawful men of the city and county of New York, aforesaid, at which day came there as well the said Goold Hoyt as the said David Gelston and Peter A. Schenck, by their respective attorneys aforesaid, and the jurors of the jury, empaneled to try the said issue, being called, also **[*270]** came, and were then and there, in due manner, chosen and sworn to try the same issue; and upon the trial of that issue the counsel learned in the law for the said Goold Hoyt, to maintain and prove the said issue on their part, gave in evidence, that at the time of the seizure of the said ship American Eagle, by the said David Gelston and Peter A. Schenck, she was in the actual, full, and peaceful possession of the said Goold Hoyt, and that, on the acquittal of the said vessel in the District Court of the United States, for the district of New York, it was decreed that the said vessel should be restored to the said Goold Hoyt, the claimant of the said vessel, in the said District Court; and for that purpose the counsel of the said Goold Hoyt gave in evidence the proceedings in the said District Court of the United States, by which it appeared that a libel had been filed in the name of the United States against the said ship American Eagle, in which it was,

among other things, alleged, that the said ship had been fitted out and armed, and attempted to be fitted out and armed, and equipped and furnished, with intent to be employed in the service of Petion against Christophe, and in the service of that part of the Island of St. Domingo which was then under the government of Petion, against that part of the said Island of St. Domingo which was then under the government of Christophe, contrary to the statute in such case made and provided; and that the said Goold Hoyt had filed an answer to the said libel, and a claim to the said vessel, in which the said Goold Hoyt had expressly denied the 271* truth of the allegations in the said libel; and it also appeared by the said proceedings, that in the month of April, one thousand eight hundred and eleven, an application had been made to the said District Court, by the said Goold Hoyt, to have the said ship appraised, and to have her delivered up to him on giving security for her appraised value; and it also appeared, by the said proceedings, that appraisers had been appointed by the said court, and that they had appraised the said ship, her tackle, &c., at thirty-five thousand dollars, and that the said appraisement had been filed, and had not been excepted to; and that the sureties offered by the said Goold Hoyt, for the appraised value of the said ship, had been accepted by the said court; and it also appeared, by the said proceedings, that the said cause had been tried before the said District Court, and that the said libel had been dismissed, and that the said ship had been decreed to be restored to the said claimant, and that a certificate of reasonable cause for the seizure of the said vessel had been denied. And the counsel of the said Goold Hoyt, to maintain and prove the said issue, did give in evidence that the value of the said ship, her tackle, apparel and furniture, at the time of her seizure as aforesaid, was one hundred thousand dollars, and did also give in evidence, that the said Peter A. Schenck seized and took possession of the said ship by the written directions of the said David Gelston; but no other proof was offered by the said plaintiff, at that time, of any right or title in the said plaintiff to the said vessel; and here the said plaintiff rested his cause.

272* Whereupon the counsel for the defendants did, then and there, insist, before the said justice, on the behalf of the said defendants, that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid, were insufficient, and ought not to be admitted or allowed as sufficient evidence to entitle the said plaintiff to a verdict; and the said counsel for the defendants did, then and there, pray the said justice to pronounce the said matters, so produced and given in evidence for the said plaintiff, to be insufficient to entitle the said plaintiff to a verdict in the said cause, and to nonsuit the said plaintiff; but to this the counsel learned in the law, of the said plaintiff, objected, and did then and there insist before the said justice, that the same were sufficient, and ought to be admitted and allowed to be sufficient to entitle the said plaintiff to a verdict; and the said justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters, so produced and given in evidence on the part of the said plaintiff,

were sufficient to entitle the said plaintiff to a verdict, and that he ought not to be nonsuited; whereupon the said counsel for the defendants did, then and there, on the behalf of the said defendants, except to the aforesaid opinion of the said justice, and insisted that the said several matters, so produced and given in evidence, were not sufficient to entitle the said plaintiff to a verdict, and that he ought to be nonsuited.

After the said motion for a nonsuit had been refused, and the opinion of the said justice had been excepted to as aforesaid, the counsel of the said Goold Hoyt did, in the process of the trial, give in evidence, on the part of the said Goold Hoyt, that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof; and that in pursuance of such purchase by the plaintiff, the said James Gillespie had delivered full and complete possession of the said ship, her tackle, &c., to the said plaintiff, before the taking thereof by the defendants.

And the said motion for a nonsuit having been refused, and the opinion of the said justice excepted to as aforesaid, the said counsel for the said defendants did, thereupon, state to the said jury the nature and circumstances of the defendants' defense, and did then and there offer to prove and give in evidence, by way of defense, or in mitigation or diminution of damages, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord one thousand eight hundred and ten, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said five hundred tons of stone ballast, one hundred hogsheds of water, one hundred and thirty barrels of salted provisions, and twenty hogsheds of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, called the American Eagle, should be employed in the service of that part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens, and property of that part of the Island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided.

And the said counsel of the said defendants did, then and there, offer to prove, and give in evidence, by way of defense, or in mitigation or diminution of damages, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor, of the customs for the district of the city of New York, on the tenth day of July, one thousand eight hundred and ten, and before that time, and afterwards, continued to be collector and surveyor as aforesaid; and that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York.

Wheat. 3.

in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take, and detain the said ship or vessel, with her tackle, apparel and furniture, and the said five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, and twenty hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested **275*** in them by the constitution and laws of the United States, and for such cause as is hereinbefore stated.

And the said counsel of the said defendants, did, then and there, insist, before the said justice, on the behalf of the said defendants, that the said several matters, so offered to be proved and given in evidence on the part of the said defendants as aforesaid, ought to be admitted and allowed to be proved and given in evidence, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid.

And the said counsel for the said defendants, did, then and there, pray the said justice to admit and allow the said matters so offered to be proved and given in evidence, to be proved and given in evidence in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid; but to this the counsel learned in the law, of the said plaintiff, objected, and did, then and there, insist, before the said justice, that the same ought not to be admitted, or allowed to be proved or given in evidence, in justification of the trespass charged against the said defendants, and that the same ought not to be admitted, or allowed to be proved or given in evidence, in mitigation or diminution of the damages claimed by the plaintiff as aforesaid, inasmuch as the counsel of the said Gould Hoyt admitted that the defendants had not been influenced by any malicious motives in making the said seizure, and that they had not acted with **276*** any view or design of oppressing or injuring the plaintiff. And the said justice did, then and there, declare and deliver his opinion, and did then and there overrule the whole of the said evidence so offered to be proved by the said defendants, and did declare it to be inadmissible in justification of the trespass charged against the said defendants; and after the admission so made by the counsel of the said Gould Hoyt, as aforesaid, did declare and deliver his opinion, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the said plaintiff from claiming any damages against the defendants by way of punishment or smart-money, and that after such admission the plaintiff could recover only the actual damages sustained, and with that direction left the same to the said jury; and the jury aforesaid, then and there gave their verdict for the said plaintiff for one hundred and seven thousand three hundred and sixty-nine dollars and forty-three cents damages; whereupon the said counsel for the said defendants, did, then and there, on the behalf of the said defendants, except to the aforesaid opinion of

Wheat. 3.

the said justice, and insisted that the said several matters, so offered to be proved and given in evidence, ought to have been admitted and given in evidence in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid.

And inasmuch as neither the said several matters so produced and given in evidence on the part of the said plaintiff, and by the counsel of the said defendants *ob- ***277** jected to, as insufficient evidence to entitle the said plaintiff to a verdict as aforesaid, nor the said several matters so offered to be proved and given in evidence, on the part of the said defendants, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid, appear by the record of the verdict aforesaid, the said counsel for the said defendants did, then and there, propose their exceptions to the opinions and decisions of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiff as aforesaid, and the said several matters so offered to be proved and given in evidence, on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided. And thereupon the said justice, at the request of the said counsel for the said defendants, did put his seal to this bill of exceptions, on the said 15th day of November, in the year of our Lord one thousand eight hundred and fifteen, pursuant to the statute in such case made and provided.

If either party shall require the proceedings in the District Court to be set out more at length, then it is understood that such proceedings shall be engrafted into the bill of exceptions, and form part thereof.

(Signed)

AMBROSE SPENCER.

[L. S.]

*The bill of exceptions being car- ***278** ried before the Supreme Court of the state of New York, the exceptions were disallowed by the court. The cause was then carried to the Court of Errors of the state, where the judgment of the Supreme Court of the state was affirmed, and the cause was brought to this court in the manner before stated.

The Attorney-General (Mr. Rush) for the plaintiffs in error, argued: 1. That the special matter offered in evidence by the plaintiffs in error ought to have been admitted as a defense to the action, or at any rate, that it ought to have been admitted. The 27th section of the act of 1798 contains, in general terms, a provision that it shall be lawful for any revenue officer to go on board of any vessel for purposes of search and examination; and if it appear that a breach of any law has been committed, whereby a forfeiture has been incurred, to make a seizure. It has been the wise policy of the law, by enactments and decisions co-extensive with the range of public office, to throw its shield over officers while acting under fair and honest convictions. Thus, under the English statutes, no justice of the peace, or even constable, can be sued for anything done officially who is not clothed with some protection more than is allowed to ordinary de-

fendants; some relaxation of the rules of pleading, or other immunities are extended to him. It is the same with mayors, bailiffs, church wardens, overseers, and a variety of other officers. So, also, excise officers may always plead the general issue, and give the special matter in evidence. By stat. 24, Geo. II., 279*] *no justice shall be sued for what he has done officially until notice in writing served upon him a month beforehand; nor then, if he tender amends. It would be easy to multiply analogous examples. Several acts of Congress, passed since that of June, 1794, illustrate the same legal principle. By the 11th section of the embargo act of the 25th April, 1808, ch. 170, the collectors of the customs were authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, there existed any intention to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President could be had upon the seizure. It has been repeatedly determined, that it was sufficient, under this act, for the collectors to have acted with honest convictions; and that the absence of probable cause afforded, in itself, no ground to a claim for damages.¹ So, also, in the law just passed, to preserve more effectually our neutral relations, a principle closely analogous has been introduced.² It is provided by the act of the 24th February, 1807, ch. 74, "That when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer under any act of Congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom 280*] such prosecution *shall be tried that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure or prosecution; provided that the ship or vessel, goods, wares, or merchandise, be, after the judgment, forthwith returned to the claimant or claimants." Here it appears, indeed, that if a certificate be granted, it operates as an absolute bar to an action. But it does not follow, that the refusal of a certificate is to close the ear of a court and jury to all the real merits. It will, perhaps, be said, that the judgment of the District Court restoring the vessel, and refusing the certificate, is conclusive; that it was a court of competent jurisdiction, and that, therefore, the matter which it adjudicated could not be reheard, or its propriety examined into collaterally, in any other court. We are aware of the decisions of this court upon this point, and of the English decisions upon the conclusiveness of judgments, from that in *Fernandez v. De Acosta*,³ in the time of Lord Mansfield, to the more recent cases. Those, however, who have scrutinized this doctrine

see plainly that, in later times at least, though it be the law, its inconveniences appear to be sometimes felt, and its wisdom perhaps sometimes doubted. It is an intrinsic objection to the doctrine, that while it professes to look with a single eye to the binding nature of the judgment, turning away *from the [281 merits, yet, in point of fact, the merits do, in most of the cases, get into view; so difficult is it to thrust them back in discussions where justice only is sought. Already has the doctrine disappeared from the codes of some of the leading states in the Union; from that of Pennsylvania by a positive statute, from that of New York by a judicial decision.⁴ In how many more of the states it has been broken down is not known, but it is not supposed to be a doctrine entitled to any peculiar favor in this court. But the difference between a sentence of condemnation and of acquittal is material. An acquittal does not ascertain facts. A conviction does. Its character is positive. The former may have arisen from want of evidence; the latter must always rest upon some foundation of proof. A conviction, says Buller, is evidence of the fact; but the reverse of it is not shown by an acquittal.⁵ Even in a common action for assault and battery, the plaintiff cannot rely upon a conviction on an indictment for the same assault.⁶ The consequence is, that the defendant may defend himself against the suit by going into the original facts. The plaintiffs in error asked no more below. So, also, to support an action for malicious prosecution, malice in the defendant, and want of probable cause, must both concur.⁷ If, in this action, an acquittal has been had upon the indictment, the plaintiff may still lay before the jury the evidence which was *heard on the indictment, viz., all the [282 facts and circumstances to show that the prosecution was malicious.⁸ This surely opens to the defendant the corresponding right of going into the original facts on his side. Every principle of just reasoning would seem, then, to lead to the conclusion that the special matter ought to have gone before the jury. If it did not justify the seizure and detention, it might have served to mitigate the damages. The admission of the plaintiff's counsel that the defendants below were not actuated by any malicious or vindictive motive, was not tantamount to hearing all the special matter, since it might, and no doubt would, have established in the minds of the jury a far stronger claim to mitigation than the mere absence of malice. The great end, therefore, of every lawsuit has been overlooked. Justice has not been done. Unless the judgments below be abrogated, the defendants below, acting as innocent men, and as vigilant and meritorious public officers, are in danger of being crushed under a load of damages which could scarcely have been made more heavy if leveled at conduct marked by the most undisputed and malignant guilt. 2. The plaintiff below, by

4.—*Vandenheuvel v. The United Ins. Co.*, 2 Johns. Cas. 451.

5.—N. P. 245.

6.—*Jones v. White*, 1 Strange, 66.

7.—Bull. N. P. 14.

8.—Bull. N. P. 14.

1.—*Cronell et al. v. M'Fadon*, 8 Cranch, 94; *Otis v. Watkins*, 9 Cranch, 337; *Otis v. Walter*, 2 Wheat, 18.

2.—Act of March 3d, 1817, chap. 58.

3.—*Park on Ins.* 178, 3d ed.

demurring to the second plea, was precluded from all right of recovery; and that plea contains matter, which the demurrer itself admits, and which entitled the defendants below to judgment. A demurrer admits all facts that are sufficiently pleaded. What, then, are the facts set forth in this plea? Plainly these: that the American Eagle was fitted out and **283*** equipped with intent that *she should be employed in the service of a foreign prince or state, to wit, of that part of St. Domingo governed by Petion, to cruise against another foreign prince or state, viz., against that part of St. Domingo governed by Christophe; that this was contrary to the act of the 5th of June, 1794, and that the seizure thereupon took place under orders from the President. Is not the case of the defendants below, after these admissions, completely made out? Does it lie with the plaintiff to say that St. Domingo was not a state, or Christophe a prince? Does not the plea affirm both? Does not the demurrer admit both? What besides was it the object of the plea to affirm? What else did the demurrer intend to admit? The former sets them forth as fundamental facts. The latter does not deny, but admits them. 3. In contending that, within the true scope and intention of the act of the 5th of June, 1794, both Petion and Christophe were to be considered foreign princes, we do not mean to depart from the reverence due to the former decisions of this court in *Rose v. Himely*,¹ but think that there are solid grounds for distinguishing the present case from that decision. It is important that the different branches of the government should look upon foreign nations with the same eyes, and subject them to the same rules of treatment. The decision in *Rose v. Himely* took place in February, 1808. At that epoch, the act of Congress specifically cutting off intercourse with St. Domingo, and treating it as a dependency of France, was in full force. For the judiciary to have pro-**284*** nounced *this island an independent state, whilst the legislature considered it as a colony, would have disturbed the harmony of the different parts of the governing power. It would not be easy to foresee the mischiefs of such a conflict of authority and opinion. Look to the South American provinces at this moment. Spain claims them as her lawful dominion; no power in Europe has acknowledged their independence; yet, in some of them, the authority of the once mother country is wholly at an end. Now, what embarrassments might not result, if, after the letter of the Secretary of State of the 19th of January, 1816, to the Spanish minister, our court should pronounce Buenos Ayres, for example, to be rightfully in its full colonial dependence upon Spain. Vattel's authority upon this subject is decisive. According to him, we are to look to the state of things *de facto*, taking each party to be in the right.² The rule laid down in *Rose v. Himely*, that such language was to be addressed to sovereigns, not courts, may have been applicable to the condition in which St. Domingo then was. It cannot, however, be conceded, that it is of constant and universal

application. The progress of events may create a state of things, of which, as they impress their convictions upon mankind, courts, too, will take notice. The Netherlands waged a war of more than half a century with Spain, Spain never ceased to call it a rebellion. But what were the sympathies, what the conduct of Protestant Europe, towards them during the principal part of the time? What that of England, in particular, who did not scruple *to form treaties with them, while [**285** Spain was still denouncing them as heretics and insurgents? The fact being now palpable to the world, that St. Domingo is independent of all connection with France, repudiating her authority, and spurning her power, this positive state of independence *de facto* may at length well be taken to stand in the place of a formal acknowledgment of it by governments; and if courts of justice are to wait until France relinquishes her claim, that day may be indefinite indeed. The act of Congress, which specifically interdicted intercourse with St. Domingo, considered as a colony of France, expired in April, 1808. It was in full force at the time of the decision in *Rose v. Himely*, which constitutes another marked distinction between that case and the present. As to the condemnations which it may be alleged took place under the general non-intercourse laws passed afterwards, of vessels coming from St. Domingo, upon the footing of its belonging to France, no inference against the argument can be hence deduced. In the first place, those laws left it wholly indefinite as to what colonies did or did not belong to France. They were couched in general terms only. They prohibited all intercourse with Great Britain and France, and their dependencies, without undertaking to designate in any case what the dependencies of either were. In the next place, as far as is known, it appears that the government remitted the forfeitures in all such cases of condemnation, thereby manifesting its opinion, if any inference is to be drawn, that time, and the progress of events, had at length taken this island out of the true *spirit [**286** and meaning of these general laws; and that, as the nations of Europe were trading with it as an independent island, the citizens of the United States might fairly be permitted to do the same. 4. A leading object of the act of 1794 was, to preserve the peace as well as neutrality of the United States. Thus, then, although St. Domingo might not be a sovereign state to all intents and purposes (which it is not necessary to contend), it was sufficiently independent, whether as to commerce or power, to fall within the mischiefs, and be embraced by the penalties, of the law in question.

Mr. Hoffman and Mr. D. B. Ogden, for the defendant in error. 1. This court is not competent to take cognizance of this cause, under the 25th section of the judiciary act of 1789, ch. 20. The court has appellate jurisdiction only from the final judgment or decree of the highest court of law or equity of the state in certain specified cases. But this jurisdiction cannot be here exercised, because the highest court of law and equity of the state of New York, to whom the writ of error is directed, is no longer in possession of the cause, but has remitted the record and judgment to the Supreme Court of the

1.—4 Cranch, 241, 272.

2.—Vattel, L. 3, ch. 3, s. 18.

state, to whom the writ of error is not, and cannot be directed. The agreement of the parties under which the record is now before this court, reserves this question to be argued. It does not determine the return to be regular and valid, but only that the transcript shall have the same effect as if annexed to the writ of error. But even supposing the cause could be re-examined **287*** upon a return to the writ of error by the Supreme Court of the state, the main foundation of appellate jurisdiction in this court is wanting. The judgment of the state court does not decide against the title, right, privilege, or exemption set up by the defendants below under the act of Congress of 1794, ch. 50. On the contrary, the state court has refused to give any construction whatever to the act of 1794, and to decide whether, under the facts of the case, it did or did not afford the defendants below a legal defense to the action; because, the parties defendant, having declined to argue the demurrer in the Supreme Court, the court of errors refused, upon grounds of state law and state practice, to hear them in that court.¹ Parties litigant are bound to exercise their rights, according to the law and practice of the forum where they attempt to assert them. If they do not assert them according to the rules prescribed by the *lex fori*, a decision against the party is not a decision against the right set up by him; but only a decision that he has not claimed that right according to the local law and practice. 2. If, however, the court should be of opinion that the cause is regularly before it, then we contend that the testimony offered by the defendants below, upon the trial at *Nisi Prius*, and which was overruled by the judge, was properly excluded. They did not offer any evidence to show that the vessel had been or was intended to be engaged in any illegal trade or employment. The only law to which **288*** the testimony offered could have any reference, is an act of Congress, which was passed June, 1794, entitled "an act, in addition to an act, for the punishment of certain crimes against the United States," made perpetual by a subsequent act. By the third section of the first-mentioned act, it is enacted, "that if any person shall, within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out and arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property of any other foreign prince or state, with whom the United States are at peace, &c., every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to any person who shall give information of the offense, and the other half to the use of the United States." The defendants below merely offered to prove that the ship was fitted out, with intent that she "should be employed in the service of that

part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens, and property of that part of the Island of St. Domingo which was then under the government of Christophe;" but did not offer to show that either of these parts of the island was a *foreign state, or that either Petion or **289** Christophe were foreign princes, with whom the United States were at peace. And even if they had proved these facts, the evidence would have been perfectly immaterial and irrelevant: because, in the words of this court, "It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting."² The same principle has also been recognized by the highest British tribunals, both as applicable to the case of St. Domingo and to other revolutions of states not recognized by the government of the country where the tribunal is sitting that is required to take notice of them.³ What would be the absurd consequences of leaving each tribunal to settle this question according to the information it might possess? Nothing can be more opposite and irreconcilable than the views given of the situation of St. Domingo by different writers and travelers. How, then, should a court decide which has no other sources of information? The government is informed by its diplomatic agents. It has a view of the whole ground, and can judge what considerations ought to influence the decision of this question of complicated policy. Our foreign relations are by necessary implication *delegated to Congress and the ex- **290** ecutive, by the constitution. Neither Petion nor Christophe have ever had any secure, firm possession of the sovereignty in St. Domingo. They have not only been contending with each other but they have had rivals who have attempted to establish adverse claims to different parts of the island by the sword. The defendants below have themselves acted in their official conduct or these principles. In the year 1809 they seized and prosecuted in the District Court, the *James* and the *Lynx*, two vessels which had come with cargoes from St. Domingo to New York, contrary to the provisions of the non-intercourse acts, forbidding all commercial intercourse between the United States and Great Britain, France, and their dependencies. In these cases they considered St. Domingo as a colony of France; and whilst the suits were depending, the ship, now in controversy, was seized by them under an allegation that she was intended for the service of an independent state, which independent state was the same St. Domingo they had just before considered as a French dependency. 3. The testimony offered by the defendants below could not be admitted, because the District Court was the proper tribunal to determine whether the vessel in question was or was not liable to seizure and forfeiture for the causes alleged. It having been

1.—For these grounds see the opinion of Chancellor Kent in this cause in the Court of Errors, 13 Johns. Rep. 578.

2.—*Rose v. Himely*, 4 Cranch, 292.

3.—1 Edwards, 1, and Appendix, G; *The city of Berne v. The Bank of England*, 9 Ves. 347.

decided in that court that she was so liable, its judgment is conclusive, and precludes every tribunal, unless upon appeal, from re-examining the grounds of the decision. The authority [291*] ties on this point are innumerable, *and flowing in a uniform current.¹ As to foreign sentences, it is settled in this court that a sentence of condemnation, by a competent court, having jurisdiction over the subject-matter of its judgment, is conclusive as to the title of the thing claimed under it.² And that the sentence of a prize court, condemning a vessel for breach of a blockade, is conclusive evidence of the fact as between the insurer and insured.³ But what is still more pertinent to the present case, the court has determined that the question, under a seizure for a breach of the laws of the United States, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon their final decree whether the seizure is to be deemed rightful or tortious.⁴ The distinction which has been suggested between the conclusiveness of condemnations and of acquittals, has been considered in several of the authorities, and it is now perfectly settled that no such distinction exists. A condemnation may be founded on the oath of the seizing party; and though, [292*] by the laws of the United States, he cannot share in the forfeiture if he becomes a witness, still he is interested to protect himself by a condemnation. Shall, then, a condemnation founded on such testimony be conclusive, and an acquittal not? The defendants themselves applied for time to plead until the District Court should decide, on the ground that its decision would be conclusive.⁵ 4. The testimony offered by the defendants below could not be admitted in mitigation of damages; because, if admitted, it would only be to show that there was reasonable cause for the seizure, and, consequently, that the defendants acted without malice, or any intention to oppress the plaintiff below. But the question whether there was or was not reasonable cause of seizure, is a question which is expressly submitted to the District Court by the statutes of the United States,⁶ and over which this court has declared the District Court had exclusive cognizance. A certificate of reasonable cause for the seizure having been denied by the District Court, every other tribunal is as much precluded, except on appeal, from examining whether there was or was not reasonable cause for the seizure, as they are from examining whether there was or was not sufficient cause of forfeiture. The plaintiff below admitted upon the trial that the defendants had not been influenced by any malicious mo-

tives in making the seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff. And the judge who tried the cause at *Nisi Prius* *charg- [293*] ed the jury that this admission precluded the plaintiff from claiming vindictive damages, and the jury rendered a verdict only for the actual damages, as proved by uncontradicted testimony. Where a certificate of reasonable cause is refused, or not granted, a party making an illegal seizure can be in no better state than he would be if the law had made no provision respecting a certificate. It is well settled that probable cause is no justification of an illegal seizure, unless it be made a justification by statute. Nor can evidence of probable cause be received, to mitigate the damages in cases where there is a disclaimer as to everything but actual damages. For whether there was or was not malice or probable cause, the actual damages sustained must be recovered for an illegal seizure, or for any other trespass, if anything whatever is recovered. 5. The second and third pleas of the defendant below are manifestly bad on general demurrer. First, Petion and Christophe were not foreign princes, nor their territories foreign states, and consequently a seizure for fitting out the vessel to be employed in their service could not be justified.⁷ Second, The President had no authority by law to order the seizure. The 7th section of the act of 1794 does not apply to this cause. If it did, the President's order can only be a justification when applied to an illegal act. If no illegal act be proved, there can be no justification under the order. Were it otherwise, the President would be a despot. The 7th section of *the [294*] act provides, "that in every case in which a vessel shall be fitted out or armed, or attempted so to be fitted out or armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as above defined, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel, of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary, for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise, from the territories of the United States, against the territories or dominions of a foreign prince or state with whom the United States are at

1.—*Vandenheuvael v. The United Ins. Co.*, 2 Johns. Cas. 127, and the authorities there cited. The authorities collected in the same case, 2 Caines' Cases in Error, 217, and by Kent, Ch. J. (now Chancellor), in his opinion in *Ludlow v. Dule*, Id. 217; *Wheaton on Capt.* 274, 278; *Peake's Law of Evidence*, 3d London ed. 78, 79; and the cases there cited in a note; *Cooke v. Sholl*, 5 T. R. 255; *Lane v. Degburgh*, Buller's N. P. 244; *Opinion of Johnson, J.*, in *Rose v. Himely*, in the Circuit Court, 4 Cranch, 508; Appendix, Note C. 12 Vin. Abr. 95; *Ev. A.*, c. 22.

2.—*Rose v. Himely*, 4 Cranch, 241.

3.—*Croudson et al. v. Leonard*, 4 Cranch, 434.

4.—*Slocum v. Mayberry*, 2 Wheat. 1.

5.—See 8 Johns. Rep. 179.

6.—Act of the 24th February, 1807, ch. 74.

Wheat. 3.

7.—See the authorities cited *ante*, p. 289.

peace." Under this provision, the President could not authorize the defendants below to **295*** seize. He *could only employ the army and navy, or the militia, for that purpose. He could authorize an arrest or detainment, not a seizure, which is a taking and carrying away. He could only authorize a taking possession of and detaining the vessel, in order to the execution of the penalties and prohibitions of the act. The vessel might have been libeled, and taken into the custody of the officers of the court; but the defendants below have not averred themselves to be revenue officers, and as such, authorized to seize by the act of 1790, ch. 153. Third. The 2d plea is not a bar in the court where it was pleaded. What could the plaintiff below have replied to this plea? That there was no forfeiture as alleged? But the state court has no authority to try the question of forfeiture under the laws of the United States. The courts of the United States have exclusive jurisdiction of that question, and their decision is final and conclusive upon every other tribunal. Or suppose that the plaintiff had replied that Petion and Christophe were not independent princes. No municipal court whatever has power to determine that question. The executive government is alone competent to recognize new states arising in the world, and it would be extremely inconvenient and embarrassing, in this age of revolutions, for courts and juries to interfere in the decision of a question of such delicate and complicated policy, depending upon a variety of facts which they cannot know, and of considerations which they cannot notice. Again, if the plaintiff had replied that the President had given no such instructions as mentioned in the plea, the replication **296*** would have been immaterial, and a ground of demurrer. Fourth. Neither of the pleas aver, that the ship was actually forfeited, but only that it was "seized as forfeited," which is not an equivalent averment. The case of *Wilkins v Despard*,¹ where a similar plea was pleaded, is distinguishable. That was a seizure under the British navigation act, 12 Car. II., ch. 18, s. 1, by which the legality of the seizure, and the question of forfeiture itself might be tried in any court of record in the British dominions, and, consequently, in the court itself, where the plea was pleaded. Fifth. The 8d section of the act of 1794, after specifying the offenses meant to be punished, provides, that "every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so that the fine to be imposed shall in no case be more than \$5,000, and the term of imprisonment shall not exceed three years; and every such ship or vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building, and equipment thereof, shall be forfeited, one half to the use of any person who shall give information of the offense, and the other half to the use of the United States." By every just rule of construction, the proceeding by indictment against the offender, and his conviction **297*** tion, must precede *the suit *in rem*, and

the forfeiture of the vessel. The phraseology of the act is different from all the other statutes authorizing seizures and creating forfeitures. By those statutes, the revenue officers have power to seize and proceed *in rem* against the thing seized as forfeited, independent of any criminal proceeding against the offending individual. By this act, the forfeiture of the thing is made to depend upon the conviction of the person, and the President alone has power to seize; and that only as a precautionary measure to prevent an intended violation of the laws. Sixth. The 3d plea is particularly defective, in omitting to state, as is done in the 2d plea, what princes or foreign states were intended. It merely alleges, that the vessel was fitted out with intent to be "employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace." It is a sacred rule of pleading, that where an offense is charged, or a forfeiture is claimed, the facts must be so alleged as that the court may judge whether there has been an offense committed or forfeiture incurred.² To so vague an allegation as this, it would be impossible for the plaintiff below to reply.

Mr. Baldwin, for the plaintiffs in error, in reply, insisted on the validity of the special pleas. The defendants below were not bound to answer the conversion, *because the trespass was [**298** complete without it. This defect, if any, ought to have been newly assigned by the plaintiff below, if he intended to have taken advantage of it.³ The forfeiture was well pleaded. The offense being committed, the forfeiture instantly attaches.⁴ The plea here states, that the ship was seized "as forfeited," in the same manner with that which was held good in *Wilkins v. Despard*,⁵ and it alleges the offense in the words of the statute. An allegation that the seizure was made for a violation of the law, that the thing seized was taken as forfeited, is equivalent to an allegation that it was actually forfeited. Nor was it necessary to aver that the seizure was made by a military or naval force. The 7th section of the act of 1794 evidently contemplates the employment of that description of force, only when, in the opinion of the President, it might become necessary to carry into effect the law. In other cases the seizure might be made by the ordinary means of the revenue officer. Nor is a conviction, on an indictment or information *in personam*, necessary before the proceedings *in rem* are commenced. None of the objections to the special pleas are available on general demurrer. The plaintiff below should have replied that Petion and Christophe were not independent princes or states, and so have had that question tried as a question of fact. The existence of new states in the world may commence in various modes. First. Colonies may become independent *of the parent state by means [**299** of force, and an acquiescence in the effects of

2.—Com. Dig. tit. Action on Stat. A 3, pl. 1. *Davy v. Baker*, 4 Burr. 2471; *Rex v. Robe*, 2: *Strange*, 999; 2 *Saund.* 379; *Radford v. McIntosh*, 3 T. R. 636.

3.—*Taylor v. Cole*, 3 T. R. 232.

4.—*The Mars*, 2 *Cranch*, 417.

5.—5 T. R. 112.

1.—5 T. R. 112.

that force on the part of the mother country for a sufficient length of time, to indicate a relinquishment of all hopes of recovering possession of the dominion. The pride of princes and nations will not always permit them openly and expressly to recognize the independence of rebellious subjects, until long after they have relinquished all hope of subduing them. When the case of *Rose v. Himely* was determined, a *war de facto* existed between France and St. Domingo; and the former, so far from relinquishing her sovereignty over the latter, was actually attempting to assert it by force of arms. A long period of time has since elapsed, and the attempt has not been renewed. The people of the island have settled down under governments, the conduct of which is a pledge of their stability, and whose policy and institutions would do honor to more civilized and ancient communities. Second. The existence of new states may be recognized by the supreme power of every country, in whose courts of justice the question of their independence may arise, and that even while the civil war still rages between the new people and its former sovereign. When thus recognized by the legislative or executive authority of other countries, the tribunals of those countries are bound to take notice of their existence as independent states. This recognition may be made in various modes; by treaty; by a legislative act; by an executive proclamation; by sending to, or receiving from the new state, a public minister or other diplomatic agent. Third. Their **300*** independence may also *be recognized by a treaty of cession from the parent country. This treaty may not have become a public, historical fact, of which courts of justice will take notice without other evidence than its own notoriety. It may be deposited in the archives of a foreign, or of our own government. It may require to be proved in the same manner as foreign written laws are proved. In any of these views, the question as to the independence of St. Domingo is a question of fact, to be tried by the jury, and, consequently, the plaintiff ought to have replied that Petion and Christophe were not independent princes or states, as alleged in the defendants' pleas. The instruction of the President, in this very case, implies that he recognized the independence of the island; the instruction could not otherwise have been legally given. As to the conclusiveness of the decree of restitution in the District Court, it is founded on principles which push the doctrine of the conclusiveness of sentences, to a degree of extravagance irreconcilable with reason and common sense. That every sentence of a court having jurisdiction of the subject-matter, so long as it remains unreversed by the appellate tribunal, is conclusive as to the title of the thing claimed under it, is conceded. But, according to the jurisprudence of the state of New York, the sentences of foreign courts of admiralty are held not to be conclusive as to other persons than those claiming title to the property;¹ and the conclusiveness of the sentences of *domestic courts of peculiar and exclusive jurisdiction depends upon precisely the same principle. But supposing a

sentence of condemnation to be conclusive, for all purposes, and against all persons; it does not follow that a sentence of restitution ought to have the same effect. A judgment of acquittal is of a negative quality merely, and ascertains no precise facts.² It only shows that sufficient evidence did not appear to the court to authorize a condemnation. Why is a decree of condemnation held to be conclusive? Because it is a basis of the title to the thing condemned. But an acquittal forms no part of the title to the thing acquitted, which is restored to the former proprietor, who holds it by the same title as before. The case, said to have been decided before Baron Price, in the year 1716,³ is not pertinent. The elementary writers do not consider this as an adjudged point in any of the cases; and their authority, which is of great weight, makes a distinction, founded in reason and the nature of things, between a sentence of condemnation and a sentence of acquittal.⁴ All the authorities confine the conclusiveness of the *res judicata* to parties and privies. The defendants below were neither. Mr. Evans, in commenting upon the decision of Baron Price, reported in Viner, says that, "upon principle, *I should conceive that the opposite determination would be more correct, as such an acquittal would be warranted upon the mere negative ground that the crown had not adduced sufficient evidence to support the seizure; and an individual, having a collateral interest in supporting the legality of the seizure, is not a concurrent party with the crown in supporting the condemnation, and asserting the claim of property on the one side, in the same manner as every person having an interest in opposing such condemnation, is in contemplation of law a sufficient party on the other."⁵ So, in this case, the defendants below were not concurrent parties with the United States in supporting the condemnation. It does not appear that the defendants were informers, and so entitled to one-half the forfeiture; the prosecution was carried on in the name of the government and by its law officers; the defendants had no control over it, and could not appeal from the decision of the District Court. They ought not, therefore, to be concluded by it.

The cause was again argued at the present term, by *Mr. Baldwin* for the plaintiffs in error, and by *Mr. D. B. Ogden* and by *Mr. Jones* for the defendant in error.

STORY, J., delivered the opinion of the court: This is a writ of error to the highest court of law of the state of New York; and the questions which are re-examinable upon the record in this *court are such only as come within the **[303]** purview of the 25th section of the judiciary act of 1789, ch. 20.

But a preliminary question has been made, which must be discussed before proceeding to consider the merits of the cause.

It is contended that the record is not, and cannot be brought, before this court.

By the judicial system of the state of New

2.—Buller's N. P. 245, Peake's Law of Ev. 48, 1 Hargr. Law Tracts, 742.

3.—12 Vin. Abr. 95, Ev. A. b. 22.

4.—Peake's Law of Evid. 48; Phillips on Evid. 228, 229; 2 Evans's Pothier, 354.

5.—2 Evans's Pothier, Ib.

1.—Vandenheuev v. The United Ins. Co., 2 Calnes' Cas. 217; S. C. 1 Johns. Cas. 127, 451.

Wheat. 3.

York, the decisions of their Supreme Court are revised and corrected in a court of errors, after which the record is returned to the Supreme Court, where the judgment as corrected is entered, and where the record remains. In this case the writ of error was received by the court of errors, after the record had been transmitted to the Supreme Court, whose judgment was affirmed.

It is contended that, the record being no longer in the court of last resort in the state, can, by no process, be removed into this court.

The judiciary act allows the party who thinks himself aggrieved by the decision of any inferior court, five years, within which he may sue out his writ of error, and bring his cause into this court. The same rule applies to judgments and decrees of a state court in cases within the jurisdiction of this court. As the constitutional jurisdiction of the courts of the Union cannot be affected by any regulation which a state may make of its own judicial system, the only inquiry will be, whether the judiciary act has been so framed as to embrace this case.

The words of the act are, "that a final judgment or decree in any suit in the highest court **304*** of law or *equity of a state in which a decision could be had, where is drawn in question," &c., "may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed," &c. The act does not prescribe the tribunal to which the writ of error shall be directed. It must be directed either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing in this particular the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ.

In this case, the writ was directed to the court of errors, which, having parted with the record, could not execute it. It was then presented to the Supreme Court; but, being directed to the Court of Errors, could not regularly be executed by that court. In this state of things the parties consented to waive all objections to the **305*** *direction of the writ, and to consider the record as properly brought up, if, in the opinion of this court, it would be now properly brought up on a writ of error directed to the Supreme Court of New York. The court being of opinion that this may be done, the case stands as if the writ of error had been properly directed.

The original suit was brought by the defendant in error against the plaintiffs in error for an alleged trespass for taking and carrying away, and converting to their own use, the ship Amer-

ican Eagle, and her appurtenances, and certain ballasts and articles of provisions, &c., the property of the defendant in error. This is the substance of the declaration, although there are some differences in alleging the tort in the different counts. The original defendants pleaded, in the first place, the general issue, not guilty, to the whole declaration; and then two special pleas. The first special plea, in substance, alleges, that the said ship was attempted to be fitted out and armed, and that the ballast and provisions were procured for the equipment of the said ship, and were put on board of the said ship as a part of her said equipment, with intent that the said ship should be employed in the service of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, to wit, of that part of the Island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in *such case made [***306** and provided; and that the original defendants, by virtue of the power and authority, and in pursuance of the instructions and directions of the President of the United States, seized the said ship, &c., as forfeited to the use of the United States, according to the statute aforesaid, &c. The second special plea is like the first, except that it does not state that the ship was seized as forfeited, but alleges that the ship was taken possession of, and detained, under the instructions of the President of the United States, in order to the execution of the prohibition and penalties of the act in such case made and provided, and except that it omits the allegations under the *videlicet* in the first plea, specifying the foreign state by or against whom the said ship was to be employed. To these pleas there is a general demurrer, and joinder in demurrer, upon which the state court gave judgment in favor of the original plaintiff. Upon the trial of the general issue, a bill of exceptions was taken to the opinion of the court. By that bill of exceptions, among other things, it appears, that the original plaintiff, at the trial, gave in evidence, that at the time of the seizure the ship was in his actual full and peaceable possession; that the ship, upon the seizure, had been duly libeled for the alleged offense in the District Court of New York; that the original plaintiff appeared and duly claimed the said ship; and upon the trial she was duly acquitted, and ordered to be restored to the original plaintiff by the District Court; and that a certificate of reasonable cause for the seizure of the said ship had been denied. The plaintiff then gave in evidence, *that the value of the ship [***307** at the time of her seizure was \$100,000; and that the said Schenck seized and took possession of the said ship by the written directions of the said Gelston; but no other proof was offered by the plaintiff, at that time, of any right or title in the said plaintiff to the said ship; and here the original plaintiff rested his cause. The original defendants then insisted before the court, that the said several matters, so produced and given in evidence on the part of the original plaintiff, were not sufficient to entitle him to a verdict, and prayed the court so to pronounce, and to nonsuit the plaintiff. But

the court refused the application, and declared, that the said several matters so produced and given in evidence were sufficient to entitle the plaintiff to a verdict, and that he ought not to be nonsuited. To which opinion the original defendants then excepted; and the original plaintiff then gave in evidence that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof, and that in pursuance of such purchase, the said Gillespie had delivered full and complete possession of the said ship, &c., to the original plaintiff, before the taking thereof by the original defendants.

The original defendants (having given previous notice of the special matter of defense to be given in evidence on the trial under the general issue, according to the laws of New York,) offered to prove and give in evidence, by way of defense and in mitigation of damages, the same matter of forfeiture alleged in their first special plea, with the additional fact that **308*** the said Gelston was collector, and the said Schenck was surveyor of the customs of the district of New York, and as such, and not otherwise, made the seizure of the ship, &c. And the original defendants did, thereupon, insist that the said several matters, so offered to be proved and given in evidence, ought to be admitted in justification of the trespass charged against the defendants, or in mitigation of the damages claimed by the plaintiff, and prayed the court so to admit it. But the counsel for the plaintiff, admitting that the defendants had not been influenced by any malicious motive in making the said seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff, the court overruled the whole of the said evidence so offered to be proved by the original defendants, and did declare it to be inadmissible in justification of the trespass charged against the defendants; and after the admission so made by the original plaintiff's counsel, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the plaintiff from claiming any damages by way of punishment or smart-money, and that after such admission the plaintiff could only recover the damages actually sustained, and with that direction left the cause to the jury.

From this summary of the pleadings, and of the facts in controversy at the trial, it is apparent that this court has appellate jurisdiction of this cause only so far as is drawn in question the validity of an authority exercised under the United States, and the decision is against the validity thereof, and so far as **309*** is drawn in question the construction of some clause in a statute of the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by the original defendants, for to such questions (so far as respects this case) the 25th section of the judiciary act has expressly restricted our examination. Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do but to expound the law as we

find it; the defects of the system must be remedied by another department of the government.

The cause will be first considered in reference to the bill of exceptions. In respect to the proof of the original plaintiff's cause of action, and the opinion of the court that such proof was sufficient to entitle him to a verdict, no error has been shown upon the argument; and certainly none is perceived by this court. If, however, there were any error in that opinion, we could not re-examine it, for it is not within the purview of the statute. It does not draw in question any authority exercised under the United States, nor the construction of any statute of the United States.

In respect to the rejection of the evidence offered by the original defendants to prove the forfeiture, and their right of seizure, there can be no doubt that this court has appellate jurisdiction, if by law that evidence ought to have been admitted in justification of the trespass charged on the original defendants; for ***it involves the construction of a statute [*310** of, and an authority derived from, and exercised under, the United States.

In order to establish the admissibility of the evidence offered by the defendants, it is necessary for them to sustain the affirmative of the following propositions. 1. That a forfeiture had been actually incurred under the statute of 1794, ch. 50. 2. That it was competent for a state court of common law to entertain and decide the question of forfeitures. 3. That the sentence of equitable in the District Court was not conclusive upon the question of forfeiture; and, 4. That the defendants, as officers of the customs, had a right to make the seizure.

Upon the last point, there does not seem to be much more room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227; *Roe v. Roe*, Hardr. R., 185; *Malden v. Bartlett*, Park. R., 105; though *Horne v. Boozey*, 2 Str., 952, seems contra.) And if the party be entitled to any part of the forfeiture (as the informer under the statute of 1794, ch. 50, is by the express provision of the law), there can be no doubt that he is entitled in that character to seize: (*Roberts v. Witherhead*, 12 Mod., 92.) In the absence of all positive authority, it might be proper to resort to these principles, in aid of ***the manifest purposes of the law.** But **[*311** there are express statutable provisions, which directly apply to the present case. The act of the 2d of March, 1799, ch. 128, s. 70, makes it the duty of the several officers of the customs, to make seizure of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue; and assuming the statute of 1794, ch. 50, not to be a revenue law within the meaning of this clause, still the case falls within the broader language of the act of the 18th of February, 1793, ch. 8, s. 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has

been committed. Upon the general principle, then, which has been above stated and upon the express enactment of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure. There is this strong additional reason in support of the position, that the forfeiture must be deemed to attach at the moment of the commission of the offense, and, consequently, from that moment, the title of the plaintiff would be completely devested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts, and it has been recognized and enforced in this court, upon very solemn argument. (*United States v. 1960 Bags of Coffee*, 8 Cranch, 398; *The Mars*, 8 Cranch, 417; *Roberts v. Witherhead*, 12 Mod., 92; *Salk*, 228; *Wilkins v. Despard*, 5 T. R., 112.)

In the next place, can a state court of common law entertain and decide the question of forfeiture *in this case. This is a question of vast practical importance; but in our judgment, of no intrinsic legal difficulty. By the constitution, the judicial power of the United States extends to all cases of law and equity arising under the constitution, laws, and treaties of the United States, and to all cases of admiralty and maritime jurisdiction; and by the judiciary act of 1789, ch. 20, s. 9, the district courts are invested with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States. This is a seizure for a forfeiture under the laws of the United States, and, consequently, the right to decide upon the same, by the very terms of the statute, exclusively belongs to the proper court of the United States; and it depends upon its final decree, proceeding *in rem*, whether the seizure is to be adjudged rightful or tortious. If a sentence of condemnation be pronounced, it is conclusive, that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be litigated in another forum. This was the doctrine asserted by this court, in the case of *Mocum v. Mayberry* (2 Wheat. R., 1), after very deliberate consideration, and to that doctrine we unanimously adhere.

The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject-matter, whether as seizing officers or informers, or claimants, are parties or may be parties to such suits, so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons *toties quoties* for the same offense, and the claimant be loaded with ruinous costs and expenses. This reasoning applies to the decree of a court having compe-

tent jurisdiction of the cause, although it may not be exclusive. But it applies with greater force to a court of exclusive jurisdiction; since an attempt to re-examine its decree, or deny its conclusiveness, is a manifest violation of its exclusive authority. It is doing that indirectly which the law itself prohibits to be done directly. It is, in effect, impeaching collaterally, a sentence which the law has pronounced to be valid until vacated or reversed on appeal by a superior tribunal.

The argument against this doctrine, which has been urged at the bar, is, that an action of trespass will, in case of a seizure, lie in a state court of common law, and therefore the defendant must have a right to protect himself by pleading the fact of forfeiture in his defense. But at what time and under what circumstances will an action of trespass lie? If the action be commenced while the proceedings *in rem* for the supposed forfeiture are pending in the proper court of the United States, it is commenced too soon; for until a final decree, it cannot be ascertained whether it be a trespass or not, since that decree can alone decide whether the taking be rightful or tortious. The pendency of the suit *in rem* would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then in the former case by the general law, and in the latter case by the special enactment of the statute of the 25th of April, 1810, ch. 64, s. 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury.

The cases also of *Wilkins v. Despard* (5 T. R., 112), and *Roberts v. Witherhead* (12 Mod., 92; *Salk*, 323), have been relied on to show that a court of common law may entertain the question of forfeiture, notwithstanding the exclusive jurisdiction of the exchequer *in rem*. But these cases do not sustain the argument. They were both founded on the act of navigation (12 Car., 2, ch. 18, s. 1), which, among other things, enacts that one-third of the forfeiture shall go to him "who shall seize, inform, or sue for the same in any court of record." So that it is apparent that in respect to forfeitures under this statute, the exchequer had not an exclusive jurisdiction, but that the other courts of common law had at least a concurrent jurisdiction. And if these cases did not admit of this obvious distinction, certainly they could not be admitted to govern this court in ascertaining a jurisdiction vested by the constitution and laws of the United States exclusively in their own courts.

It is, therefore, clearly our opinion, that a state court has no legal authority to entertain the question of forfeiture in this case, and that it exclusively belonged to the cognizance of the proper court of the United States. Indeed, no principle of general law seems better settled than that the decision of a court of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other

court, in which the same subject-matter comes incidentally in controversy. It is familiarly known in its application to the sentences of ecclesiastical courts, in the probate of wills and granting of administrations of personal estate; to the sentences of prize courts in all matters of prize jurisdiction; and to the sentences of courts of admiralty and other courts acting *in rem*, either to enforce forfeitures or to decide civil rights.

In the preceding discussion, we have been unavoidably led to consider and affirm the conclusiveness of the sentence of a court of competent jurisdiction proceeding *in rem* as to the question of forfeiture; and *a fortiori* to affirm it in a case where there is an exclusive jurisdiction. In cases of condemnation the authorities are so distinct and pointed that it would, after the very learned discussions in the state courts, be a waste of time to examine them at large. Nothing can be better settled than that a sentence [*316*] tence of condemnation *is, in an action of trespass for the property seized, conclusive evidence against the title of the plaintiff. (See Harg. Tracts, 467, and cases there cited; *Thomas v. Withers*, cited by Buller, J., in *Wilkins v. Despard*, 5 T. R., 112, 117; *Scott v. Shearman*, 2 W. Bl., 977; *Henshaw v. Pleasance*, 2 W. Black., 1174; *Geyer v. Aguilar*, 7 T. R., 681, and case cited by Lord Kenyon; *Id.*, 696; *Medous v. Dutches of Kingston*, Ambler's Rep., 756; 2 Evans's Pothier on Obligations, 346 to 367.)

A distinction, however, has been taken and attempted to be sustained at the bar, between the effect of a sentence of condemnation and of a sentence of acquittal. It is admitted that the former is conclusive; but it is said that it is otherwise as to the latter, for it ascertains no fact. It is certainly incumbent on the party who asserts such a distinction to prove its existence by direct authorities, or inductions from known and admitted principles. In the *Dutches of Kingston's* case (11 State Trials, 261; *Runnington Eject.*, 364; *Hale. Hist. Com. Law by Runnington*, note, p. 39. &c.), Lord Chief Justice DeGrey declares that the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which the sentences favorable to the party are to be admitted as conclusive evidence for him, the sentences, if unfavorable, are, in like manner, conclusive evidence against him. This is the language of very high authority, since it is the united opinion of all the judges of England; and though delivered in terms applicable strictly to a criminal [*317*] suit, must be *deemed equally to apply to civil suits and sentences. And upon principle, where is there to be found a substantial difference between a sentence of condemnation and of acquittal *in rem*? If the former ascertains and fixes the forfeiture, and, therefore, is conclusive, the latter no less ascertains that there is no forfeiture, and, therefore, restores the property to the claimant. It cannot be pretended that a new seizure might, after an acquittal, be made for the same supposed offense; or if made, that the former sentence would not, as evidence, be conclusive, and, as a bar, be peremptory against the second suit *in rem*. And if conclusive either way, it must be because the acquittal ascertains the fact that there was no forfeiture. And if the fact be found,

Wheat. 3.

it is strange that it cannot be evidence for the party if found one way, and yet can be evidence against him if found another way. If such were the rule, it would be a perfect anomaly in the law, and utterly subversive of the first principles of reciprocal justice. The only authority relied on for this purpose is a dictum in Buller's *Nisi Prius*, 245, where it is said that though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an acquittal in such court is no proof of the reverse, for an acquittal ascertains no fact as a conviction does. The case relied on to support this dictum (3 Mod., 164), contains nothing which lends any countenance to it. (Peake's Evid. 8d ed., p. 47, 48.) But assuming it to be good law in respect to criminal suits, it has *nothing [*318*] to do with proceedings *in rem*. Where property is seized and libeled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not. The decree of the court, in such case, acts upon the thing itself, and binds the interests of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it. The original owner stands upon his title discharged of any latent claims, with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem* does, therefore, ascertain a fact, as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. It should therefore be conclusive upon all the world of the non-existence of the title of forfeiture, for the same reason that a sentence of condemnation is conclusive of the existence of the title of forfeiture. It would be strange, indeed, if, when the forfeiture *ex directo* could not be enforced against the thing, but by an acquittal was completely purged away, that indirectly the forfeiture might be enforced through the seizing officer; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against, the government itself.

*One argument farther has been urged [*319*] at the bar on this point, which deserves notice. It is, that the sentence of acquittal ought not to be conclusive upon the original defendants, because they were not parties to that suit. This argument addresses itself equally to a sentence of condemnation; and yet in such case the sentence would have been conclusive evidence in favor of the defendants. The reason, however, of this rule, is to be found in the nature of proceedings *in rem*. To such proceedings all persons having an interest or title in the subject-matter are, as we have already stated, in law, deemed parties; and the decree of the court is conclusive upon all interests and titles in controversy before it. The title of forfeiture is necessarily in controversy in a suit to establish that forfeiture; and, therefore, all persons having a right or interest in establishing it (as the seiz-

ing officer has) are, in legal contemplation, parties to the suit. It is a great mistake to consider the seizing officer as a mere stranger to the suit. He virtually identifies himself with the government itself, whose agent he is, from the moment of the seizure up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. For some purposes, as for instance to procure a decree of distribution after condemnation where he is entitled to share in the forfeiture, or to obtain a certificate of reasonable cause of seizure after an acquittal, he may make himself a direct party to the suit, and in all other cases he is deemed to be present and represented by the government itself. By the very act of seizure [320*] he agrees to become a party to the suit under the government; for in no other manner can he show an authority to make the seizure, or to enforce the forfeiture. If the government refuse to adopt his acts or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates. In legal propriety, therefore, he cannot be deemed a stranger to the decree *in rem*; he is at all events a privy, and as such must be bound by a sentence which ascertains the seizure to be tortious. But if he were a mere stranger, he would still be bound by such sentence, because the decree of a court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world.

Upon principle, therefore, we are of opinion that the sentence of acquittal in this case, with a denial of a certificate of a reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions cannot again be litigated in any other forum. And if the point had never been decided, we should, from its reasonableness and known analogy to other proceedings, have had entire confidence in the correctness of the doctrine. But there are authorities directly in point which have never been overruled, nor, as far as we know, ever been brought judicially into doubt. Above a century ago it was decided by Mr. Baron Price (12 Vin., Abrid. A. B. 22, p. 95), that an acquittal in the exchequer was conclusive evidence of the illegality of the seizure, and he refused in that case (which was trover for the goods seized) to [321*] let the parties in *to contest the fact over again. This case was cited as undoubted law by Mr. Justice Blackstone, in his elaborate opinion in *Scott v. Shearman* (2 W. Bl., 977); and the doctrine was fully recognized by the court, and particularly by Lord Kenyon, in *Cooke v. Sholl* (5 T. R., 255), although that cause finally went off upon another point. In all the cases which have been decided on this subject, no distinction has ever been taken between a condemnation and an acquittal *in rem*, and the manner in which these cases have been cited by the court, obviously show that no such distinction was ever in their contemplation. If to these decisions we add the pointed language of Lord Chief Justice De Grey, in the *Dutchess of Kingston's* case (11 State Trials, 218, &c.), "that the rule of evidence must be, as it is often declared to be, reciprocal." The declaration of Lord Kenyon, in *Geyer v. Aguilar* (7 T. R., 681, 696), that where there has been a proceeding in the

exchequer, and a judgment *in rem*, as long as that judgment remains in force it is obligatory upon the parties who have civil rights depending on the same question;" and the general rule laid down by Lord Apsley (*Meadows v. Dutchess of Kingston*, Amb. Rep., 756), that where a matter comes to be tried in "a collateral way, the decree of a court having competent jurisdiction shall be received as conclusive evidence of the matter," *ex directo* determined, there seems a weight of authority determined in favor of the doctrine, which it is very difficult to resist. We may add, that in a recent case, which was not cited in the argument (*The Bennet*, 1 Dodson's Rep., 175, 180), where a ship had been captured *as prize, as [322*] being engaged in an illegal voyage, and acquitted by the sentence of a vice-admiralty court, Sir W. Scott held, that by such sentence of a competent tribunal, the question had become *res adjudicata*, and might be opposed with success as a bar to any inquiry into the same facts upon a second capture during the same voyage. Yet here the parties, who were captors, were different; and the argument might have been urged that the acquittal ascertained no fact. The learned judge, however, considered the acquittal conclusive proof against the illegality of the voyage, and that all the world were bound by the sentence of acquittal *in rem*. And the same doctrine was held by Buller, J., in his very learned opinion in *Le Caux v. Eden* (Doug. Rep., 594, 611, 612.)¹

This view of the case would be con- [323] clusive against the admission of the evidence offered by the original defendants at the trial, as a justification of the asserted trespass. But the other point which has been stated, and which involves the construction of the act of 1794, ch. 50, s. 8, is not less decisive against the defendants. That act inflicts a forfeiture of the ship, &c., in cases where she is fitted out and armed, or attempted or procured to be fitted out and armed, with the intent to be employed "in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at

1.—In a recent case, in the Court of Exchequer in England, it has been determined that a judicial sale of a vessel found at sea and brought into port as derelict, under an order of the Instance Court of Admiralty, on the part of the salvors and claimant (without fraud and collusion), is available against the crown's right of seizure for a previous forfeiture incurred by the ship having been guilty of a forfeitable offense against the revenue laws; although the crown was not a party to the proceeding in the Admiralty Court, other than by the king's Procurator-General claiming the vessel as a droît of admiralty; and although no decision of droît or no droît was pronounced, and the sale took place *pendente lite* under an interlocutory order. It was held that the crown should have claimed before the court, either as against the ship in the first instance, or subsequently against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition. That the warrant for arresting the ship by the admiralty, and the process of citation, was notice to all the world of the subsequent proceedings. And that in pleading such sale, in defence to an information in the Exchequer, the facts should be put specially on the record, so that the Attorney-General might demur to, or traverse them. The Attorney-General v. Norstedt (claiming the ship Triton), 3 Price's Exchequer Rep. 97. See Wynne's History of the Life of Sir Leoline Jenkins, Vol. II., p. 702.

peace." The evidence offered and rejected, was to prove that the ship was attempted to be fitted out and armed, and was fitted out and armed, with intent that she should be employed in the service of that part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities, upon the subjects, citizens and property of that part of the Island of St. Domingo which was then under the government of Christophe. *No evidence was offered to prove that either of these governments was recognized by the government of the United States, or of France, "as a foreign prince or state;" and if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively, that Petion and Christophe were foreign princes within the purview of the statute. No doctrine is better established than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose v. Himely* (4 Cranch, 241), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals. (*The Manilla*, 1 Edwards, R., 1.; *The City of Berns v. The Bank of England*, 9 Ves., 347; *Dolde v. Bank of England*, 10 Ves., 353; 11 Ves., 288.) If, therefore, this were a fact proper for the consideration of a jury, and to be proved *in pais*, the court below were not bound to admit the other evidence, unless this fact was proved in aid of that evidence, for without it no forfeiture could be incurred. If, on the other hand, this was matter of fact, of which the court were bound judicially to take cognizance, then the court were right in rejecting the evidence, for as far as we have knowledge, neither the government of Petion nor Christophe have ever been recognized as a foreign state, by the government of the United States, or of France.

In every view, therefore, of this case, the state court were right in rejecting the evidence, so far as it was offered in justification. Was it, then, admissible in mitigation of damages? Upon this point we really do not entertain the slightest doubt. The evidence had no legal tendency to show that any forfeiture had been incurred, and upon the proof already in the cause, the seizure was established to be tortious. The plaintiff admitted that the defendants had acted without malice, or an intention of oppression. Under such circumstances, he waived any claim for vindictive damages, and the state court very properly directed the jury, that the plaintiff could only recover the actual damages sustained by him. And in no possible shape, consistently with the rules of law, could the evidence diminish the right of the plaintiff to recover his actual damages. We have taken notice of this point the more readily because it was pressed at the bar with considerable earnestness. But in strictness of law, the point is not subject to our revision. We have no right on a writ of error

Wheat. 3.

U. S., Book 4.

from a state court, under the act of Congress, to inquire into the legal correctness of the rule by which the damages were ascertained and assessed. There is no law of the United States which interferes with, or touches, the question of damages. It is a question depending altogether upon the common law; *and [*326 the act of Congress has expressly precluded us from a consideration of such a question. Whether such a restriction can be defended upon public policy, or principle, may well admit of most serious doubts.

We may now pass to the consideration of the second plea, which asserts, as a defense, a seizure under the laws of the United States, by the express instruction of the President, for a supposed forfeiture *in rem*, and attempts to put in issue the question whether such forfeiture was incurred or not. If this plea was well pleaded, then a question may properly be said to arise within the meaning of the 25th section of the judiciary act, and as the state court decided against the right and authority set up thereon, the decision is re-examinable in this court. Several objections have been urged at the bar against the sufficiency of this plea upon technical grounds; and if these objections are well founded, then it may be admitted that the court below may have given judgment on these special grounds, and not have decided against the right and authority set up under the United States. In the first place, it is argued, that this plea is bad, because it does not answer the whole charge in the declaration, the plea justifying only the taking and detention, and containing no answer to the damaging, spoiling, and conversion of the property charged in the declaration. We are, however, of opinion, that the plaintiff can take nothing by this objection. The gist of the action in this case was the taking and detention, and the damaging, spoiling, and conversion were matter of aggravation only; *and it is perfectly well [*327 settled, that a plea need answer only the gist of the action, and if the matter alleged in aggravation be relied on as a substantive trespass it should be replied by way of new assignment. (*Taylor v. Cole*, 3 T. R., 292; S. C., 1 H. Bl., 555; *Dye v. Leatherdale*, 3 Wils. R., 20; *Fisherwood v. Carman*, cited 3 T. R., 297; *Gates v. Bayley*, 2 Wils. R., 313; 1 Saund. R., 28, note 3; Com. Dig. Plead. E. 1; *Monprivatt v. Smith*, 2 Camp. R., 175.) Independent, however, of this general ground, there is, in this particular case, a decisive answer to the objection; for if the matter of the plea were true and well pleaded, then by the forfeiture the property was completely divested out of the plaintiff; and, consequently, neither the conversion nor damage were any injury to him.

But there are other defects in this plea which, in our judgment, are fatal. In the first place, it is not alleged that the ship and her equipments were forfeited for any offense under the laws of the United States. It is true that it is stated that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of a foreign state, &c., to commit hostilities upon the subjects of another foreign state, &c., contrary to the statute in such case made and provided. But it is not added whereby and for the cause aforesaid she became and was forfeited to the United

States. Nor is this deficiency supplied by the subsequent averment that the ship was, by the instructions of the President, seized "as forfeited to the use of the United States;" for the manner and cause of the forfeiture ought to **328*** be directly stated! The plea is, therefore, not only argumentative, but it omits a substantive allegation, without which it could not be sustained as a bar.

In the next place, the plea is bad because it does not aver that the governments of Petion and Christophe are foreign states which have been duly recognized as such by the government of the United States, or of France, which, for reasons already stated, was necessary to complete the legal sufficiency of the plea.

And in our judgment a still more decisive objection is, that the plea attempts to draw to the cognizance of a state court a question of forfeiture under the laws of the United States, of which the federal courts have, by the constitution and laws of the United States, an exclusive jurisdiction. For the reasons already mentioned, if the suit for the forfeiture was still pending when the action was brought, that fact ought to have been pleaded in abatement, or as a temporary bar to such action. If the action was brought before proceedings *in rem* had been instituted, that fact ought to have been pleaded, with an allegation that the jurisdiction of the question of forfeiture exclusively belonged to the District Court of the district where the seizure was made, which would have been a plea in the nature of a plea to the jurisdiction of the state court. If the suit were determined, then a condemnation, or an acquittal with a certificate of reasonable cause of seizure, ought to have been pleaded, as a general bar to the action. These are all the legal defenses which the mere seizure could justify; and if these all failed, then the **329*** seizing officer must have been deemed guilty of the trespass. The plea, then, stops short of the allegations which the seizing officer was bound to make to sustain his defense, and it attempts to put in issue matter which, standing alone, no court of common law is competent to try. The demurrer, then, may well be sustained to this plea, since the party demurring admits nothing except what is well pleaded, and the plea being bad in substance, there is, in point of law, no confession of any forfeiture.

The third plea differs in several respects from the second, and is that on which the court have felt their principal difficulty. It asserts that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state with which the United States were then at peace, contrary to the form of the statute in such case made and provided; and that the defendants, by virtue of the instructions of the President, "did take possession of, and detain," the said ship, &c., "in order to the execution of the prohibitions and penalties of the act in such case made and provided." It omits to allege any forfeiture of the ship, or that she was seized as forfeited. So far, then, as the plea may be supposed to rely on such forfeiture as a justification, it is open to the same objections which have been stated against the second plea.

Another objection has been urged at the bar against this plea, which does not apply to the second. It is, that it does not specify the foreign state in *whose service, or against ***330** whom, the ship was intended to be employed. As the allegation follows the words of the statute, it has sufficient certainty for a libel or information *in rem* for the asserted forfeiture under the statute; and, consequently, it has sufficient certainty for a plea. Indeed, there is as much certainty as there would have been if it had been averred that it was in the service of, or against, some foreign state unknown to the libellant, which has been adjudged in this court to be sufficient in an information of forfeiture. (*Locke v. The United States*, 7 Cranch, 339.)

But the main objection to this plea is, that it attempts to justify the taking possession, and detaining of the ship, under the instructions of the President, when the facts stated in the plea do not bring the case within the purview of the statute of 1794, ch. 50, which is relied on for this purpose. This statute, in the seventh section, provides, that in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun, or set on foot, contrary to the prohibitions and provisions of that act, and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons, having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, *or of the ***331** subjects or citizens of any such prince or state: in every such case, it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of the act, &c. It is to be recollected that this third plea does not allege any forfeiture, nor justify the taking and detaining of the ship for any supposed forfeiture; and that it does not allege that the President did employ any part of the land or naval forces, or militia of the United States for this purpose, or that the original defendants, or either of them, belonged to the naval or military forces of the United States, or were employed in any such capacity, to take and detain the ship, in order to the execution of the prohibitions and penalties of the act. But the argument is, that as the President had authority by the act to employ the naval and military forces of the United States for this purpose, *a fortiori*, he might do it by the employment of civil force. But upon the most deliberate consideration, we are of a different opinion. The power thus entrusted to the President is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the

purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to that high responsibility which all **332*** executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions, in cases within the act, are completely justified in taking possession of, and detaining, the offending vessel, and are not responsible in damages for any injury which the party may suffer by reason of such proceeding. Surely it never could have been the intention of Congress that such a power should be allowed as a shield to the seizing officer, in cases where that seizure might be made by the ordinary civil means. One of the cases put in the section is, where any process of the courts of the United States is disobeyed and resisted; and this case abundantly shows that the authority of the President was not intended to be called into exercise, unless where military and naval force were necessary to ensure the execution of the laws. In terms the section is confined to the employment of military and naval forces; and there is neither public policy nor principle to justify an extension of the prerogative beyond the terms in which it is given. Congress might be perfectly willing to entrust the President with the power to take and detain, whenever, in his opinion, the case was so flagrant that military or naval force were necessary to enforce the laws, and yet with great propriety deny it, where, from the circumstances of the case, the civil officers of the government might, upon their private responsibility, without any danger to the public peace, completely execute them. It is certainly against the general theory of our institutions to create great discretionary powers by implication; and in the **333*** present instance, we see nothing to justify it. The third plea is, therefore, for this additional reason, bad in its very substance, and the state courts were right in giving judgment on the demurrer for the original plaintiff.

The judgment of the court for the correction of errors of the state of New York, is affirmed with damages at the rate of 6 per cent. upon the judgment, from the rendition thereof, and costs.

JOHNSON, J. As the opinion delivered in this case goes into the consideration of a variety of topics which do not appear to me to be essential to the case, I will present a brief view of all that I consider as now decided.

Three pleas are filed to the action. The first is the general issue, under which, according to the practice of the state from which the case comes, notice was given that the forfeiture would be given in evidence.

The second plea is a justification on the ground of a seizure under the order of the President, for the forfeiture incurred under the third section of the act of 1794.

The third is a justification under the order of the President, to detain for the purpose of enforcing the prohibitions and penalties incurred under the third section. And this order is supposed to have been issued under authority given in the seventh section.

On the first plea issue was taken; and on the trial the state court refused to admit evidence

of the forfeiture, *on the ground that [**334** the acquittal in the District Court was conclusive against the forfeiture. And on this point this court is of opinion that the State Court decided correctly. This court is also of opinion that the State Court could not have tried the question of forfeiture arising under the laws of the United States. But this point would have been fatal to the suit, not to the defense, had it been properly pleaded.

To the second and third pleas the defendant demurred; but as the second plea contained only an argumentative, and, of course, defective averment of the forfeiture, viz., "seized as forfeited," that is "because forfeited," that plea did not bring up the question of forfeiture, or any question connected with it.

Neither does the third plea bring up the question of forfeiture; for the justification therein relied on is wholly independent of the forfeiture, and rests upon the order of the President to detain for trial, in effect. And hence the only other point in the case is, whether the seventh section of the act empowered the President to issue such an order. And on this point we are of opinion that there is no power given by that act to authorize a seizure, but only to call out the military or naval forces to enforce a seizure when necessary. The defense set up is not founded upon the exercise of such a power, but upon a supposed order to the defendants, in their private individual character, to take and detain. The act, therefore, does not sustain the defense.

Judgment affirmed.

*Mr. D. B. Ogden inquired to which [**335** of the state courts the mandate to enforce the judgment was to be transmitted.

MARSHALL, Ch. J. We must consider the record as still remaining in the Supreme Court of New York, and consequently the mandate must be directed to that court.

Mandate to the Supreme Court of New York.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Supreme Court of judicature of the people of the state of New York, returned with the writ of error issued in this case, and was argued by counsel. On consideration whereof, it is adjudged and ordered, that this court having the power of revising, by writ of error, the judgment of the highest court of law in any state, in the cases specified in the act of Congress, in such case provided, at any time within five years from the rendition of the judgment in the said courts, have the power to bring before them the record of any such judgment, as well from the highest court of law in any state as from any court to which the record of the said judgment may have been remitted, and in which it may be found, when the writ of error from this court is issued. And the court, therefore, in virtue of the writ of error in this cause, do proceed and take cognizance of this cause upon the transcript of the record now remaining in the Supreme Court of judicature of the people of the state of New York; and they do hereby adjudge and order, that the judgment of the court for the trial of impeachments and correction **336*** of errors in this case, be, and the same is hereby affirmed, with costs and damages,

at the rate of six per centum per annum on the amount of the judgment of the said court, for the trial of impeachments and correction of errors of the state of New York, to be computed from the time of the rendition of the judgment of the said court for the trial of impeachments and correction of errors of the state of New York.

Att'g—13 Johns. Rep. 139.

Approved—9 Wheat. 367; 3 How. 205; 3 Wall. 388; 17 Wall. 93.

Limited—11 How. 457; 1 Otto. 147.

Cited—9 Wheat. 374, 870; 10 Wheat. 289; 14 Pet. 604; 6 How. 380; 7 How. 57; 14 How. 51; 10 Wall. 291; 13 Wall. 649; 14 Wall. 56; 1 Otto. 681; 7 Otto. 643; 7 Blatchf. 33; 1 Abb. 100, 103, 578; 1 Brown, 119; 1 Mason, 99, 102; 3 Sumn. 230, 274, 275, 605; 3 Ware, 77; 1 Wood. & M. 180, 501; Newb. 299; 1 Biss. 10; Crabbe, 354; Deady, 100; 6 Ben. 510; 2 Cliff. 68; 3 Cliff. 315; 1 Story, 134, 553; 1 Sawy. 155; 2 Dill. 306; 2 McLean, 384; 8 Bank. Reg. 154, 513; 13 Bank. Reg. 390.

[CONSTITUTIONAL LAW.]

THE UNITED STATES *v.* BEVANS.

Admitting that the 3d article of the constitution of the United States, which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; Congress have not, in the 8th section of the act of 1790, ch. 9, "for the punishment of certain offenses against the United States," so exercised this power as to confer on the courts of the United States jurisdiction over such murder.

Quære. Whether courts of common law have concurrent jurisdiction with the admiralty over murder committed in bays, &c., which are inclosed parts of the sea.

Congress having, in the 8th section of the act of 1790, ch. 9, provided for the punishment of murder, &c., committed "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state," it is not the offense committed, but the bay, &c., in which it is committed, that must be out of the jurisdiction of the state.

[337*] "The grant to the United States in the constitution of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union. But the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion of territory not yet given away; and the residuary powers of legislation still remain in the state.

Congress have power to provide for the punishment of offenses committed by persons serving on board a ship of war of the United States, wherever that ship may lie. But Congress have not exercised that power in the case of a ship lying in the waters of the United States; the words "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States," in the 3d section of the act of 1790, ch. 9, not extending to a ship of

war, but only to objects in their nature fixed and territorial.

THE defendant, William Bevans, was indicted for murder in the Circuit Court for the District of Massachusetts. The indictment was founded on the 8th section of the act of Congress of the 80th of April, 1790, ch. 9, and was tried upon the plea of "not guilty." At the trial, it appeared in evidence that the offense charged in the indictment was committed by the prisoner on the sixth day of November, 1816, on board the United States ship of war, Independence, rated a ship of the line of seventy-four guns, then in commission, and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine, duly enlisted, and in the service of the United States, and was acting as sentry regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was at the same time *duly enlisted and in the [*338 service of the United States as cook's mate on board of said ship. The said ship was at the same time lying at anchor in the main channel of Boston harbors in waters of a sufficient depth at all times of tide for ships of the largest class and burthen, and to which there is at all times a free and unobstructed passage to the open sea or ocean. The nearest land at low water-mark to the position where the said ship then lay, on various sides is as follows, viz.: The end of the long wharf so called in the town of Boston, bearing south-west by south, half south at the distance of half a mile; the western point of Williams's Island, bearing north by west, at the distance between one-quarter and one-third of a mile; the navy yard of the United States at Charlestown, bearing north-west half-west, at the distance of three-quarters of a mile, and Dorchester Point so called, bearing south south-east, at the distance of two miles and one-quarter, and the nearest point of Governor's Island so called (ceded to the United States), bearing south-east half-east, at the distance of one mile and three-quarters. To and beyond the position or place thus described, the civil and criminal processes of the courts of the *state of Massachusetts have hitherto constantly been served and obeyed. The prisoner was first apprehended for the offense in the District of Massachusetts.

The jury found a verdict that the prisoner, William Bevans, was guilty of the offense as charged in the indictment.

Upon the foregoing statement of facts, which *was stated and made under the direc- [*339 tion of the court, the prisoner, by his counsel, after verdict, moved for a new trial, upon which motion two questions occurred, which

NOTE.—See note to United States *v.* Coolidge, 1 Wheat. 415. See U. S. Rev. Stat. Secs. 5339 and 5372, and authorities there cited.

As to the concurrent jurisdiction of the state and United States courts, in regard to territory and the offence, see U. S. *v.* Grush, 5 Mason, 290; Bishop's Crim. Law, secs. 141, 145-155, 159, 170-181, 199, 984, 987-989, and authorities there cited.

Under the crimes act of April 30, 1790, sec. 12, 1 Stat. at Large, 115, the Circuit Court has not jurisdiction to punish the crime of manslaughter committed in a river within the jurisdiction of a foreign sovereign. U. S. *v.* Wittberger, 5 Wheat. 76.

The disposal of the judicial power, except in a few specified cases, belongs to Congress; and the

courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the constitution might warrant. Turner *v.* Bk. of N. A., 4 Dall. 8.

Congress has not delegated the exercise of judicial power to the circuit courts, but in certain specific cases. Both the constitution and an act of Congress must concur in conferring power upon circuit courts. McIntyre *v.* Wood, 7 Cranch, 504; Livingston *v.* Van Duzer, 1 Paine, 45; U. S. *v.* Hudson, 7 Cranch, 32.

A considerable portion of the judicial power, placed at the disposal of Congress by the constitu-

Wheat. 3.

also occurred at the trial of the prisoner. 1. Whether, upon the foregoing statement of facts, the offense charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction of the state of Massachusetts, or of any court thereof. 2d. Whether the offense charged in the indictment, and committed on board the said ship as aforesaid, was within the jurisdiction or cognizance of the Circuit Court of the United States for the District of Massachusetts. Upon which questions the judges of the said Circuit Court were at the trial, and upon the motion for a new trial, opposed in opinion; and thereupon, upon the request of the district-attorney of the United States, the same questions were ordered by the said court to be certified under the seal of the court to the Supreme Court, to be finally decided.

Mr. Webster, for the defendant. The ground of the motion for a new trial in this case is, that on the facts proved, the offense is not within the jurisdiction of the Circuit Court of the United States. The indictment is founded on the 8th section of the act of Congress, for the punishment of certain crimes; by which act murder is made cognizable in the courts of the United States, if committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." 340*] To sustain the jurisdiction *in this case, then, it must appear, either that the place where the murder was committed was the "high seas" or that it was a river, bay, or basin, not within the jurisdiction of any state. 1. The murder was not committed on the high seas, because it was committed in a port or harbor; and ports and harbors are not parts of the high seas. To some purposes they may be considered as parts of the sea, but not of the high sea. Lord Hale says, "the sea is either that which lies within the body of a county or without. The part of the sea which lies not within the body of a county is called the main sea or ocean."¹ By the "main sea" Lord Hale undoubtedly means the same as is expressed by "high sea," "*mare altum*," or "*le haut meer*." There is a distinction between the meaning of these last terms, and the meaning of the sea. And this distinction does not consist merely in this, that it is "high sea" to low water-mark only, and sea to high water-mark, when the tide is full. A more obvious ground of distinction is, that the high seas import the uninclosed and open ocean without the *fauces terra*. So Lord Hale must be understood in the passage cited. Ports and harbors are, by the common law, within the bodies of counties; and that being the high sea which lies not within the body of any county, ports and harbors

are, consequently, not part of the high seas. Exton, one of the distinguished advocates of the admiralty jurisdiction, sneers at the common "lawyers for the alleged absurdity of supposing ships to ride at anchor, or to sail, within the body of the county. The common lawyers might retort, the greater incongruity of supposing ports and harbors to be found on the high seas." "Touching treason or felony," says Lord Hale, "committed on the high sea, as the law now stands, it is not determinable by the common law courts. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction."² A navigable arm of the sea, therefore, is not the high sea. The common and obvious meaning of the expression, "high seas," is also the true legal meaning. The expression describes the open ocean, where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge, in which protection and shelter are sought from this turbulent dominion, within the inclosures and projections of the land. The high sea, and havens, instead of being of similar import, are always terms of opposition.

"*Insula portum Efficit objectu laterum: quibus omnis ab alto Frangitur. inque sinus scindit sese unda reductos.*"

The distinction is not only asserted by the common lawyers, but recognized by the most distinguished civilians, notwithstanding what is said in the case in *Owen*,⁴ and some other *dicta*. The statute 13 Richard *II., ch. [342 5, allows the admiral to entertain jurisdiction of things done on the sea, "*sur le meer*." The civilians contend, that by this expression the admiralty has jurisdiction in ports and havens, because the admiral is limited to such things as are done on the sea, and not to such only as are done on the high sea. In remarking upon this, and other statutes relating to the admiralty, in his argument for the jurisdiction of that court, delivered in the house of lords, Sir *Leoline Jenkins* says: "The admiral being a *juxta ordinarius* (as *Bracton* calls such as have their jurisdiction fixed, perpetual, and natural), for 100 years before this statute, it shall not be intended to restrain him any further than the words do necessarily and unavoidably import. For instance, the statutes say, that the admiral shall intermeddle only with things done upon the sea; it will be too hard a construction to remove him further, and to keep him only *super altum mare*; if he had jurisdiction before in havens, ports, and creeks, he shall have it still; because all derogations to an antecedent right are odious, and ought to be

2.—Exton, 146.

3.—2 Hale's P. C., ch. 3.

4.—Owen, 123.

1.—Hale, *De Jure Maris*, ch. 4.

tion, has been intentionally permitted to lie dormant by not being called into action by law. *Conkling's Treatise*, 2d ed. 68; *Smith v. Jackson*, 1 Paine, 453.

A case of collision in a river where the tide ebbs and flows is within the admiralty jurisdiction of the United States, even though the locality be within the body of a county. *Waring v. Clarke*, 5 How. 441; *Jackson v. Steamboat Magnolia*, 20 How. 296; *Propeller Commerce*, 1 Black. 574; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 378.

The civil jurisdiction of the United States, in maritime causes of contract or tort, embraces tide

waters within the bays, inlets of the sea, and harbors along the sea coast of the country, and in navigable rivers. *U. S. v. Wilson*, 3 Blatchf. 435.

The circuit courts of the United States have no jurisdiction except such as Congress, by constitutional laws, has conferred upon them. *Hubbard v. N. R. Co.*, 3 Blatchf. 84; *Shute v. Davis*, 1 Pet. C. C. 431.

Offense committed on board American vessel in navigable waters is an offense against U. S. laws, notwithstanding vessel lay within waters of a foreign country at the time. *U. S. v. Bennett*, 3 Hugh. 496.

strictly taken."¹ This argument evidently proceeds on the ground of an acknowledged distinction between the sea and the high sea; the former including ports and harbors, the latter excluding them. Exton's Comment on the same statute, 13 Rich. II., ch. 5, is to the same effect. "Here, *sur le meer*," says he, "I hope shall not be taken for *super altum mare*; when as the statute is so absolutely free from distinguish-^{343*} ing *any one part of the sea from the other, or limiting the admiral's jurisdiction unto one part thereof, more than to another; but leaveth all to his cognizance. But this I am sure of, that by the records throughout the reign (of Edward III.) the admirals were *captanei et admiralli omnium portuum et locorum per coastera maris* (as hath been already showed), as well as of the main sea."² This writer is here endeavoring to establish the jurisdiction of the admiralty over ports and harbors, not as they are parts of the high sea, but as they are parts of the sea. He contends, therefore, against that construction of the statute by which jurisdiction on the sea would be confined to jurisdiction on the high sea. Upon the authority, therefore, of the civilians themselves, as well as on that of common law courts, ports and harbors must be considered as not included in the expression "of the high seas." Indeed, the act of Congress itself goes clearly upon the ground of this distinction. It provides for the punishment of murder and robbery committed on the high seas. It also provides for the punishment of the same offenses when committed in ports and harbors of a particular description. This additional provision would be absurd, but upon the supposition that ports and harbors were not part of the high sea. 2. If this murder was not committed on the high seas, was it committed in such haven or harbor as is not within the jurisdiction of any state? The case states, that in point of fact, the jurisdiction of Massachusetts has been constantly exercised^{344*} over *the place. *Prima facie* this is enough. It satisfies the intent of the act of Congress. It shows that the crime would not go unpunished, even if the authority of the United States Court should not interfere. An actual jurisdiction in such cases will be presumed to be rightful. Thus, in the case of Captain Goodere, indicted for the murder of his brother, Sir John Dinely Goodere, in a ship in Kingroad, below Bristol, the indictment being tried before the recorder of Bristol, and the murder being alleged to have been committed within the body of the county of that city, witnesses were called to prove that the process of the city government had frequently been served and obeyed, where the ship was lying when the murder was committed on board; and this was holden to be sufficient to show that the offense was committed within the jurisdiction of the city.³ But the jurisdiction of Massachusetts over the place where this murder was committed can be shown to be rightful. It is true that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and it may be admitted that this power is exclusive, and that

no state can exercise any jurisdiction of that sort. Still, it will remain to be shown, not only that this offense is one of which the admiralty has jurisdiction, but also, that it is one of which the admiralty has exclusive jurisdiction. For although the state courts, and the courts of the United States, cannot have concurrent admiralty jurisdiction, yet the common law and the admiralty may have concurrent jurisdiction; *and the state courts, in the ex-³⁴⁵ ercise of their common law jurisdiction, may have authority to try this offense, although it might also be subject to the concurrent jurisdiction of a court of admiralty, and might have been tried in the courts of the United States, if Congress had seen fit to give the courts jurisdiction in such cases. But the act only gives jurisdiction to the Circuit Court, in cases where there is no jurisdiction in the state courts. The state courts exercise, in this respect, the entire common law jurisdiction. If, therefore, the common law has a jurisdiction in this case, either exclusive or concurrent, the authority of the Circuit Court under the act does not extend to it. In order to sustain this conviction, it must be shown, not only that it is a case of exclusive admiralty jurisdiction, but also that Congress has conferred on the Circuit Court all the admiralty jurisdiction that it could confer. But Congress has not provided that the admiralty jurisdiction of the Circuit Court over offenses of this nature shall be exercised in any case in which there is a concurrent common law jurisdiction in the state courts. There is a jurisdiction, in this case, either exclusive or concurrent, in the common law; because the place where the murder was committed was a port or harbor, and all ports and harbors are taken, by the common law, to be within the bodies of counties.⁴ It is true that by the statute 15 Rich. II., ch. 8, jurisdiction is given to the admiral over murder and mayhem, committed in *great ships, lying in the streams of³⁴⁶ great rivers, below the bridges near the sea. Lord Coke's reading of this statute would altogether exclude the admiral's jurisdiction from ports and harbors; but Lord Hale holds the jurisdiction to be concurrent. "This statute first gave the admiral jurisdiction in any river or creek within the body of a county. But yet observe, this is not exclusive of the courts of common law; and, therefore, the King's Bench, &c., have herein a concurrent jurisdiction with the court of admiralty."⁵ And this doctrine of Lord Hale is now supposed to be the settled law in England—viz., that the common law and the admiralty have concurrent jurisdiction over murder and mayhem, committed in great rivers, &c., beneath the bridges next the sea. It is not doubted, certainly, that the common law has jurisdiction in such cases. In Goodere's case, before mentioned, some question arose about the court in which the offender should be tried. The opinion of the attorney and solicitor-general, Sir Dudley Rider and Sir John Strange, was that the trial must be in the county of the city of Bristol. He was, accordingly, tried before Sir Michael Foster, recorder of the city, and convicted. From the

1.—Life of Sir L. Jenkins, Vol. I, p. 77.

2.—Exton, 100.

3.—6 State Trials, 795. •

4.—Comyn's Dig. Admiralty, E. 14; Bac. Abr. Court of Admiralty, A; 2 East's Crown Law, 808.

5.—Hale's P. C., ch. 3.

terms in which the opinion of the attorney and solicitor-general was expressed, it might be inferred that the common law was thought to have exclusive jurisdiction of the case, agreeably to the well-known opinion of Lord Coke. At any rate, it was admitted to have jurisdiction, either exclusive or concurrent, and it [347*] "does not appear that the civilians who were consulted on the occasion, Dr. Paul and Sir Edmund Isham, doubted of this.¹ If, then, the common law would have jurisdiction of this offense in England, it has jurisdiction of it here. The admiralty will not exclude the common law in this case, unless it would exclude it in England. The extent of admiralty and maritime jurisdiction to be exercised under the constitution of the United States, must be judged of by the common law. The constitution must be construed, in this particular, by the same rule of interpretation which is applied to it in other particulars. It is impossible to understand or explain the constitution without applying to it a common law construction. It uses terms drawn from that science, and in many cases would be unintelligible or insensible, but for the aid of its interpretation.² The case cited shows that the extent of the equity powers of the United States courts ought to be measured by the extent of these powers, in the general system of the common law. The same reason applies to the admiralty jurisdiction. There may be exceptions, founded on particular reasons, and extending as far as the reasons extend on which they are founded. But as a general rule, the admiralty jurisdiction must be limited as the common law limits it; and there is no reason for an exception in this case. There is no ground to believe that the framers of the constitution intended to revive the old contention [348*] between the "common law and the admiralty. Whatever might have been the original merits of that question, it had become settled, and an actual practical limit had been fixed for a long course of years. They cannot be supposed to have intended to disturb this, from a general impression that it might have been otherwise established at first. This, then, being a case in which the common law has jurisdiction, according to established rules and usage, the act of Congress has conferred no power to try the offense on the courts of the United States.

Mr. Wheaton, for the United States. 1. The state court had not jurisdiction of this case, because the offense was committed on board a national ship of war, which, together with the space of water she occupies, is extraterritorial even when in a port of a foreign country: *A fortiori*, when in a port of the United States. A national ship is a part of the territory of the sovereign or state to which she belongs. A state has no jurisdiction in the territory of the United States. Therefore it has none in a ship of war belonging to the United States. The exemption of the territory of every sovereign from any foreign jurisdiction, is a fundamental principle of public law. This exemption is extended by comity, by reason, and by justice, to the cases, 1st. Of a foreign sovereign himself going into

the territory of another nation. Representing the power, dignity, and all the sovereign attributes of his nation, and going into the territory of another state under the permission, which, in time of peace, is implied from the absence of any "prohibition, he is not amenable to [349 the civil or criminal jurisdiction of the country. 2d. Of an ambassador stationed in a foreign country, as the delegate of his sovereign, and to maintain the relations of peace and amity between his sovereign and the state where he resides. He is, by the constant usage of civilized nations, exempt from the local jurisdiction of the country where he resides. By a fiction of law, founded on this principle, he retains his national character unmixed, and his residence is considered as a continued residence in his own country.³ 3d. Of an army, or fleet, or ship of war, marching through, sailing over, or stationed in the territory of another sovereign. If a foreign sovereign, or his minister, or a foreign ship of war, stationed within the territorial limits of a particular state of the Union, is, in contemplation of law, extraterritorial and independent of the jurisdiction of that state, *a fortiori*, must the army and navy of the United States be exempted from the same jurisdiction. If they were not, they would be in a worse situation than those of a foreign power, who are exempt both from the state and the national jurisdiction. Vattel says that the territory of a nation comprehends every part of its just and lawful possessions.⁴ He also considers the ships of a nation generally as portions of its territory, though he admits the right of search for goods in merchant vessels.⁵ Grotius comes more directly to "the point we have in view. [350 He holds that sovereignty may be acquired over a portion of the sea, "*ratione personarum, ut si classis, qui maritimis est exercitus, aliquo in loco, maris se habeat.*"⁶ So, also, Casaregis maintains the same doctrine, and fortifies his position by multiplied citations from ancient writers of authority. He holds it as an undeniable and universally received principle of public law that a sovereign cannot claim the exercise of jurisdiction in the seas adjacent to his territories, "*exceptis tamen Ducibus Generalibus vel Generalissimis alicujus exercitus vel classis maritimæ vel ductoribus etiam alicujus navis militaris nam isti in suos milites gentem et naves libere jurisdictionem sive voluntariam sive contentiosam sive civilem, sive criminalem in alieno territorio quod occupant tamquam in suo proprio exercere possunt,*" &c.⁷ The case of *The Exchange*, determined in this court after a most learned, able, and eloquent investigation, puts the seal to the doctrine.⁸ If, as in that case, the exemption of foreign ships of war from the local jurisdiction be placed on the footing of implied or express assent; that may more naturally and directly be inferred in the case of a state of this Union, a member of the confederacy, than of a foreign power, unconnected by other ties than those of peace and amity which prevail between distinct nations.

3.—*The Caroline*, 6 Rob. 468.

4.—*Droit des Gens*, L. 2, ch. 7, s. 80.

5.—*Id.* L. 1, ch. 19, s. 218, 217.

6.—*De Jur. Bel. ac Pac.* L. 2, c. 3, s. 13.

7.—*Dis.* 174, 186.

8.—7 Cranch, 116.

1.—*Dodson's Life of Sir Michael Foster*, p. 4.

2.—*The United States v. Collidge*, 1 Gallis. 488.

Wheat. 3.

The exclusive jurisdiction which the United States have in forts and dock-yards ceded to 351*] them, is derived from the express assent of the states by whom the cessions are made. It could be derived in no other manner; because without it, the authority of the state would be supreme and exclusive therein. But the exclusive jurisdiction of the United States on board their ships of war is not derived from the express assent of the individual states; because the United States have it in common with all other independent powers; they have it by the public law of the world; a concession of it in the constitution would have been merely declaratory of that law. The power granted to Congress by the constitution, "to make rules for the government of the land and naval forces," merely respects the military police of the army and navy, to be maintained by articles of war which form the military code. But this case is not within the grasp of that code, the offense being committed within the jurisdiction of the United States. The power of a court-martial to punish murder, is confined to cases "without" the United States, by the act of the 28d of April, 1800, for the government of the navy, ch. 33. In England, murder committed in the army or navy, is triable (not by courts-martial), but in the ordinary criminal courts of the country. But in what courts? In the national courts. If committed on land, in the courts of common law; if committed within the limits of the admiralty jurisdiction, at the admiralty sessions.¹ In the memorable case of the frigate

Chesapeake, the pretension of searching public ships for deserters was solemnly disavowed *by the British government, and their [*352 immunity from the exercise of any jurisdiction but that of the sovereign power to which they belong was spontaneously recognized.² The principle that every power has exclusive jurisdiction over offenses committed on board their own public ships, wherever they may be, is also demonstrated in a speech of the present Chief Justice of the United States, delivered in the House of Representatives on the celebrated case of *Nash, alias Robbins*; which argument though made in another forum, and for another object, applies with irresistible force to every claim of jurisdiction over a public ship that may be set up by any sovereign power other than that to which such ship belongs.³ *All juris- [*353 diction is founded on consent; either the consent of all the citizens implied in the social compact itself, or the express consent of the party or his sovereign. *But in this [*354 case, so far from there being any consent, implied or express, that the state courts should take cognizance of offenses committed on board of ships of war belonging to the United States, *those ships enter the ports of the dif- [*355 ferent states under the permission of the state governments, which is as much a waiver of jurisdiction as it would be in the case of a foreign ship entering by the same permission. A foreign ship would be exempt from the local jurisdiction; and the sovereignty of the United States on board their own ships of war cannot

1.—Tytler's Military Law, 153.

2.—Mr. Canning's Letter to Mr. Monroe, August 3d, 1807; 5 Waite's Documents, 89.

3.—Bee's Adm. Rep. 286. The Edinburgh Review for October, 1807, art. 1, contains an examination of this subject, in which the writer deduces the following propositions:

I. That the right to search for deserters on board of merchant ships rests on the same basis as the right to search for contraband goods. The ground of this right being in each case the injury done to the belligerent—which can only be known by a search, and redressed by immediate impressment. P. 9.

II. That this right must be confined to merchant ships, and is wholly inapplicable to ships of war of any nation. That in case of the protecting of deserters by such ships the only remedy lies in negotiation, and if that fails, in war. P. 9, 10.

The non-existence of the right to search national ships is inferred from the following arguments.

1. The great inconvenience of the exercise of the right—the tendency to create dissension.

2. The silence of all public jurists on the subject, though occasions have arisen in which its existence would have settled the question in dispute at once.

For example, the case of The Swedish convoy; The judgment of Sir W. Scott thereon; Dr. Croke's remarks on Schlegel's work; Letters of Sulpicius; Lord Grenville's speech on the Russian treaty, November, 1810, p. 11.

III. The language of all treaties, in which the subject of search is mentioned, where it is always confined to merchant ships. Consolato del mare, ch. 273; Treaty of Whitehall, 1661, art. 12; Treaty of Copenhagen, 1670, art. 20; Treaty of Breda, 1667, art. 18; Treaty of Utrecht, 1713, art. 24; Treaty of Commerce with France, 1763, art. 23; Treaty with America, 1795, art. 17, 18, 19. So, in the language of jurists, the right is always confined to merchant ships. Vattel, liv. 3, ch. 7, s. 113 and 114; Martens on Privateers, ch. 2, s. 20; Hubner, de la Saisie des batimens neutres, Vol. I, part 1, ch. 8, s. Whitlock's mem. p. 654; Molloy, de Jur. Mar., book 1, ch. 5.

IV. That the territory of an independent state is inviolable, and cannot be entered into to search for deserters. Vattel, lib. 2, ch. 7, s. 93, s. 94, and s. 79.

That the same principle of inviolability applies to

the national ships, and that these floating citadels are as much a part of the territory as castles on dry land. They are public property, held by public men in the public service, and governed by martial law. Moreover, the supreme power of the state resides in them, the sovereign is represented in them, and every act done by them is done in his name.

V. From the analogical case of the rights and privileges of ambassadors, every reason for which applies strongly to the present exemption. Vattel, lib. 4, ch. 7 and 8; Grotius, de Jure Belli, 17, 4, 4.

VI. From the absurdity of determining the claims of sovereign states in the tribunals of one of them: when these claims can only be decided by the parties themselves. Yet if search in such case be resisted, the admiralty would on capture be the judge. All jurists agree that there is no human court in which the disputes of nations can be tried. And no provisions are made in any treaty for a trial of this nature. P. 15.

VII. That the naval supremacy of Great Britain affords no argument for the right.

That this naval supremacy was never admitted by other nations, generally, though it was by Holland. That it is confined to the British seas, and that even in them it only respects the mere right of salute, and no more. See Grotius, lib. 2, ch. 3, s. 8, 13; Puffendorf, de Jure Gent. lib. 4, ch. 5, s. 7; Seld. Mar. Claus. lib. ch. 14; Ibid. lib. 2, ch.; Molloy b. 1, ch. 5; Treaty of peace and alliance with Holland, 1664, art. 13; Treaty of Whitehall, 1667, art. 10; Treaty of Breda, 1667, art. 19; Treaty of Westminster, 1674, art. 6; Treaty of Paris, 1764, with Holland, art. 2; Vattel, liv. 1, ch. 23, s. 280, p. 17, 18.

VIII. Two instances only exist of an attempt to claim the right, and these were of Holland. In the negotiation of the peace of 1654, Cromwell endeavored to obtain from the Dutch the right to search for deserters in their vessels of war within the British seas. But this was rejected, and the right of salute only acknowledged. Soon after that peace (1654) the question was discussed in consequence of a Dutch convoy being searched as to the merchant ships in the channel. The Dutch government, on this occasion, gave public instructions to their commanders to allow the merchant ships to be searched, but never to allow the ships of war. Thurlow, Vol. II., p. 503, p. 19, 20.

Wheat. 3.

be less perfect while they remain in any of the ports of the confederacy than if they were in a port wholly foreign. But we have seen that when they are in a foreign port they are exempt from the jurisdiction of the country. With still more reason must they be exempt from the jurisdiction of the local tribunals when they are in a port of the Union. 2. The State Court had not jurisdiction, because the place in which the offense was committed (even if it had not been committed on board a public ship of war of the United States) is within the admiralty jurisdiction with which the federal courts are invested by the constitution and the laws. By the constitution, the judiciary power extends to "all cases of admiralty and maritime jurisdiction."

There can be no doubt that the technical common law terms used in the constitution are to be construed according to that law, such as "*habens corpus*," "trial by jury," &c. But this is a term of universal law, "cases of admiralty and maritime jurisdiction;" not cases of admiralty jurisdiction only; but the amplest, broadest, and most expansive terms that could be used to grasp the largest sense relative to the subject-matter. The framers of the constitution were not mere common lawyers only. Their minds were liberalized by a knowledge 356*] of universal jurisprudence and general policy. They may as well, therefore, be supposed to have used the term admiralty and maritime jurisdiction as denoting the jurisdiction of the admiralty in France, and in every country of the civilized world, as in England alone. But even supposing this not to have been the case, the statutes of Richard II., at their enactment, could not have extended to this country, because the colonies did not then exist. They could not afterwards on the discovery

and colonization of this country become applicable here, because they are geographically local in their nature. British statutes were not in force in the colonies, unless the colonies were expressly, or by inevitable implication, included therein. We never admitted the right of the British parliament to bind us in any case, although they assumed the authority to bind us in all cases. It is therefore highly probable that the framers of the constitution had in view the jurisdiction of those admiralty courts with which they were familiar. The jurisdiction of the colonial admiralty courts extended, First. To all maritime contracts, wherever made and wherever to be executed. Second. To all revenue causes arising on navigable waters. Third. To all offenses committed "on the sea shores, public streams, ports, fresh waters, rivers, and arms as well of the sea as of the rivers and coasts," &c.³ But if this construction should not be tenable, it may be shown that an offense committed in the *place [357 where the record shows this crime was committed, is within the rightful jurisdiction of the admiralty, according to English statutes and English authorities. Before the statutes of Richard II. the criminal jurisdiction of the admiralty extended to all offenses committed on the high seas, and in the ports, havens and rivers of the kingdom.³ Subsequently to the statutes of Richard, there has never been any question in England that the admiralty had jurisdiction on the sea coast within the ebb and flow of the tide. The doubt has been confined to ports and havens. But "the sea," technically so termed, includes ports and havens, rivers and creeks, as well as the sea coasts; and therefore the admiralty jurisdiction extends as well to these (within the ebb and flow) as to the sea coasts.⁴ On this branch of

1.—1 Bl. Com. 107, 108.

2.—De Lovio v. Boit, 2 Gallis. 470, note 47.

3.—Roughton's Articles in Clerk's Praxis, 99, et *infra*. Exton, book 12 and 13; Selden, De Dominio Maris, book 2, ch. 24; Zouch's Jurisdiction of the Admiralty asserted, 96; Hall's Adm. Practice, XIX.; Spelman's Works, 226, Ed. 1727.

4.—Nota. Que chescun ewe, que flow et reflew est appel bras de meer et tant aunt come el flowe." 22 Assise, 98.

CHOCKE, J., "Si jeo ay torre adjoit al mere issint que le mere ebbe et flow sur ma terre, quant il flowe chescun poet pischer en le ewe que est flow sur ma terre, car donques il est parcel de le mere, et en le mere chescun homme poet pischer de common droit." Year Book, 8 Edw. 4, 19, a; S. C. cited 5 Co. Rep. 107.

"It was resolved that where the sea flows and has plenitudinem maris, the admiral shall have jurisdiction of everything done on the water between the high water-mark by the natural course of the sea; yet, when the sea ebbs, the land may belong to a subject, and everything done on the land, when the sea is ebbed, shall be tried at the common law, for it is then parcel of the county and *infra corpus comitatus*, and therewith agrees. 8 Edw. IV. 19, a. So note that below the low water-mark the admiral hath the sole and absolute jurisdiction; between the high water-mark and low water-mark, the common law and the admiral have *divisum imperium*, as is aforesaid, *scilicet* one *super aquam* and the other *super terram*." Sir Henry Constable's case, 5 Co. Rep. 106, 107.

"The place absolutely subject to the jurisdiction of the admiralty is the sea, which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the shores or banks adjoining, from all the first bridges seaward, for in these the admiralty hath full juris-

diction in all causes, criminal and civil, except treasons and right of wreck." Spelman, of the Admiralty Jurisdiction, Works, 226, Edw. 1727.

"The court was of opinion, that the contract being laid to be made *infra fluxum et refluxum maris*, it might be upon the high sea; and was so, if the water was at high water-mark, for in that case there is *divisum imperium* between the common law and the admiralty jurisdiction, according as the water was high or low. Harber v. Wharton, 2 Ld. Raym., 1462.

The ancient commission issued under the statute 28 Henry VIII., ch. 15, concerning the trial of crimes committed within the admiralty jurisdiction, contains the following words, descriptive of the criminal jurisdiction of the court: "Tam in aut super mari, aut in aliquo porta, rivo, aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudinem, a quibuscunque primis pontibus versus mare, quam super littus maris, et alibi ubicunque infra jurisdictionem nostram maritimarum, aut limites Admiralitatis Regni nostri, et Dominium nostrorum." Zouch, 112, 2 Hale's P. C. ch. 3. Lord Hale speaking of this statute, 28 Hen. VIII., ch. 15, quoting the words which define the locality of the jurisdiction given to the high commission court, viz., "in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction," this seems to me to extend to great rivers, where the sea flows and refloes below the first bridges, and also in creeks of the sea at full water, where the sea flows and refloes, and upon high water upon the shore, though these possibly be within the body of the county; for there at least, by the statute of Rich. II., they have a jurisdiction; and thus, accordingly, it has been constantly used in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words "pretends to have" to such a pretense as is without any right at all, and therefore, al-

Wheat. 3.

358*] the case it *would be useless to do more than refer to the opinion of one of the learned judges of this court,¹ in which all the learning 359*] on the civil and criminal jurisdiction *of the admiralty is collected together, and concentrated in a blaze of luminous reasoning, to prove that this tribunal, before the statutes of 360*] Richard II. *had cognizance of all torts, and offenses, on the high seas, and in ports and havens, as far as the ebb and flow of the tide; that the usual common law interpretation, abridging this jurisdiction to transactions wholly and exclusively on the high seas, is indefensible upon principle, and the decisions founded upon it are irreconcilable with one another; whilst that of the civilians has all the consistency of truth itself; and that whether the English courts of common law be, or be not, bound by these decisions, so that they cannot retrace their steps, yet that the courts of this country are unshackled by any such bonds, and may and ought to construe liberally the grant of admiralty and maritime jurisdiction contained in the constitution. To the authorities there cited, add those in the margin, showing that 361*] the courts *of admiralty in Scotland, France, and the other countries of Europe possess the extent of jurisdiction we contend for.² The liberal construction of the constitution, for which we contend, is strongly fortified by the interpretation given to it by the Congress in an analogous case, which interpretation has been confirmed by this court. The judiciary act declares that revenue suits, arising out of seizures 362*] on waters *navigable from the sea, &c., shall be causes of admiralty and maritime jurisdiction. And in the case of *The Vengeance*,³ and other successive cases, the court has confirmed the constitutionality of this legislative provision. But neither the Congress nor the court could make those suits cases of admiralty and maritime jurisdiction which were not so by the constitution itself. The constitution is the supreme law, both for the legislature and for

the court. The High Court of Admiralty in England has no original jurisdiction of revenue causes whatever. But the colonial courts of admiralty have always had, and that inherent, independent of, and pre-existent to, the statutes on this subject.⁴ The inevitable conclusion, therefore, is, that both the legislature and the court understood the term *cases of admiralty and maritime jurisdiction*, to refer, not to the jurisdiction of the High Court of Admiralty in England, as frittered down by the illiberal jealousy and unjust usurpations of the common law courts, but to the admiralty jurisdiction as it had been exercised in this country from its first colonization. But it has been already shown that this jurisdiction extended to all crimes and offenses committed in ports and havens. It therefore follows that such was the extent of the admiralty jurisdiction meant to be conferred upon the federal courts by the framers of the constitution. 3. By the judiciary act of 1789, ch. 25, the Circuit Court has jurisdiction of all crimes cognizable under the authority of the United States. By the act of *1790, ch. 9, it is provided, that "if [*363 any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder," &c., "he shall suffer death." It appears by the face of the record itself that this murder was committed, in fact, "in a river, haven, or bay," and it has already been shown that in law it was committed out of the jurisdiction of any particular state.

The *Attorney-General*, on the same side. If the offense in question be not cognizable by the Circuit Court, it is entirely dispensishable. The harbor of Boston is bounded by three distinct counties, but not included in either; consequently the *locus in quo* is not within the body of any county. These three counties are Suffolk, Middlesex and Norfolk; and are referred to as early as the year 1637, in the public acts of the colony of Massachusetts as then estab-

though the admiral pretends to have jurisdiction upon the shore when the water is reflowed, yet he hath no cognizance of a felony committed there," &c., &c. 2 Hale's P. C. ch. 3.

The navy mutiny act of the 22 Geo. II., ch. 33, sec. 4, thus defines the jurisdiction of a navy court-martial, to wit: "Nothing contained in the articles of war shall extend or be construed to extend, to empower any court-martial in virtue of this act, to proceed to the punishment or trial of any of the offenses specified in the several articles (other than the offenses specified in the 6th, 34th, and 36th articles and orders), which shall not be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in the haven, river, or creek within the jurisdiction of the admiralty," &c. In the 25th section of the act is the following proviso: "Provided always, that nothing in this act shall extend, or be construed to extend to take away, from the Lord High Admiral of Great Britain, or the commissioners for executing the office of Lord High Admiral of Great Britain or any vice-admiral, or any judge or judges of the admiralty, or his or their deputy or deputies, or any other officers or ministers of the admiralty, or any others having or claiming any admiralty power, jurisdiction, or authority within the realm, or any other of the king's dominions, or from any person or court whatsoever any power, right, jurisdiction, pre-eminence, or authority, which he, or they, or any of them, lawfully hath, have, or had, or ought to have and enjoy, before the making of this act, so as the same person shall not be punished twice for the same offense." 1 M'Arthur on Courts-Martial, 174, 348, 4th Ed.

1.—De Lovio v. Boit, 2 Gallis. 308.

2.—In Scotland, the delegate of the High Admiral, who holds the Court of Admiralty, "is declared to be the king's justice-general upon the seas, or fresh water, within flood and mark, and in all harbors and creeks," &c. 2 Bro. Civ. and Adm. Law, 30, 490; Erskine's Institutes, 34, 10th ed. "In Scotland (as Wellwood, a Scottish man, writes), the admiral and judge of the admiralty hath power within the sea-flood, over all sea-faring men, and in all sea-faring causes and debates, civil and criminal. So that no other judge of any degree may meddle therewith, but only by way of assistance, as it was found in the action brought by Anthony de la Tour against Christian Martens, November 6th, 1542." Zouch, 91. "Connoitront (les juges de l'amirauté) pareillement des pirateries, pillages et desertions des équipages, et généralement de tous crimes et délits commis sur mer, ses ports, havres, et rivages." Ordonnance de la marine, L. 1, t. 2, art. 10, de la Compétence. "L'amirauté étoit une véritable juridiction ayant le droit de glaive et conséquemment de juger les personnes tant au criminel qu'au civil, et certaines choses qui par leur nature étoient purement maritimes, ce qui résulte du titre de la compétence, art. 2, et 10. Le tribunal des juges consuls jugeoit les choses commerciales; d'où il résultoit que les amirautés connoissent de tous les procès, actions et contrats survenus pour vente de navires naufragés, assurances, &c. et les tribunaux consulaires de tous les actes de commerce purement mercantile." Boucher, Droit Maritime, 727.

3.—3 Dall. 297.

4.—The Fabius, 2 Rob. 245.

lished.¹ It is not pretended that the place where the ship of war lay at the time this offense was committed is within the limits of the county of Middlesex. By the act of the legislature of Massachusetts of the 26th of March, 1793, all the territory of the county of Suffolk not comprehended within the towns of Boston and Chelsea, was formed into a new county by the name of Norfolk. And by this act and the subsequent acts of the 20th of June, 1793, and 18th of June, 1803, the county of Suffolk now comprehends only the towns of Boston and **364*** Chelsea. The *locus in quo* cannot be within the body of either of these counties, or of the old county of Suffolk; for there is no positive law fixing the local limits of the counties themselves, or of the towns included therein; and according to the facts stated on the record, it is at least doubtful whether a person on the land on one side of the waters of the harbor could discern what was done on the other side.² If the *locus in quo* be not within the body of any county, it is confessedly within the admiralty jurisdiction. That jurisdiction is exclusively vested in the United States courts,³ and therefore the state court could not take cognizance of this offense. To whichever forum, however, the cause be assigned, the accused is equally safe. In either court the trial is by a jury, and there is the same privilege of process to compel the attendance of witnesses, &c. The objection commonly urged to the admiralty jurisdiction, that it proceeds according to the course of the civil law, and without the intervention of a jury, would not apply. Besides, that objection is wholly unfounded, even as applied to the court when proceeding in criminal cases according to the an-

cient law of the admiralty, independent of statutes; when thus proceeding, it never acted without the aid of a grand and petit jury. There is no doubt the courts of the United States are courts of limited jurisdiction, but not limited as to each general class of cases of which they take cognizance. The terms of the constitution embrace "all cases of admiralty and [***365** maritime jurisdiction;" civil and criminal, and whether the same arise from the locality or from the nature of the controversy. The meaning and extent of these terms is to be sought for, not in the common law, but in the civil law. Suppose the terms had been *jus postliminii*, or jactitation of marriage; where else, but to the civil law, could resort be had in order to ascertain their extent and import? It may be that the jurisdiction of the civil law courts is a subdivision of the great map of the common law; but in order to ascertain its limits, extent and boundaries, the map of this particular province must be minutely inspected. The common law had no imperial prerogative over the civil law courts by which they could be controlled, or have been in fact controlled. The terrors of prohibition were disregarded, and the contest between these rival jurisdictions was continued with unabated hostility until the agreement signed by all the judges in 1632, and ratified by the king in council.⁴ The war between them would never have been terminated, but by the overruling authority of the king in council. A temporary suspension of hostilities had been effected by a previous agreement of the judges of the King's [***366** Bench and the admiralty, made in 1575; but that agreement was soon violated by the common law courts.⁵ So that the limits of the ad-

1.—Colony Laws, ed. 1672, title courts, 36, 37.

2.—2 Hawkins, ch. 9, s. 14; 2 East's P. C. 84.

3.—Martin v. Hunter, 1 Wheat. 333, 337.

4.—"Resolution upon the cases of Admiral Jurisdiction. Whitehall, 18th February. Present, the King's most Excellent Majesty.

Lord Keeper,	Lord V. Wimbleton,
Lord Ab. of York,	Lord V. Wentworth,
Lord Treasurer,	Lord V. Falkland,
Lord Privy Seal,	Lord Bishop of London,
Earl Marshall,	Lord Cottington,
Lord Chamberlain,	Lord Newburgh,
Earl of Dorset,	Mr. Treasurer,
Earl of Carlisle,	Mr. Comptroller,
Earl of Holland,	Mr. Vice-Chamberlain,
Earl of Denbigh,	Mr. Secretary Coke,
Lord Chan. of Scotland,	Mr. Secretary Windebank.
Earl of Morton,	

"This day, the king being present in council, the articles and propositions following, for the accommodating and settling the difference concerning prohibitions, arising between His Majesty's courts at Westminster, and his court of admiralty, were fully debated and resolved by the board; and were then likewise, upon reading the same, as well before the judges of His Majesty's said courts at Westminster, as before the judge of his said court of admiralty, and his attorney-general, agreed unto, and subscribed by them all in His Majesty's presence, viz.:

"1. If suit should be commenced in the court of admiralty upon contracts made, or other things personal done beyond the sea, or upon the sea, no prohibition is to be awarded.

"2. If suit be before the admiral for freight or mariner wages, or for breach of charter-parties, for wages to be made beyond the seas; though the charter-party happen to be made within the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty, or if the question be made, whether the Wheat. 3.

charter-party be made or not; or whether the plaintiff did release, or otherwise discharge the same within the realm; this is to be tried in the king's courts, and not in the admiralty.

"3. If suit be in the court of admiralty, for building, amending, saving, or necessary victualing of a ship against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm.

"4. Although of some causes arising upon the Thames beneath the bridge, and divers other rivers beneath the first bridge, the king's courts have cognizance; yet the admiralty hath also jurisdiction there in the point specially mentioned in the statute of *Decimo quinto Richardi Secundi*, and also by exposition and equity thereof, he may inquire of and redress all annoyances and obstructions in those rivers, that are any impediment to navigation or passage to or from the sea; and no prohibition is to be granted in such cases.

"5. If any be imprisoned, and, upon *habeas corpus* brought, it be certified, that any of these be the cause of his imprisonment, the party shall be remanded.

"Subscribed 4th February, 1632, by all the judges of both benches." Cro. Car. 296, London Ed. of 1657. By Sir Harbottle Grimstone. These resolutions are inserted in the early editions of Croke's reports, but left out in the later, seemingly *ex industria*. 2 Brown's Civ. & Adm. Law, 79.

5.—

"12th of May, 1575. The request of the judge of the admiralty to the Lord Chief Justice of Her Majesty's Bench, and his colleagues, with their answers to the same.

"1st Request. That after judgment or sentence given in the Court of Admiralty, in any cause or appeal made from the same to the High Court of Chancery, it may please them to forbear the granting of any writ of prohibition, either to the judge of said court or to Her Majesty's delegates, at the sute of him by whom such appeal shall be made, seeing by choice of remedy in that way, in reason

368*] miralty *jurisdiction in England, as fixed at the time the United States constitution was established, could not be ascertained by the **369***] common law alone. Resort *must have been had for this purpose to the resolutions of the king in council, in 1575 and 1682, and to the statutes of Richard II. and Henry VIII.

370*] The framers of the constitution took a large and liberal view of this subject. They were not ignorant of the *usurpations of the common law courts upon the admiralty jurisdiction, and therefore used, *ex industria*, the broad terms, "all cases of admiralty and maritime jurisdiction;" leaving the judiciary to determine the limit of these terms, not merely by the inconsistent decisions of the English common law courts (which are irreconcilable with each other, and with the remains of jurisdiction that are by them acknowledged still to belong to the admiralty), but by an impartial view of the whole matter, going back to its original foundations. What cases are "of admiralty and maritime jurisdiction," must be determined either by their nature or by the

place where they arise. The first class includes all questions of prize, and all maritime contracts wherever made, and wherever to be executed. The second includes all torts and offenses committed on the high seas, and in ports and rivers within the ebb and flow of the tide. It is within the latter branch of the admiralty jurisdiction that the present case falls. The jurisdiction of the admiralty all over Europe, and the countries conquered and colonized by Europe, extends to the sea, and its inlets, arms and ports; wherever the tide ebbs and flows. Even in England, this particular offense, when "committed in great ships, being hovering in the main stream of great rivers, beneath the bridges of the same, nigh to the sea," is within the admiralty jurisdiction. The place where this murder was committed is precisely within the jurisdiction of the admiralty as expounded *by Lord Hale in his commentary on [*371 the statute 28th Henry VIII., ch. 15, which has been preferred to Lord Coke's construction by all the judges of England in the very recent case of *King v. Bruce*,¹ *The observation of [*372

he ought to be contented therewith, and not to be relieved any other way.

"Answer. It is agreed by the Lord Chief Justice and his colleagues, that after sentence given in the delegates, no prohibition shall be granted. And if there be no sentence, if a prohibition be not sued for within the next term following sentence in the Admiralty Court, or within two terms after at the farthest, no prohibition shall pass to the delegates.

"2d Request. That prohibitions hereafter be not granted upon bare suggestions or surmises, without summary examination and proof thereof, wherein it may be lawful to the judge of the admiralty, and the party defendant to have counsel, and to plead for the stay thereof, if there shall appear cause.

"Answer. They have agreed that the judge of the admiralty and the party defendant shall have counsel in court, and to plead to stay, if there may appear evident cause.

"3d Request. That the judge of the admiralty, according to such an ancient order as hath been taken by King Edward I., and his council, and according to the letters patent of the Lord Admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of the memory of man, may have and enjoy cognition of all contracts, and other things, rising as well beyond as upon the sea, without let or prohibition.

"Answer. This is agreed upon by the said Lord Chief Justice and his colleagues.

"4th Request. That the said judges may have and enjoy the knowledge of the breach of charter-parties, made betwixt masters of ships and merchants for voyages to be made to the parts beyond the sea, and to be performed upon and beyond the sea, according as it hath been accustomed time out of mind, and according to the good meaning of the 32d of Henry VIII., c. 14, though the same charter-parties be made within the realm.

"Answer. This is likewise agreed upon, for things to be performed, either upon or beyond the sea, though the charter-party be made upon the land, by the statute of the 32d of Henry VIII., chap. 14.

"5th Request. That writs of *corpus cum causa* be not directed to the said judge, in causes of the nature aforesaid, and if any happen to be directed, that it may please them to accept of the return thereof, with the cause, and not the body, as it hath always been accustomed.

"Answer. If any writ of this nature be directed in the causes before specified, they are content to return the bodies again to the lord admiral's jail, upon certificate of the cause to be such, or if it be for contempt or disobedience to the court in any such cause." *Zouch's Jurisdiction of the Admiralty of England Asserted*, 121.

Extract from "The complaint of the Lord Admiral of England, to the King's Most Excellent Majesty, against the judges of the realm, concerning prohibitions granted to the Court of Admiralty, 11

February, *penultimo die Termin Hillarii, Anno 8. Jac. Regis, &c.*"

"5. To the end that the admiral jurisdiction may receive all manner of impeachment and interruption, the rivers beneath the first bridge where it ebbs and flows, and the ports and creeks, are by the judges of the common law affirmed to be no part of the seas, nor within the admiral jurisdiction. And whereupon prohibitions are usually awarded upon actions depending in that court, for contracts and other things done in those places: notwithstanding that by use and practice, time out of mind, the Admiral Court have had jurisdiction within such ports, creeks and rivers.

"7. That the agreement made anno domini 1575, between the judges of the King's Bench and the Court of Admiralty, for the more certain and quiet execution of admiral jurisdiction, is not observed as it ought to be." *Zouch. Preface*. The last of the above articles of complaint was answered by Sir Edward Coke in the name of the common law judges as follows:

"Answer. The supposed agreement mentioned in this article hath not as yet been delivered unto us, but having heard the same read over before His Majesty (out of a paper not subscribed with the hand of any judge) we answer, that for so much thereof as differeth from these answers, it is against the laws and statutes of the realm; and therefore the judges of the King's Bench never assented thereunto, neither doth the phrase thereof agree with the terms of the law of the realm."

1.—"At the admiralty sessions holden at the Old Bailey in the year 1812, John Bruce was tried before Lord Ellenborough, Ch. J., for the willful murder of a ferry boy of the name of James Dean.

"The evidence of the fact was extremely clear, and was fully confessed by the prisoner himself at the trial, and the jury found him guilty. But it appeared also, that the place in which the murder was committed is a part of Milford Haven, in this passage over the same, between Builwell and the opposite shore near the town of Milford, the passage there being about three miles over. It was about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river; the water there, which was always perfectly salt, was generally above twenty-three feet deep, and the place was, excepting at very low tides, indeed, never known to be dry. Men-of-war of seventy-four guns were then building near an inlet close by the place. In spring tides, sloops and cutters of one hundred tons burthen are navigable where the body was found, which is also nearly opposite to where men-of-war ride. The deputy Vice-Admiral of Pembroke-shire said, that he had of late employed his water bailiffs to execute process in that part of the haven, but there was no evidence either way, as to the execution of the common law process there.

"The court upon this evidence left the case to Wheat. 3.

Justice Buller, in *Smart v. Wolf*,¹ that "with respect to what is said relative to the admiralty jurisdiction in 4 Inst., 135, I think that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained, not only a jealousy of, but an enmity against that jurisdiction," is a sufficient answer to anything that depends on the authority of Lord Coke as to this controversy. If, then, the *locus in quo* be within the admiralty jurisdiction, it is "out of the jurisdiction of any particular state;" because all the states have surrendered, by the constitution, all the admiralty jurisdiction they formerly possessed to the United States. The **373*** criminal *branch of that jurisdiction has been given by the United States to the Circuit Court in the act of 1790, ch. 9. The *locus in quo* has not been shown to be within the state jurisdiction. Because the state process has been served therein is no proof of the legality of such service; and the case does not state that such process had been, in any instance, served on board the public ships of war of the United States. Those ships are exempt even from a foreign jurisdiction; and, when lying in the dominions of another nation, are not subject to its courts, but all civil and criminal causes arising on board of them are exclusively cognizable in the courts of the United States. This is a principle of public law which has its foundation in the equality and independence of sovereign states, and in the fatal inconveniences and confusion which any other rule would introduce. The merchant vessels of a nation may be searched for contraband, for enemy's property, or for smuggled goods, and, as some have contended, for deserters, whether they are on the high seas or in the ports of the searching power; but public ships of war may not be searched, whether on the high seas or in the ports of the power making the search. The first may be searched anywhere, except within the jurisdiction of a neutral state. They may be searched on the ocean; because there all nations have a common jurisdiction. They may be searched in the waters of the searching power; because the permission to resort to its ports (whether implied or express) does not import any **374*** exemption from the local *jurisdiction.² The latter (*i. e.* public vessels) may not be searched anywhere, neither in the ports which they enter nor on the high seas. Not in the ports which they enter; because the permission to enter implies an exemption from the jurisdiction of the place. Nor on the high seas; because the common jurisdiction which all nations have thereon does not extend to a pub-

lic ship of war, which is subject only to the jurisdiction of the sovereign to which it belongs. Every argument by which this exemption is sustained, as to foreign states, applies with equal force as between the United States and every particular state of the Union; and it is fortified by other arguments drawn from the peculiar nature and provisions of our own municipal constitution. The sovereignty of the United States and of Massachusetts are not identical; the former have a distinct sovereignty, for separate purposes, from the latter. Among these is the power of raising and maintaining fleets and armies for the common defense and the execution of the laws. If any particular state had it in its power to intermeddle with the police and government of an army or navy thus raised upon any pretext, there would be an end of the exclusive authority of the United States in this respect. Wars and other measures, unpopular in particular sections of the country, might be impeded in their prosecution, by the interference of the state authorities. Such a conflict of jurisdictions must terminate in anarchy and confusion. But the court will take care that no such *con- **375** flict shall arise. The judiciary act of 1789, ch. 20, s. 11, giving to the circuit courts cognizance of all crimes and offenses cognizable under the authority of the United States, and the statute of 1790, ch. 9, declaring, that "if any person shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder, &c., he shall, on conviction, suffer death," and that, "if any person or persons shall, within any fort, &c., or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death," and a public ship of war, as well as the space of water she occupies, being "out of the jurisdiction of any particular state," and being "a place" under the sole and exclusive jurisdiction of the United States; it follows that the Circuit Court of Massachusetts District had exclusive cognizance of this offense, which was committed out of the jurisdiction of any particular state, and in a place under the sole and exclusive jurisdiction of the United States.

Mr. Webster, in reply. The argument on the part of the United States is, that the Circuit Court has jurisdiction, first, because the murder was committed on board a national ship of war, in which no state can exercise jurisdiction; inasmuch as ships of war are considered as parts of the territory of the government to which they

the jury, with observations as to the situation of the place, whether it was within the jurisdiction or not, and the jury found the prisoner guilty; but the case was saved for the opinion of the twelve judges.

"The question was, whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Henry VIII., c. 15, for the trial of the offenses therein mentioned, 'committed in or upon the sea, or in any other haven, river, creek or place, where the admiral or admirals have or pretend to have power, authority or jurisdiction,' do by law extend.

"The judges, with the exception of Justice Grose, all assembled on the 23d of December, 1812, at Lord Ellenborough's chambers, to consider this question, and they were unanimously of opinion, Wheat. 3.

that the trial was properly had, and that there was no objection to the conviction, on the ground of any supposed want of jurisdiction, in the commissioners appointed by commission under the statute 28 Hen. VIII., c. 15, in respect of the place where the offense was committed. During the discussion of this point, the construction of this statute by Lord Hale in his Pleas of the Crown, was much preferred to the doctrine of Lord Coke in his Institutes, and most, if not all the judges, seemed to think that the common law had a concurrent jurisdiction in this haven; and in other havens, creeks and rivers in this realm." 2 Leach's Crown cases, 1093; Case 353, 4th ed. 1815.

1.—3 T. R. 348.

2.—The Exchange, 7 Cranch, 144.

belong, and no other government can take cognizance of offenses committed in them. Two answers may be given to this argument. The **376*** first is, that the main inquiry being, whether the Circuit Court has jurisdiction, and the jurisdiction of that court being only such as is given to it by the act of Congress, it is sufficient to say that no act of Congress authorizes that court to take cognizance of any offenses, merely because committed on ships of war. Whether Congress might have done this, or might not, it is clear that it has not done it. It is the nature of the place in which the ship lies, not the character of the ship itself, that decides the question of jurisdiction. Was the "haven" in which the murder was committed within the jurisdiction of Massachusetts? If so, no provision is made by the act for punishing the offense in the Circuit Court. The law does not inquire into the nature of the employment or service in which the offender may have been engaged at the time of committing the offense; but only into the local situation or territory where it was committed. If committed within the territorial jurisdiction of a state, it excludes the jurisdiction of the Circuit Court by express words of exception. If, therefore, it has been shown that this haven or harbor is within the limits of Massachusetts, and under the general common law jurisdiction of that state, the offense being committed in that harbor, cannot be tried in the Circuit Court. The second answer is, that the doctrine contended for is applicable only between one sovereign power and another; a relation in which the government of the United States does not stand towards the state governments. Whenever ships of war of the United States are within the country, in the ports or harbors of any state, they **377*** are to be considered as at home. They are not then in foreign ports or harbors, and the jurisdiction of the states is, as to them, a domestic jurisdiction. If this be not so, persons on board such ships, though in the bosom of their own country, would be, in most cases, subject to no civil jurisdiction whatever. Even persons committing offences on land might flee on board such ships, and escape punishment, if they could not be followed by state process. The doctrine contended for would go to a great length. The cases cited speak of armies, as well as ships of war; and the doctrine, if applicable in the latter case, is equally so in the former. How, then, are offenses to be punished, if committed by persons attached to the army of the United States, while in their own country? It is admitted that in England such offenders are punished in the courts of common law; and the act of Congress establishing the articles of war also provides expressly that any officer or soldier accused of a capital or other crime, such as is punishable by the known laws of the land, shall be delivered to the civil magistrate, in order to be brought to trial. What civil magistrate is here intended? It must necessarily be such magistrate as acts under state authority, because no provision is made for the trial of such offenders in the courts of the United States. Perhaps such provisions might be made by Congress, relative as well to offenses committed by soldiers in the army as by seamen in the navy, under the general power to establish rules for the government of the army

and navy. But no such provision has hitherto been made. State process, on the contrary, has been constantly served and obeyed in **[378]** cases proper for the interference of the civil authority, both in the army and navy. Writs of *habeas corpus*, issued by state judges, have been served on, and obeyed by military officers in their camps and naval commanders on their quarter-decks.¹ To all these purposes the state courts are considered as parts of the general system of judicature established in the country. They are not regarded as foreign, but as domestic tribunals. The consequences, which it has been imagined might follow from the exercise of state jurisdiction in these cases, are hypothetical and possible only. Hitherto no inconvenience has been experienced. In most instances which might occur, this court would have a power of revision; and if, in other instances, inconvenience should be felt, it must be attributed to that distribution and partition of power which the people have made between the general and state governments. It would be a strange inconsistency to hold the states to be foreign powers in relation to the government of the United States, and to apply to them the principles of the cases cited, and to hold their courts to be judicatures existing under a foreign authority; when the judgments of those courts are not only treated here as judgments of the courts of the United States are treated, but when also Congress has referred to them the execution of many laws of the general government, and when appeals from their decision are constantly brought, in the provided cases, into this court by writ of error. It is also insisted, *on the other side, that this is a **[379]** case of admiralty and maritime jurisdiction. It is not a case of exclusive admiralty jurisdiction. If that jurisdiction is to be defined and limited in its application to the case, by the general principles of the English law. And not only must the common law be resorted to, for the interpretation of the technical terms and phrases of that science, as used in the constitution, but also for ascertaining the bounds intended to be set in the jurisdiction of other courts. In other words, the framers of the constitution must be supposed to have intended to establish courts of common law, of equity, and of admiralty, upon the same general foundations, and with similar powers, as the courts of the same descriptions respectively, in that system of jurisprudence with which they were all acquainted. Is there any doubt what answer they would have given, if they had been asked whether it was their purpose to include in the admiralty and maritime jurisdiction, such cases only as had been tried by the courts of that jurisdiction for a century, or whether they intended to confer the admiralty jurisdiction, as the civilians contend it existed before the time of Richard II? It is said, however, that there has been a practical construction given to this provision of the constitution, as well by Congress as the courts of law, which has in one instance at least, and that a very important one, departed from the limits assigned to the admiralty by the common law. This refers to seizures for the violation of the laws of trade and of the revenue; which seizures, although made in

1.—In the matter of Stacy, 10 Johns. Rep. 310.

ports and harbors, and within the bodies of **380*** counties, are *holden to be of admiralty jurisdiction, although such certainly is not the case in England. The existence of this exception must be admitted. The act to establish the judicial courts provides that the District Court "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade, where the seizures are made on waters navigable from the sea," &c. Perhaps this act need not necessarily be so construed as to consider such seizures to be of admiralty jurisdiction, if they were not such before. The word "including" might refer to the general powers of the court, and not to the words immediately preceding, viz., "admiralty and maritime jurisdiction." But then such seizures, like other civil causes, are, by the constitution, to be tried by jury, unless they be of admiralty and maritime jurisdiction; and it must be admitted that this court has repeatedly decided that they are of admiralty jurisdiction, and are not to be tried by jury, the first case is that of *La Vengeance*. The opinion of the court was delivered in this case, without giving the reasons upon which it was founded.¹ The next is *The Sally*.² This was decided without argument, and expressly on the authority of the preceding case. The point was made again in *The United States v. The Betsey and Charlotte*,³ and decided as it had been before; the court considering the law to be completely settled by the case of *The Vengeance*. Two subsequent cases, *The Samuel* and **381*** *The Octaria*,⁴ have *been disposed of in the same manner.

As was said in the argument of the case last cited, the arguments urged against the doctrine, in all the cases subsequent to *The Vengeance*, have always been answered by a reference to the authority of that case. As these cases have all been decided, without any exhibition of the grounds and reasons on which the decisions rest, they afford little light for analogous cases. They show that, in one respect, admiralty jurisdiction is here to be taken to be more comprehensive than it is in England. It will not follow that it is to be so taken in all respects. If this were to follow, it would be impossible to find any bound or limit at all. It is admitted that this exception from the English doctrine of admiralty jurisdiction does exist here. But if distinct and satisfactory reasons for the exception can be shown, this will rather strengthen than invalidate the general proposition. Such reasons may, perhaps, be found in the history of the American colonies, and of the vice-admiralty courts established in them by the crown. The first and grand object of the English navigation act, 12 Ch. 11., seems to have been the plantation trade.⁵ It was provided by that act that none but English ships should carry the plantation commodities; and that the principal articles should be carried only to the mother country. By the subsequent act of 15 Ch. 11., the supplying of the plantations

with European goods was meant to be confined wholly to the mother country. Strict rules were laid down to secure the due *exe- [***382** cution of these acts, and heavy penalties imposed on such as should violate them. Other statutes to enforce the provisions of these were passed, with other rules, and new penalties, in the subsequent years of the same reign. "In this manner was the trade to and from the plantations tied up, almost for the sole and exclusive benefit of the mother country. But laws which made the interest of a whole people subordinate to that of another, residing at the distance of three thousand miles, were not likely to execute themselves very readily; nor was it easy to find many upon the spot who could be depended upon for carrying them into execution."⁶ In fact, these laws were, more or less, evaded or restricted in all the colonies. To enforce them was the constant endeavor of the government at home; and to prevent or elude their operation the constant object of the colonies. "But the laws of navigation were nowhere disobeyed and contemned so openly as in New England. The people of Massachusetts Bay were, from the first, disposed to act as if independent of the mother country; and having a governor and magistrates of their own choice, it was very difficult to enforce any regulations which came from the English parliament, and were adverse to their colonial interest."⁷ No effectual means of enforcing the several acts of navigation and trade had been found, when, in 1696, the act of 7 and 8 Will. III., ch. 22, was passed, for preventing frauds, and regulating abuses in the plantation trade. This act gave a new *body of regulations; and, [***383** among other things, because great difficulty had been experienced in procuring convictions, new qualifications were required for jurors, who should sit in causes of alleged violation of the laws; and the officer or informer might elect to bring his prosecution in any county within the colony. All of these correctives were of little force, so the government soon after, with the view of securing the execution of this and the other acts of trade and navigation, proceeded to institute courts of admiralty.⁸ These courts appear to have claimed jurisdiction in causes of alleged violation of the laws of trade and navigation, upon the construction of this act of 7 and 8 Will. III. In 1702, the board of trade, being "doubtful," as they say, "of the true jurisdiction of the admiralty," desired to be informed by the Attorney and Advocate-General (Sir Edward Northey and Sir John Cooke), "whether the courts of admiralty, in the plantations, by virtue of the 7 and 8 of King William, or any other act, have there any further jurisdiction than is exercised in England. Whether the courts of admiralty, in the plantations, can take cognizance of questions which arise concerning the importation or exportation of any goods to or from them, or of frauds in matters of trade. And in case a vessel sail up any river with prohibited goods, intended for the use of the inhabitants, whether the informer may choose in what court he will prosecute—in the Court of Admiralty, or of common law. The opinion of

1.—3 Dall. 297.

2.—2 Cranch, 406.

3.—4 Cranch, 443.

4.—1 Wheat. 9, 20.

5.—Reeves's Hist. Law of Ship, 45.

Wheat. 3.

6.—Reeves, 55.

7.—Id. 57.

8.—Id. 70.

the Attorney-General was, that "the act (7 and 384*) 8 Will. III.) gave the Admiralty Court in the plantations jurisdiction of all penalties and forfeitures for unlawful trading, either in defrauding the king in his customs or importing into, or exporting out of, the plantations, prohibited goods; and of all frauds in matters of trade, and offenses against the acts of trade, committed in the plantations;" and he mentions the case of Colonel Quarry, judge of the admiralty in Pennsylvania, then pending in the Queen's Bench, in which a judicial decision on the point might be expected. The opinion of the Advocate-General was, of course, equally favorable to the admiralty jurisdiction.¹ On this construction of the statute, the courts of admiralty in the colonies assumed jurisdiction over causes arising from violation of the laws of trade and of revenue; "and from this time," says Mr. Reeves, "there seems to have been a more general obedience to the acts of trade and navigation." This jurisdiction continued to be exercised by the colonial courts of admiralty down to the period of the revolution; and is still exercised by the courts of those colonies, which retain their dependence on the British crown.² This may be the ground on which it has been supposed that the states of the Union, in forming a new government, and granting to it jurisdiction in admiralty and maritime causes, might be presumed to have included in the grant the authority to take cognizance of causes arising from the violation of the laws relative [385*] to customs, navigation, and *trade. All the colonies had seen this authority exercised as matter of admiralty jurisdiction. It was not peculiar to the courts of any one of them, but common to all. It had been engrafted on the original admiralty powers of these courts for near a century. They were familiar to the exercise of this jurisdiction, as an admiralty jurisdiction. It had been incorporated with their admiralty jurisdiction, by statute; and they have long regarded it as a part of the ordinary and established authority of such courts. There might be reason, then, for supposing that those who made the constitution intended to confer this power as they found it. And if any other exception to the English definition and limitation of the power of courts of admiralty can be found to have been as early adopted, as uniformly received, as long practiced upon, and as intimately interwoven with the system of colonial jurisprudence, there will be equal reason to believe that the framers of the constitution had regard to such exception also. Such exceptions do not impeach the rule. On the contrary, their effect is to establish it. If the exception, when examined, appears to stand on grounds peculiar to itself, the inference is, that where no peculiar reasons exist for an exception, such exception does not exist. In the case before the court, no reason is given, to induce a belief that an exception does exist. No practice of excluding the common law courts from the cognizance of crimes, committed in ports and harbors, is shown to have existed in any colony. There can be no doubt, therefore, that, saving

such *exceptions as can be reasonably [*386 accounted for, the admiralty jurisdiction was intended to be given to the courts of the United States, in the extent, and subject to the limits, which belong to it in that system of jurisprudence with which those who formed the constitution were well acquainted.

MARSHALL, *Ch. J.*, delivered the opinion of the court: The question proposed by the Circuit Court, which will be first considered, is,

Whether the offense charged in this indictment was, according to the statement of facts which accompanies the question, "within the jurisdiction or cognizance of the Circuit Court of the United States for the District of Massachusetts."

The indictment appears to be founded on the 8th sec. of the "act for the punishment of certain crimes against the United States." That section gives the courts of the Union cognizance of certain offenses committed on the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state.

Whatever may be the constitutional power of Congress it is clear that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offense committed in a river, haven, basin or bay; which river, haven, basin or bay, is within the jurisdiction of any particular state.

What, then, is the extent of jurisdiction which a state possesses?

We answer, without hesitation, the jurisdiction of *a state is co-extensive with its [*387 territory; co-extensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the constitution which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of Congress to legislate in the case; not that Congress has exercised that power. It has been argued, and the argument in favor of, as well as that against the proposition, deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty, over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offense is within the jurisdiction of Massachusetts. But in construing the act of Congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

To bring the offense within the jurisdiction of the courts of the Union, it must have been committed in a river, &c., out of the jurisdiction of any state. It is not the offense committed, but the bay in which it is committed, which must be out of the jurisdiction *of [*388 the state. If, then, it should be true that Mas-

Wheat. 3.

1.—2 Chalmers's Opinions of Eminent Lawyers, 187, 193.

2.—2 Bro. Civ. & Adm. Law, 482; 2 Rob. 248.

Massachusetts can take no cognizance of the offense; yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offense to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union.

Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory; or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have deposed Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative—and we believe they must—then the bay in which this murder was committed is not out of the jurisdiction of a state, and the Circuit Court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which has been committed.

It may be deemed within the scope of the question certified to this court to inquire whether any other part of the act has given cognizance of this murder to the Circuit Court of Massachusetts.

The third section enacts, "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place, or district of country, under the sole and exclusive jurisdiction of the United States, com-

mit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death."

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed is, it has been said, "a place within the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offense.

That a government which possesses the broad power of war; which "may provide and maintain a navy;" which "may make rules for the government and regulation of the land and naval forces," has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section, as on the 8th, the inquiry respects, not the extent of the power of Congress, but the extent to which that power has been exercised.

The objects with which the word "place" is associated, are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible that, by the words "other place," was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, "which was not comprehended by any of the terms employed, to which some other name might be given; and, therefore, the words "other place," or "district of country," were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact that at the time of passing this law the United States did not possess a single ship of war. It may, therefore, be reasonably supposed, that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark, that afterwards, when a navy was created, and Congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States, of any crime committed in a ship of war, wherever it may be stationed.¹ Upon these reasons the court is of opinion, that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognizable in the Circuit Court for the District of Massachusetts; which opinion is to be certified to that court.

The opinion of the court, on this point, is believed to render it unnecessary to decide the

1.—This, it is conceived, refers to the ordinary courts of the United States, proceeding according to the law of the land. The crime of murder, when committed by any officer, seaman or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court-martial. Act of 1803, for the better government of the navy, ch. 187, (33,) sect. 1, art. 21. But the case at bar was not cognizable by a navy court-martial, being committed within the territorial jurisdiction of the United States.

question respecting the jurisdiction of the State Court in the case.

Certificate accordingly.

Cited—5 Wheat. 115 (n); 12 Pet. 721, 733, 746; 14 Pet. 617, 619; 5 How. 481, 482; 7 How. 537, 555, 556; 18 How. 76; 19 How. 610; 6 Wall. 498; 16 Wall. 531; 3 Otto. 104; 10 Otto. 275, 279; 8 Cliff. 55, 64; 1 Wood. & M. 84, 407, 408, 415, 417, 421, 427, 432, 435, 438, 442, 448, 458, 455, 470, 478, 483, 484, 485; 3 Blatchf. 438; Blatchf. & H. 241, 252; McCabon, 211; 2 Paine. 143; 1 Sumn. 559; 1 Brown, 157; McAll. 200.

392* *[INSTANCE COURT.]

THE *ÆOLUS*. Wood, *Claimant*.

A question of fact under the non-importation laws. Defense set up on the plea of distress, repelled. Condemnation.

APPEAL from the Circuit Court for the District of Massachusetts.

This vessel and cargo were libeled in the District Court for the District of Maine, as forfeited to the United States, for lading on board at Liverpool, in Great Britain, certain goods which were of the growth, produce, and manufacture of Great Britain, with intent to import the same into the United States, and with the knowledge of the master, and also for an actual importation of the same into the United States. The seizure was made at Bass Harbor, in the District of Frenchman's Bay, by Meletiah Jordan, collector of that district.

A petition was interposed by Joseph T. Wood, of Wiscasset, who styled himself agent of Peter **393*** Molus* and Israel Rosnel, both of Bjornburgh, in Finland, in Russia, and also of Frantz Scholtz, of Archangel, in Russia, merchants, and subjects of the Emperor of Russia. The petition stated that Molus, Rosnel and Scholtz were owners of the brig and cargo; that she sailed from Liverpool in the beginning of December, 1813, with a cargo bound to the Havanna, with liberty and instructions to touch at some port in North America, to ascertain whether, according to existing laws, they could be admitted to an entry, and if not, to receive such orders as the agent of the owners might give. That after a long passage of 75 days, and experiencing severe weather, and the vessel being in a leaky condition, and the provisions growing short, she was compelled to make Bass Harbor. That there was some expectation at Liverpool, when the *Æolus* sailed, that a treaty of peace between the United States and Great Britain had been concluded, or was in great forwardness. The petition prayed that the vessel and cargo might be restored to Mr. Wood, on his giving bail for the appraised value. This claim was filed the 14th of February, 1814. At the May term following, Molus & Rosnel claim the brig as their property, and Scholtz claims the cargo as belonging to himself.

In February term, 1815, a rule was made on the claimants to produce the log-book at the trial, and an original letter to J. T. Wood, mentioned in the deposition of the supercargo.

Montero, mate of the brig, swore that she sailed direct from Liverpool to the United States.

The captain* on the passage told him [**394** that the vessel was bound to the United States. The captain and supercargo said it was their intention to have gone to Wiscasset, or Portland, where they were to discharge, but owing to the bad state of their rigging, and the wind being ahead, they put into Mount Desert, where they were detained by the custom-house officer. He also states that it was agreed, in Liverpool, with all the sailors, himself and the cook excepted, that they should come to the United States, and return from thence to Liverpool. About three months after, the mate was examined again, when he told a story so different from the relation which is found in his first deposition that but little credit is due to him as a witness for either party.

Lingman, one of the mariners of the *Æolus*, swore that he was shipped on board that vessel in October last, she then lying in Liverpool, on a voyage to some port in America, and from thence back to some port in Europe.

Daniel Molus, master of the *Æolus*, testified that, in October, 1813, he came to Liverpool, from Bjornburgh, in the brig *Æolus*. One Lou-rande, who was master of the brig, having a power to charter her as he might think proper, did charter her to Frantz Scholtz, of Archangel, by his agent, David Morgan, on a voyage to the Havanna, and a port in North or South America. He was ordered by Morgan, the agent of Scholtz, to proceed with the brig to the Havanna, and call off such ports as the supercargo should direct. On the 5th of December, 1813, the brig left Liverpool. *Two days af- [**395** ter, he was ordered by the supercargo to proceed off the port of Wiscasset, and land some passengers, when he would receive further orders from the supercargo, who expected to find further orders there. On their passage, the brig had thirteen of her chains broken, some of them in the eye round the bolt, and therefore could not be repaired until some of the cargo was discharged. Five of her shrouds were carried away, the bolts in the heel of her bowsprit were broken, and the bowsprit came some in upon deck. The stern boat was, by a sea, stove in pieces at the stern and lost, with several light sails which had been thrown into her. The spritsail yard was lost; her waist rails and boards were wholly carried away by the sea. The binnacle was several times capsize, and the compasses very much injured. One of the passengers was lost overboard. The brig was short of water; and at the time of her arrival on the American coast, the crew was in very great distress, being on a short allowance of water, which was very thick and bad, and not fit to be used until it was boiled, to make it thin. There was no rigging to repair the vessel any longer. On the 17th of February, 1814, a council of the whole ship's crew and passengers was held, and all were of opinion it was very dangerous keeping longer at sea, and were for getting into the first port which could be made. The supercargo reluctantly consented. If he had not, the brig must have gone in, as her condition would have justified the act. In the afternoon of the 18th of February, 1814, the *Æolus* anchored in Bass *Harbor, after a passage of 75 days, in [**396** which every hardship had been experienced. The vessel was a complete wreck, and the strength and spirit of the crew nearly exhausted.

She was immediately seized by the custom-house officer, and the papers all delivered up. Shortly after, the supercargo received advice from his agent, who soon came on board himself. This witness speaks of a survey of three shipmasters, and of their opinion; but as no such survey is found in the proceedings, it is presumed that none was made; or, if made, reduced to writing. He further states that the brig had been repaired while at Bass Harbor, at an expense of near \$3,000. The cargo was the sole property of Mr. Scholtz, of Archangel, and was put on board by his agent, David Morgan, of London, who employed Richards, Ogden, & Selden, as brokers for that purpose.

Frederic Williams testifies that he was supercargo; that the brig was Russian—expected in England that the non-importation law would soon be repealed. His orders were to proceed to Havanna, and to call off Wiscasset, where he would receive orders from Joseph Wood, agent of Mr. Sholtz, and if restrictions were removed, to enter with the brig; if otherwise, to proceed to the Havanna; had much tempestuous weather, carried away most of their chains, and many of the shrouds. On the arrival of the brig at Bass Harbor, he wrote to Wood that the brig had been seized, and consulting him what had best be done. He gave up his papers to the deputy-marshal, and took a receipt for them. Wood wrote to him, and also came down to **397*** the brig himself, and informed *him that the vessel had been seized for an alleged violation of the non-importation law. He received his instructions as supercargo from Morgan, the agent of Scholtz, in London, and they were verbal instructions only. He did not recollect that he had ever received any letter, either from Morgan or Scholtz, concerning this voyage. He is a native of Massachusetts, but had not resided in the United States for about four years previous to the commencement of this voyage. Since the arrival of the Æolus, he has resided nearly two years in New York. All the papers he had were receipts from the cartmen in Liverpool, and they were bundled together in the cabin, from which place he took them and delivered them to Wood, who, he presumes, has them.

It appears, by the testimony of Robert Kelley, that Wood informed him, in the beginning of February, 1814, that he expected a brig from the West Indies, and a Russian brig to call off the mouth of Sheepscot River for orders, and to know whether they can enter. He desires Kelley, by letters which are produced, to keep a good lookout for these vessels, to direct the one from the West Indies to proceed to Newport, and to inform the captain or supercargo of the Russian brig, that the laws will not admit of his entering, unless he is in want of something, in which case he may put into the mouth of the river. Kelley cruised off the mouth of the river for about four weeks, when he heard from Wood that the Russian vessel had put into Mount Desert and was seized.

Thomas Rice relates a conversation which he overheard, between Wood and a Mr. Pepper. **398*** in *which the former offered the latter a handsome present, to swear that he had been offered money by Haddock & Jordan, to give testimony against the brig, and in which Wood also stated that he had offered the mate money,

Wheat. 3.

to contradict the testimony he had given for Jordan.

John Bridges swears that, being in Liverpool in November, 1818, with six other Americans, they were applied to by Mr. Richards, of the house of Ogden, Richards & Seldon, who offered to find them clothes, pay their board while at Liverpool, and to find them a passage to America. He accordingly supplied them with clothes, paid their board eight weeks, and then put them on board the Russian brig Æolus, in which they sailed for Portland.

Samuel Haddock, Jun., an inspector of the customs, went on board of the brig when she came into Bass Harbor, and demanded her papers of the supercargo, which he refused to give up, as he was determined to proceed further to the westward. He understood from the mate that the sugercargo had taken the bills of the cargo from him and burnt them. He thinks the brig might have proceeded on her voyage to the Havanna, when she came into Bass Harbor, with such repairs as might have been made on board. None of the officers complained or intimated to him that the brig had come into Bass Harbor in distress, nor did they pretend that the cargo was damaged, until they began to break bulk.

By another witness, it appears that, after the seizure, the master of the Æolus, in company with the mate, purchased of him a chart of the Amelia islands, Havanna, *and the **[*399]** coast adjacent, observing that he had no idea of going such a voyage when he left England, or he should have provided himself with one.

Abraham Richardson was put on board the brig as an inspector of the customs, when she was seized, and continued on board till the cargo was discharged, which was about 25 days. He overheard a conversation between Wood and the supercargo, in the state-room of the latter, in which Wood expressed a wish that the brig had got to Wiscasset, as he had told the collector at that place that the brig was coming, and that he had offered him \$10,000 if he would let her enter. He observed that the collector did not tell him whether he would, but he believed that if the vessel had put in there, they would have got her off very easy. The supercargo observed to Wood, that if it was known that he, Wood, was concerned in the voyage, it would condemn vessel and cargo. Wood replied: "You must be very careful not to drop a word about it. We must make it out Russian property if we can." The supercargo then remarked, that if the collector would not clear out the brig for Wiscasset, they must make her out as bad as possible, so that she could not be moved, and then bond the cargo; upon which Wood observed, that if it was condemned they should then make a good voyage, as the bonds would not be much more than the double duties. This witness heard no complaints on board of any distress, and believes the Æolus might have proceeded to the West Indies.

*The papers on board represented **[*400]** the vessel and cargo as Russian property. On this testimony the property was condemned as forfeited to the United States, from which sentence the claimants appealed to this court.

Mr. D. B. Ogden and Mr. Wheaton, for the ap-



pellants and claimants, argued upon the facts, that the cargo was not put on board with intent to import the same into the United States, but that the primary destination was to the Havanna, with orders to call off the coast of this country, and to enter in case the non-importation laws should be repealed. But even if the fact were ever so well established, that the cargo was originally put on board with intent to import it into the United States, Congress could not, consistently with the principles of universal law, forfeit the property of foreigners for an act done by them in a foreign port. The putting on board the prohibited commodities, with intention to import, is made a distinct, substantive offence, by the fifth section of the act of the 1st of March, 1809, ch. 195. This offence was consummated within a foreign territory. If the vessel had been captured on the high seas, before her arrival in the United States, she would have been taken *in delicto*, according to any construction by which this section can be applied to foreigners. The legislature might, indeed, intend to confiscate the property of our own citizens, for acts done by them in foreign countries, because their allegiance travels with them wherever they go. But the operation of a statute is generally limited to the territory, or the subjects of the country where it is made.¹ This section of the act may stand consistently with this construction; but it will be confined in its operation to the conduct of our own citizens. The subsequent coming into the waters of the United States was occasioned by a *vis major*, and did not constitute an importation in law. To constitute such an importation there must be a voluntary arrival within a port. An involuntary arrival is not an importation; nor an arrival within the jurisdictional limits merely; there must be a voluntary arrival within some port, or collection district, with intent to unload.²

The *Attorney-General* and *Mr. Preble*, contra, argued upon the facts that the primary destination was to the United States, and that the distress set up as a plea to justify the fact of importation was fictitious, or created by the act of the parties themselves.

LIVINGSTON, *J.*, delivered the opinion of the court, and after stating the case, proceeded as follows:

It is not necessary or important, on this occasion, to inquire into the national character of the *Æolus*, or to ascertain in whom the proprietary interest of the cargo resided at the time of seizure; because, whether Russian, British or American, they are both equally liable to forfeiture, if the offense stated in the libel has been committed. The cargo, being avowedly of the growth, produce, or manufacture of Great Britain, it is conceded that a forfeiture must follow, if the fact of a voluntary importation into the United States be made out. Yet, in deciding this question, it is

impossible to discard entirely from view some of the circumstances which preceded, and took place after the arrival of this vessel at Bass Harbor, which, although not immediately connected with any calamity which may have brought her there, are not at all calculated to excite much sympathy, or to call for any extraordinary exertion or credulity, while listening to the tale of distress, on which every hope of restitution is now rested.

Mr. Scholtz, a Russian merchant at Archangel, in time of war between this country and Great Britain, and during the existence of our non-importation act, loads at that place no less than five brigs with the products of Russia, which he commits to the care of Mr. Morgan, a merchant at Liverpool, with instructions, as is said, to invest the proceeds of those cargoes in such British manufactures as he might judge suitable for sale in the Havanna. Mr. Morgan, who, at or about the time of loading these vessels, was at Archangel, proceeds to Liverpool, disposes of the cargoes there, charters the Russian brig *Æolus*, and dispatches her for the Havanna, to the address of certain merchants there, who are informed by a letter from him of the origin of this adventure, and that he has sent to them a cargo, in conformity with the orders of his principal, which he begs them to sell at good, or even saving prices, and after investing the proceeds in certain produce, to load the *Æolus* and send her to Mr. Scholtz, at Archangel. The instructions of Mr. Scholtz, in an affair of so much magnitude, nowhere appear in the proceedings; but if they were, in truth, of the kind stated by Mr. Morgan himself, in his letter, which has just been referred to, we shall find there was a total departure from them; for not only was the cargo of the *Æolus* the most unsuitable which could have been selected for a warm climate; but the Havanna, to which alone, by his own account, he was to send the *Æolus*, was to be her port of destination only in case she could not enter a port in the United States. When we find so great a departure from instructions as would inevitably fix upon the agent a responsibility to the whole extent of the property committed to his charge, we may well be permitted to doubt of their existence altogether, and to suspect that Mr. Morgan is acting in the character of a principal, and not, as he would have us believe, in that of a humble subordinate agent. This suspicion is not diminished, when we find, that although this suit has been pending between two and three years, Mr. Scholtz has interfered with it neither in person, nor has he thought it worth his while to appoint any agent for that purpose.

After the purchase of a cargo principally calculated for a northern market, and worth not less than \$104,311.57, it is committed to a supercargo, to whom no other than verbal instructions are given. This gentleman styles himself a commissioned officer in the imperial navy of Russia; and on his arrival in the United States can speak nothing but broken English. He proves, however, to be a natural born citizen of Massachusetts, who had been absent from his country not more than four years, and who, therefore, as may well be supposed, was not long in recovering his vernacular tongue, which we soon find him speak-

1.—Caseregis, Disc. 130, sec. 14-22.

2.—Reeves's Law of Shipping, 203, 207; The Eleanor, 1 Edwards, 161; The Paisley, 1d. App. 117; The Mary, 1 Gallis, 206; The United States v. Arnold, 1d. 353, S. C. 9 Cranch, 104; The Blaireau, 4 Cranch, 355, note; The Fanny, 9 Cranch, 131.

ing with as much facility as if he had never been absent from his native state. Mr. Williams, for that is the name of the supercargo, is directed by Mr. Morgan to call off Wiscasset, where he would receive orders from Mr. Wood, who, it seems, although it does not appear how, was fully apprised of the destination of this vessel, and of the time when she would probably be in his neighborhood. Whence he derived this knowledge, or when, he has not deigned to inform the court, and although claiming so valuable a property for the owners of vessel and cargo, he has shown no authority whatever from either of them for interfering in this way; and when, after the lapse of more than two years and a half from the first institution of proceedings in the District Court, interrogatories are addressed to him, for the purpose of discovering who were the real owners of this property, and whether they had appointed him, and when, as their attorney, and some other matters which he alone could have rescued from the mystery in which they are now involved, he produces no authority whatever, and contents himself with informing the commissioners, that being agent of the claimants, he **405*** thinks it improper, at that *time, to answer any interrogatories, and shall, therefore, decline doing so.

The Æolus leaves Liverpool without being furnished with a chart of the Havanna, or the coast adjacent, and two days after her departure the master is ordered by the supercargo to proceed off the port of Wiscasset, which was accordingly done, and all idea of going to the Havanna, if any were entertained, appears, from that moment, to be abandoned; and she is accordingly found, after a boisterous and long winter's passage, in a high latitude off the American coast. Now, if there be nothing criminal in a vessel coming on our coast, with a *bona fide* intention of ascertaining whether, under existing laws, she would be permitted to an entry; yet, when a vessel is found in this situation, in a boisterous season of the year, and so very much out of the way of the place to which it was pretended she was destined, if our ports were shut, and then relies on the plea of distress for coming in, a court will require the most satisfactory proof of the necessity which is urged in her defense.

To make out this necessity, the principal, if not the only witnesses produced, are the master and supercargo. Out of fifteen persons, these two are selected, and relied on to establish this all-important fact. No survey is had of the vessel or cargo either before or after it was discharged. To these two witnesses, if they stated a sufficient distress, which is not conceded, very serious objections lie. The master is so much implicated in all transactions of this nature, that it must always be more or less hazardous **406*** arduous for a claimant *to resort to his testimony, when other and less exceptionable witnesses are at hand. Not only some of the seamen on board might have been examined; but why not call on persons residing at the place where the vessel discharged, to examine her, and to give their testimony. Such persons were at hand, for the master speaks of three ship masters who surveyed her, and gave their opinion. As no survey is produced, and neither of these ship masters is a witness, the Wheat. 3.

court can take no notice of any opinion they may have entertained or have given to the master of the Æolus. The testimony of the supercargo on this subject, if it made out an adequate cause for coming in, would have been entitled to more credit, if he had behaved throughout this transaction in a manner more consistent than he appears to have done. But independent of his conduct, there are parts of his testimony which it is very difficult to believe, and which throw a shade over the whole. He swears that his instructions from Morgan were not in writing, and that he had never received either from him or Scholtz any letter concerning this voyage. It is incredible that any man should be entrusted with so large a property, without other than verbal instructions; or, at any rate, it is so entirely out of the common course of business, that the court cannot be blamed for disbelieving it. But there are other circumstances which detract much from the credit of these two witnesses. There is every reason to believe from other evidence in the cause, that when the brig came into Bass Harbor, neither of them thought of justifying their conduct on the ground of necessity. *This suggestion was made to them by **407** Mr. Wood, and not until they had been there a week or longer. This fact is proved in a way to admit of but little doubt of its accuracy; not only by the profound silence which was observed on this subject by the master and others, for some time after the arrival of the brig, but by positive testimony, which establishes that the allegation of distress was a matter of concert between the supercargo and Mr. Wood. It also appears, by other witnesses in the cause, that the Æolus, notwithstanding the injuries which she had received, might have proceeded to the West Indies without any other repairs than such as might have been put on her at sea. Upon the whole, the court is of opinion that the coming in of the Æolus was voluntary, and not produced by any distress which could justify the measure, and that thereupon the sentence of the Circuit Court must be affirmed with costs.

JOHNSON, J., dissented. This valuable vessel, with a cargo worth \$120,000, is claimed as Russian property. She was libeled as forfeited under the provision of the non-importation act, and all questions respecting proprietary interest I consider irrelevant to the case. The excuse for putting into the port of Bass Harbor was distress, and, as in the case of *The New York*,¹ the minority of the court are of opinion that she ought to have been permitted to store her cargo, repair, reship it, and depart. Such, evidently, was the policy of the law under which she was seized, which had for its object the *exclusion of British **408** goods; whereas this seizure legalized their introduction into the country.

It is urged in this case, that a variety of circumstances indicated a fraudulent intention. That the examination of the witnesses exhibits a melancholy view of depravity of morals, I freely admit; but the observation is fully as applicable to the testimony for the prosecution as that against it.

1.—*Vide ante*, p. 50.

The two principal circumstances relied on as *indicia* of fraud, to wit, her clearing out for Havanna, and her having a cargo adapted to a northern market, admit of an explanation perfectly consistent with innocence. For it is well known that a neutral never clears out from a British port to a port of their enemy; and as to her having a cargo adapted to a northern market, it is precisely what she avows, that her intention was to deposit it in that market had the prohibition been taken off on her arrival.

Under these circumstances, it appears to me that the only question in the case was, whether the distress was accidental or factitious. If there had been any fraudulent means made use of to produce the injury sustained, condemnation ought to follow. But if produced by causes not within the control of man, even though the distress may not have been deemed sufficient to entitle the party to a permit to unlade and refit, yet it was no sufficient cause for condemnation, and the vessel should have been ordered off. That the distress in this case was not factitious, nor very inconsiderable, there is every reason to believe. The vessel had had a voyage of seventy-five days, nearly double what might reasonably have been provided, *for she had shipped a sea which carried away her railings, and washed overboard one of her passengers; her shrouds and bowsprit were materially damaged, and her water short. Under these circumstances, I must think that this collector was less under the influence of humanity and a sense of duty than that of avarice, in making this seizure. Had he libeled her as enemy's property, I should have thought the case not destitute of reasonable grounds; but it was not his interest to convert her into a droit of admiralty, and it is not our province, under this libel, to admit anything into the case which can bear the appearance of charging with one crime and trying for another.

Decree affirmed.

[PRIZE.]

THE ATALANTA. FOUSSAT, Claimant.

A neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war.

A question of proprietary interest. Further proof ordered.

APPEAL from the Circuit Court for the District of Georgia.

This ship, being a British armed vessel, was captured in the year 1814, on a voyage from [410*] Bordeaux *to Pensacola, by the sloop of war Wasp, and sent into Savannah, in Georgia, where she was libeled, and condemned in the District Court as prize of war. The cargo, which was claimed for M. Foussat, a merchant domiciled at Bordeaux, was also condemned. On appeal to the Circuit Court as to the cargo, further proof was ordered, and restitution decreed to the claimant. The cause was then brought by appeal to this court.

The vessel was owned by Messrs. Berkely,

Salkeld & Co., of Liverpool, who were also the owners of large cotton plantations near Pensacola. She sailed from Liverpool on the 14th of August, 1814, for Bordeaux, laden with a cargo, part of which, about equal in value to the cargo subsequently taken in at Bordeaux, belonged to the owners of the ship; and the documentary evidence showed that her ultimate destination was Pensacola or the Havanna. A few days after the arrival of the vessel at Bordeaux, she was chartered by the claimant, who then had a vessel of his own lying unemployed in that port, and the cargo claimed was put on board in September, 1814. One Pritchard, who sailed in the vessel, was a British subject, and according to some of the testimony, acted as supercargo. At the time of the capture, the master and Pritchard were taken out of the vessel and carried on board the Wasp, which ship has never since been heard of, and is supposed to have been lost at sea. The proceedings in the District Court were extremely irregular; no examinations of the prisoners on the standing interrogatories having been taken, and witnesses having been examined in the first instance, *who [411] neither belonged to the captured nor the capturing vessel. The further proof produced by the claimant in the court below consisted of an affidavit of the claimant, swearing to the property in himself, and a certificate of two royal notaries at Bordeaux, that the copy of a letter from the claimant to Vincent Ramez, the consignee at Pensacola, dated the 28th of August, 1814, and stating the object of the adventure, was truly extracted from the claimant's letter-book.

Mr. Berrien, for the appellants and captors, argued, that the cargo was liable to condemnation, 1st. As being laden on board an enemy's armed vessel; and, 2d, on account of the defects in the proofs of proprietary interest. That, although the doctrine inculcated in the case of *The Nereide*,¹ tended to show that the circumstance of the cargo being found on board an armed enemy's vessel was not in itself a substantive cause of condemnation, the principal had not been decided by a majority of the court; Justice Johnson's opinion limiting it to the case of a neutral at peace with all the world.² This was not the case of *Mr. Pinto*, but it was the case of *M. Foussat*. Just before the decision of *The Nereide*, Sir William Scott had held the contrary doctrine,³ and decreed salvage for the recapture of neutral goods previously taken by one of our cruisers, on board an armed British ship, upon the ground that *the American courts might justly [412] have condemned the property. But even supposing this circumstance not to be a substantive cause of condemnation, it inflames the suspicions of hostile interests, arising from the other circumstances of the case, and does not admit of an explanation consistently with the pretended neutral character set up by the claimant. The inconvenience of exposing himself to these suspicions must have been compensated by the protection afforded by an armed force, or that protection would not have been

1.—9 Cranch, 388

2.—Id. 431.

3.—The *Fanny*, Dodson, 443, July 20th, 1814.

Wheat. 3.

resorted to. The case is, in that respect, distinguished to its disadvantage, from that whole class of cases, including *The St. Nicholas* and others,¹ where *fraud*, and not *force*, was resorted to, in order to evade, instead of directly resisting belligerent rights. The principle of reciprocity, as a doctrine of prize law, has been overruled by the court,² and, therefore, it cannot be contended that the rule of the French prize code, by which the having an enemy's supercargo on board is a cause of condemnation, is to be retaliated upon the claimant. But this fact increases the improbability that a Frenchman, who must have known the law of his own country in this respect, would have exposed his property to the risk of confiscation in the courts of a country whose prize law he could not know, because it was still unsettled. All the other circumstances of the case tend to the conclusion that it was not his property, but that of the British ship-owner.

413* *Mr. Sergeant*, contra, contended, that the case of *The Fanny*, even if it were not contradicted by that of *The Nereide*, was not directly in point. Sir W. Scott there goes on the probability or danger of condemnation in our courts, as affording a reason for giving salvage. Besides, the *Fanny* was a commissioned, as well as armed vessel; which the *Nereide* and the *Atalanta* were not. But it must be confessed that the decision in *The Fanny* was a very careless, not to say superficial, judgment. The judge agrees that the Portuguese flag was an inadequate protection, and yet holds the neutral liable to condemnation for taking shelter under a belligerent force. With all due respect to the great man by whom it was pronounced, it may be said to be tinctured with some of those peculiarities which mark the conduct of the tribunals of a great maritime country, bent on the assertion of its pretensions by its overwhelming naval power. At all events, it does not form a law for this court, any more than the principle of retaliation which has been already repudiated by the court. The proceedings in the present case have been marked by irregularities subversive of that justice which is due to neutrals, and by a neglect of those forms which are a part of the silent compact by which they agree to submit to the exercise of the harsh and inconvenient prerogative of search. The cause was not heard in the court of first instance upon the ship's papers and the preparatory depositions, before extraneous testimony was let in, by an order for further proof. The salutary principles of prize practice, which afford a security to neutrals in a trial in the courts of the captor, that would otherwise be grossly oppressive, have been wholly disregarded. It is a rule of justice in admiralty courts, whether of instance or prize, that where the original evidence appears to be clear, the court will not indulge in extraneous suspicions.³ If the employment of an armed enemy's vessel be innocent, no unfavorable inference can legally be drawn from it any more than from the employment of an unarmed belligerent carrier. Both this circumstance and the employment of an English su-

percargo (if he was employed) would rather show that no fraud was intended, since the annals of the prize court do not afford a single instance of a fraudulent case which was not entirely covered with the neutral garb.

The *Attorney-General*, in reply, insisted, that the fact of the cargo being captured on board an armed belligerent ship, raised a strong presumption, throwing the *onus probandi* on the claimant with more than usual weight. The only evidence to relieve this presumption was the oath of the claimant himself, unsupported by that of any other witness, or by any documentary evidence; and that, too, under an order for further proof; a mere test affidavit, without which a claimant can in no case receive restitution, but which is no evidence, or next to none, in a case of the least doubt or difficulty.

*MARSHALL, *Ch. J.*, delivered the [**415** opinion of the court: This vessel was captured on a voyage from Bordeaux to Pensacola by the sloop of war *Wasp*, and sent into Savannah in Georgia, where she was libeled and condemned as prize of war. The cargo was claimed for Mons. Fousat a French merchant residing at Bordeaux. In the District Court the cargo was condemned as enemy's property, avowedly on the principle that this character was imparted to it by the vessel in which it was found. On an appeal to the Circuit Court, further proof was directed, and this sentence was reversed, and restitution decreed to the claimant. From this decree the captors appealed to this court.

It has been contended that this cargo ought to be condemned as enemy's property, because, 1st. It was found on board an armed belligerent. 2d. It is, in truth, the property of British subjects.

On the first question, the case does not essentially differ from that of *The Nereide*. It is unnecessary to repeat the reasoning on which that case was decided. The opinion then given by three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be changed, or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknowledged, this court must reject constructions which render it totally inoperative.

2d. Respecting the proprietary interest, much doubt is entertained. In addition to the extraordinary fact of employing a belligerent carrier, while a neutral vessel belonging to [**416** the alleged owner of the cargo lay in port, there are circumstances in this case calculated to awaken suspicion, which the claimant ought to clear up, so far as may be in his power.

The return cargo of the *Atalanta* was to be in cotton, and Berkely, Salkeld & Co., the owners of the vessel, were also owners of large cotton plantations, the produce of which might readily be shipped from Pensacola. The papers show that the *Atalanta* sailed from Liverpool, where her owners reside, with a cargo for Bordeaux, a part of which, about equal in value to the cargo taken in at Bordeaux, belonged to Berkely, Salkeld & Co., and that her ultimate destination at the time of sailing was Pensacola, or the Havanna.

1.—*Ante*, Vol. I., p. 417.

2.—*The Nereide*, 9 Cranch, 422.

3.—*The Octavia*, 1 Wheat. 23, note c.

Within a day or two after her arrival at Bordeaux, she was chartered by the claimant for the voyage on which she was captured, and the cargo he now claims was put on board. A Mr. Pritchard sailed in the vessel, who was a British subject, and who has been represented in some of the testimony as a supercargo.

There are, undoubtedly, circumstances to diminish the suspicion which must be excited by those that have been mentioned. The proceedings have been very irregular; no examinations *in preparatorio* have been taken. The captain, and probably the mate, with the alleged supercargo, were carried on board the *Wasp*, and have perished at sea, and Mr. Fous-sat, whose character is unexceptionable, has sworn positively to his interest. Yet, this interest can be, and therefore ought to be, proved [417*] by other testimony, and *it is in the power of Mr. Fous-sat to explain circumstances, which, as they now appear, cannot be disregarded. The court, therefore, requires further proof, which Mr. Fous-sat is allowed to produce, to the following points:

1st. To his proprietary interest in the cargo. To show how and when it was purchased.

2d. To produce his correspondence with Berkely, Salkeld & Co., if any, respecting this voyage.

3d. To explain the circumstances relative to the original destination to Pensacola, when the *Atalanta* sailed from Liverpool.

4th. To explain the character of Mr. Pritchard, and his situation on board the *Atalanta*.

5th. To establish the genuineness of the letter of the 28th of August, and say by what vessel it was sent.

6th. To show to whom that part of the cargo of the *Atalanta*, on the voyage from Liverpool to Bordeaux, which belonged to Berkely, Salkeld & Co., was consigned, and how it was disposed of.

7th. To produce copies of the letters of Berkely, Salkeld & Co. relative to this transaction, or account for their non-production.

JOHNSON, J. When this cause was considered in the court below, I entertained great doubts on the subject of the proprietary interest. But those doubts have here been satisfactorily cleared up. I am now satisfied, that no inference unfavorable to the claim can fairly be drawn from the circumstance of this cargo being [418*] laden on board an armed belligerent. If it had been intended to throw a veil of neutrality over hostile property, it is more probable that a neutral carrier would have been used than a belligerent; and as to the dangers supposed to have been unnecessarily incurred, of being captured and turned away from the destined market, it is more than probable that a chance of being captured and carried into an American port, so far from being prejudicial to the adventure would have enhanced its profits. The claimant, then, if conscious of his innocence, had no evil to apprehend from capture; on the contrary, as the cargo was calculated for an American market, it might, in case of capture, have reached its destination directly; whereas, if it had arrived at Pensacola, its route would have been more circuitous. With regard to the fact that the voyage in its inception was destined to Pensacola, that I think

also satisfactorily explained. It was in strict pursuance of her original destination; on her arrival at Bordeaux she was put up for Pensacola, and chartered by this claimant for the voyage. The instructions to the captain show that it was not fixed, whether, on her return voyage, she should be laden on owners' account or not; and it probably depended upon the contingency of her being taken up at Bordeaux for a return freight. As to the facts that Pritchard, the supercargo to Bordeaux, continued in that capacity on the voyage to Pensacola; that Ramez, the consignee, was the agent of the ship-owner; and that the present cargo was purchased with the freight and cargo to Bordeaux, I am now satisfied that they are unsupported by the evidence. That [419*] Pritchard should continue to be designated by the appellation of supercargo among the crew, was to be expected from his having been known among them by that epithet on the voyage to Bordeaux, and that Ramez, who had been recommended to Berkely, Salkeld & Co., for his integrity by their agent, should be by them, or by some other, recommended to the patronage of Fous-sat, was perfectly consistent with ordinary mercantile intercourse; and in the total absence of proof, that the freight, or proceeds of the outward cargo of the ship ever came to the hands of Fous-sat, there is no sufficient reason for conjecturing that the cargo laden on board for Pensacola was purchased with those funds.

I am, therefore, of opinion, that the proprietary interest is sufficiently established. But, as the proprietary interest is altogether immaterial, if lading a neutral cargo on board an armed belligerent is, *per se*, a ground of condemnation, it becomes necessary to consider that question.

It has long been with me a rule of judicial proceeding, never, where I am free to act, to decide more in any case than what the case itself necessarily requires; and so far only, in my view, can a case be considered as authority. Accordingly, when the case of *The Neride* was before this court, I declined expressing my opinion upon the general question, because the cargo, considered as Spanish property, was exposed to capture by the Carthaginian and other privateers, and considered as belonging to a revolted colony, was liable to Spanish capture. The neutral shipper, therefore, could not be charged with evading our belligerent [420*] rights, or putting off his neutral character when placing himself under the protection of an armed belligerent, when sailing, as that shipper was, between Sylla and Charybdis, he might accept of the aid or protection of one belligerent; without giving just cause of offense to another.

But a case now occurs of a vessel at peace with all the world; and to give an order for further proof without admitting the rule, that lading a neutral cargo on board an armed belligerent is not, *per se*, a cause of forfeiture appears to me nugatory.

It is true, this is not a case of a commissioned or cruising vessel, and I have no objection to reserving the question on such a case until it shall occur, if it can be done consistently with the principles upon which I found my opinion; but in my view, there is no medium, and no

Wheat. 3.

necessity for a belligerent to insist on any exception in his favor. On the contrary, I consider all the evils as visionary that are dwelt upon as the result of thus extending this right in favor of neutrals. No nation can be powerful on the ocean that does not possess an extensive commerce; and if her armed ships are to be converted into carriers (almost, I would say, an absurd supposition), her own commerce would have the preference; so that the injury could never be of any real extent. But should it be otherwise, what state of things ought one belligerent more devoutly to desire than that the whole military marine of her enemy should be so employed, and bound down to designated voyages, from which they were not at liberty to deviate? It would be curious to see a government thus involving itself with merchant shippers in questions of affreightment, assurance, deviation, average, and so forth; the possibility may be imagined, but the reality will never exist.

The general rule in this case, it will be observed, is controverted by no one; nor is it denied that it is incumbent on the captor to maintain the exception contended for. It is for him to prove that the acknowledged right of the neutral to employ a belligerent carrier does not include the right of employing an armed belligerent carrier.

In order to support this proposition, arguments are usually adduced, from the silence of writers upon the subject; from decisions in analogous cases; and from its general inconsistency with the belligerent right of search or adjudication.

If it be asked, why have writers, and particularly the champions of neutral rights been silent on this subject? I think the answer obvious. Practically it is of very little general importance either to neutrals or belligerents, and those who are more disposed to favor belligerent claims would naturally avoid a doctrine which they could not maintain, whilst all who wrote for the benefit of those who are to read would avoid swelling their volumes with unnecessary discussions, or raising phantoms for the amusement of laying them. The silence of the world upon the subject is, to my mind, a sufficient evidence that public sentiment is against it. It is impossible, but that in the course of the long and active naval wars of the last two centuries, cases must have occurred in which it became necessary to consider this question; and though it had escaped the notice of jurists, it must have been elicited by the avarice of captors, the ingenuity of proctors, or the learned researches of courts of prize. Yet we find not one case on record of a condemnation as prize of war on the ground of armament; nor a *dictum* in any of the books that suggests such an exception. But the rule itself is laid down everywhere; and in my view, laying down the rule without the exception, is in effect a negative to the exception.

But it is not true that this subject has altogether escaped the notice of writers on the law of prize. There is on record one opinion on this subject, and that of great antiquity and respectability, and which may have given the tone to public opinion, and thus account for the silence of subsequent writers; I allude to the *dictum* extracted from Casaregis, in which the

author asserts, "that if a vessel laden with neutral merchandise attack another vessel, and be captured, her cargo shall not be made prize, unless the owner of the goods, or his supercargo engage in the conflict." Now, if an actual attack shall not subject to forfeiture, much less shall arming for defense; and it is fairly inferable from the passage that the author had in his view the case of an armed belligerent carrier, or he would not have represented her as the attacking vessel.

But it is contended, that decisions have taken place in the courts of other states, in analogous cases, which cannot be reconciled with the principle on which the claimant rests his defense. On this subject I will make one general remark: I acknowledge no decision as authority in this court but the decisions of the court, as far as necessary, to the case decided; and the decisions of the state courts, as far as they go to fix the landmarks of property; and generally, the *lex loci* of the respective states. All other decisions I will respect for as much as they are worth in principle.

The decisions relied on in this part of the argument are those by which neutral vessels under neutral convoy, were condemned for the unneutral act of the convoying vessel; and those in which neutral vessels have been condemned for placing themselves under protection of a hostile convoy. With regard to the first class of cases, it is very well known that they originated in the capture of the Swedish convoy, at a time when Great Britain had resolved to throw down the glove to all the world on the principle of the northern confederacy. It was, therefore, a measure essentially hostile. But independently of this, there are several considerations which present an obvious distinction between both classes of cases and this under consideration. A convoy is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding his fortune to theirs; or if involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been made liable to, in case of capture. To elucidate this idea, let us suppose the case of an individual who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war which would otherwise take men from the ranks; and the reason will be obvious why he should be treated as a prisoner of war, and involved in the fate of a conquered enemy. But it is not so with the goods which constitute the lading of the ship; those give neither real nor numerical strength to an enemy, but rather embarrass and impede him. And even if it be admitted that, in all cases, a cargo should be tainted with the offense of the carrying vessel, it will be seen that the reason upon which those cases profess to proceed is not applicable to the case of neutral goods on

board a hostile carrier. Resistance, either real or constructive, by a neutral carrier, is, with a view to the law of nations, unlawful; but not so with the hostile carrier; she had a right to resist, and in her case, therefore, there is no offense committed to communicate a taint to her cargo.

But it is contended that the right to use a hostile, armed carrier, is inconsistent with the belligerent's right of search, or of capture, or of adjudication; for on this point the argument is not very distinct, though I plainly perceive it must be the right of adjudication, if any, that is impaired. The right of capture applies only to enemy ships or goods; the right of search to **425*** enemy goods on board a neutral carrier; and therefore it must be the right of adjudication that is supposed to be impaired, which applies to the case of goods found either on board of a neutral or belligerent, and this mere *scintilla juris* is at last the real basis upon which the exception contended for must rest. But in what manner is this right of adjudication impaired? The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He has no right to capture it; And if it be hostile covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases—subdue the ship before he gets the cargo. It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral. Nor is it at all certain that lading on board an enemy carrier is done at all times with an intent to avoid capture; it may be to solicit it; as in the case of the late war, when British goods, though neutral owned, could only be brought into our market through the medium of capture. There, instead of capture being a risk of the voyage, it was one of the chances of profit. And the hostile carrier may have been preferred to the neutral, with the express view of increasing the chances of capture.

When we come to analyze, and apply the **426*** arguments of the defenders of this exception, I think it will be found that they expose themselves to the imputation of unfairness, in professing to sustain an exception, when they mean to aim a blow at the whole neutral right of using a belligerent carrier; or they do not follow up their reasoning in its consequences, so as to be sensible of the result to which it leads. The exception which exhausts the principal rule must be incorrect, if the rule itself be admitted as a correct one; it is, in fact, an adverse proposition, and it appears to demonstrate that all the arguments urged in favor of the exception, now under consideration, if they prove anything, prove too much, and obviously extend to the utter extinction of the rule itself, or the destruction of every beneficial consequence that the neutral can derive from it. Thus, if it be unlawful to employ an armed belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred, the difference is only in degree, not

in principle; and if it is left to the courts of the belligerent to apply the exception to successive cases as they arise, it evidently becomes a destroying principle, which will soon consume the vitals of the rule. And the neutral will soon consider it as a snare, not a privilege.

Again, the proposition is that the neutral may employ a hostile carrier; but the indispensable attributes of a state of hostility are the right of armament, of defense, of attack, and of capture; if, then, you strip the belligerent of any one, or more of these characteristics, the proposition is falsified, for he can no longer ***be called a hostile carrier; he assumes** **[*427** an amphibious anomalous character; for which there is no epithet applicable unless it be that of semi-hostile. And what becomes of the interest of the neutral? It is mockery to hold out to him the right of employing a hostile carrier, when you attach to the exercise of that right consequences which would make it absurd for a belligerent to enter into a charter-party with him. If resistance, arming, conveying, capturing, be the acknowledged attributes and characteristics of the belligerent, then deprive him of these attributes, and you reduce him to a state of neutrality, nay, worse than a state of neutrality; for he continues liable to all the danger incident to the hostile character, without any of the rights which that character confers upon him. What belligerent could ever be induced to engage in the transportation of neutral goods, if the consequence of such an undertaking be that he puts off his own character and assumes that of the neutral, relinquishes his right of arming, or resisting, without acquiring the immunities or protection of the neutral character. It is holding out but a shadow of a benefit to the neutral.

Some confusion is thrown over this subject by not discriminating carefully between the cases where a neutral shipper, and a hostile carrier, are the parties to the contract, and those in which both shipper and carrier are hostile. In the latter case, the carrier, when armed, may fairly be understood to have undertaken to fight as well as to carry. But when a neutral is the shipper, the carrier (independently of specific contract) is left to fight, or not, as he shall deem proper. ***Thus, if a neutral** **[*428** shipper charter an unarmed belligerent, he would not be released from his contract, should the belligerent put arms or men into his ship; otherwise taking ordinary and prudent precaution for the safety of his vessel, precautions which would in general lessen the insurance on the cargo itself, would be a violation of the master's contract. And on the other hand, a belligerent master would be under no obligation to the neutral to fight, if met by an enemy on the ocean, even though particularly required by the neutral shipper. There is, then, nothing in that argument which is founded on the supposition that the neutral is assisting in expediting a naval hostile equipment, when he employs a belligerent carrier; on the contrary, he either embarrasses the belligerent in, or detaches him from, the operations of war.

It makes no difference in my view, whether the right of using a hostile carrier be considered as a voluntary concession in behalf of neutrals or as a conclusion from those principles which form the basis of international law.

Wheat. 3.

We find it emanating from the same source as the right of search and adjudication, and it is of equal authority. If in practice it should ever be found materially detrimental to acknowledged national rights, it may be disavowed or relinquished; or should our own legislative power ever think proper to declare against the right, it can impose a law upon its own courts. But until it shall be so relinquished, or abrogated, we are bound to apply it with all the beneficial consequences that it was intended to produce.

I do not, however, consider it as a mere voluntary ⁴²⁹* concession in favor of neutral commerce. Were it now, for the first time, made a question whether a neutral should be permitted to use a hostile carrier, I should not hesitate to decide that it would be exceedingly harsh and unreasonable to deny to the neutral the exercise of such a right. The laws of war and of power already possess sufficient advantages over the claims of the weak, the wise, and pacific. I am, in sentiment, opposed to the extension of belligerent rights. Naval warfare, as sanctioned by the practice of the world, I consider as the disgrace of modern civilization. Why should private plunder degrade the privileges of a naval commission? It is ridiculous, at this day, to dignify the practice with the epithet of reprisal. If it be reprisal, we may claim all the benefit of the example of the savages in our forests, to whom the practice is familiarly known, but we must yield to them in the reasonableness of its application, for they really do apply the thing taken to indemnify the party injured. The time was when war, by land and by sea, was carried on upon the same principles. The good sense of mankind has lessened its horrors on land, and it is scarcely possible to find any sufficient reason why an analogous reformation should not take place upon the ocean. The present time is the most favorable that has ever occurred for effecting this desirable change. There is a power organized upon the continent of Europe that may command the gratitude and veneration of posterity by determining on this reformation. It must take effect when they resolve to enforce it.

⁴³⁰* We find the law of nations unfortunately embarrassed with the principle that it is lawful to impose a direct restraint upon the industry and enterprise of a neutral, in order to produce an incidental embarrassment to an enemy. In its original restricted application, this principle was of undoubted correctness, and did little injury; but in the modern extended use which has been made of it, we see an exemplification of the difficulty of restraining a belligerent in the application of a convenient principle, and an opposite illustration of one of the objections to admitting the exception unfavorable to the use of an armed hostile carrier. But surely there must be some limit to the exercise of this right by a belligerent. And it is incumbent upon him to show that the restraint imposed upon the neutral, is indispensable to the exercise of his own acknowledged right, or the punishment inflicted on him to be justly due to the violation of his neutral obligations. Now, what violation of belligerent right or neutral obligation can result from the employment of a hostile carrier? If employed to break a block-

ade, carry goods that are contraband of war, or engaged in other illicit trade, the goods are liable to condemnation, on principles having no relation to this case. But if employed in lawful commerce, where is the injury done to the belligerent? There is no partiality exhibited on the part of the neutral; for the belligerents are necessarily excluded from each other's ports, and cannot be employed, except each in the commerce of his own country; and so far from violating any belligerent right, the neutral ⁴³¹* tempts the ship of the enemy from a place of safety to expose her to hostile capture, or detaches her from warlike operations, and engages her in pursuits less detrimental to the interest of her enemy than cruising or fighting. To the neutral the right of employing a hostile carrier may be of vital importance. The port of the enemy may be his granary; he may have no ships of his own, no other carrier may be found there; no other permitted to be thus employed, or no other serve him as faithfully, or on as good terms. So, also, with regard to the produce of his own industry, his only market may be in the port of one of the belligerents, and his only means of access to it through the use of the carriers of that port.

A case has been referred to in the argument—the case of *The Fanny* in Dodson's Reports—in which the Court of Admiralty in England granted salvage upon goods shipped on board an armed enemy carrier captured by an American privateer, and recaptured by the British. The ground on which the court professes to proceed, according to the report, is, that these goods were in danger of being condemned in our courts, on the ground that the shipper had quit the protection of his neutrality, and resorted to the protection of arms.

Had the question decided in that case been one of forfeiture, and not of salvage, that decision would have been in point. But even then I should have claimed the privilege exercised by the learned judge who presides in that court with so much usefulness to his country, and honor to himself, of founding my own ⁴³²* opinions upon my own researches and resources. Should a similar case ever again occur in that court, and the decisions of this court have passed the Atlantic, that learned judge will be called on to acknowledge that the danger of condemnation was not as great as he had imagined; and that independent of the question agitated in this case, this court would have had respect to the embarrassing state of warfare in which the people of Buenos Ayres were involved, and adjudged that the precautions for defense were intended against their enemies rather than their friends. With regard to the award of salvage, it is well known that the grant of salvage upon the recapture of a neutral was the favorite offspring of that judge's administration; until then no contribution had been levied upon neutral commerce to give activity to hostile enterprise. When a question of salvage on such a recapture shall occur in this court those adjudications will come under review; but this case cannot be considered in point until this court is called on to decide whether the British example shall prevail or the obvious dictate of reason, that the neutral should be liberated and permitted to pursue his voyage, or at least to decide for

himself in which of the belligerent courts his rights will be most secure.

Upon the whole, I am fully satisfied that the decision in the case of *The Nereide* was founded in the most correct principles, and recognize the rule that lading on board an armed belligerent is not, *per se*, a cause of forfeiture; as **433*** not only the most correct *on principle, but the most liberal and honorable to the jurisprudence of this country.

*Further proof ordered.*¹

Cited—5 Wheat. 433.

[PRACTICE.]

HOUSTON v. MOORE.

The court has no jurisdiction under the 25th section of the judiciary act of 1789, ch. 20; unless the judgment, or decree, of the State Court be a final judgment or decree. A judgment, reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment.

ERROR to the Supreme Court of the State of Pennsylvania.

This was an action of trespass, brought by the plaintiff in error against the defendant in error, for levying a fine ordered to be collected by the sentence of a court-martial, under an act of the legislature of the state of Pennsylvania, which was alleged to be repugnant to the constitution and laws of the United States. The suit was commenced in the Court of Common Pleas for the county of Lancaster, in which court a trial was had, and the jury, under the charge of the court, found a verdict for the **434*** plaintiff, on which *judgment was rendered. The cause was carried to the Supreme Court of the state of Pennsylvania, by writ of error, where the judgment of the Court of Common Pleas was reversed, and the cause remanded to that court, with directions to award a *venire facias de novo*. The plaintiff then sued out a writ of error, to bring the cause to this court.

Mr. C. J. Ingersoll moved to dismiss the writ of error, as having been improvidently issued under the 25th section of the judiciary act, ch. 20, the decision of the State Court not being a "final judgment" in the cause.

Mr. Hopkins, contra.

MARSHALL, Ch. J., delivered the opinion of the court: The appellate jurisdiction of this court, under the 25th section of the judiciary act, ch. 20, extends only to a final judgment or decree of the highest courts of law or equity in the cases specified. This is not a final judgment of the Supreme Court of Pennsylvania. The cause may yet be finally determined in favor of the plaintiff in the State Court.

Writ of error dismissed.

1.—Justice Todd and Justice Duvall did not sit in this cause.

NOTE.—See Note to *Martin v. Hunter*, 1 Wheat. 304.

428

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Supreme Court of the commonwealth of Pennsylvania, for the Lancaster District. On examination whereof, it is adjudged and ordered, that the writ of error in this cause be, and the same is hereby dismissed, this court not having *jurisdiction in said cause, there not hav- ***435** ing been a final judgment in said Supreme Court of the commonwealth of Pennsylvania.¹

Cited—5 Pet. 206; 11 How. 32; 2 Wood. & M. 421.

[PRIZE.]

THE ANNE. BARNABEU, Claimant.

The captors are competent witnesses upon an order for further proof, where the benefit of it is extended to both parties.

The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, exclusive, or within neutral territory.

It is not competent for a neutral consul, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country.

Quere, Whether such a claim can be interposed, even by a public minister, without the sanction of the government in whose tribunals the cause is pending.

A capture, made within neutral territory, is, as between the belligerents, rightful; and its validity can only be questioned by the neutral state.

If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

Irregularities on the part of the captors, originating from mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.

APPEAL to the Circuit Court for the District of Maryland.

*The British ship *Anne*, with a cargo ***436** belonging to a British subject, was captured by the privateer *Ulor*, while lying at anchor near the Spanish part of the Island of St. Domingo, on the 13th of March, 1815, and carried into New York for adjudication. The master and supercargo were put on shore at St. Domingo, and all the rest of the crew, except the mate, carpenter and cook, were put on board the capturing ship. After arrival at New York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted by the commissioner, under seal, to the district judge of Maryland district, to which district the *Anne* was removed, by virtue of the provisions of the act of Congress of the 27th of January, 1813, ch. 478.

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed in behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture; and, upon the whole evidence, the District Court rejected

1.—Costs are not given where the writ of error is dismissed for want of jurisdiction. *Inglee v. Coulidge*, ante, Vol. II., p. 308.

Wheat. 3.

the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the Circuit Court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the District Court was affirmed, *pro forma*, to bring the cause for a final adjudication before this court.

437* *Mr. Harper*, for the appellant and claimant, argued, that the captors were incompetent witnesses, on the ground of interest, except when further proof was imparted to them;¹ and that they were not entitled to the benefit of further proof in this case, being *in delicto*. The irregularity of their proceedings, and the violation of the neutral territory, would not only exclude them from further proof, but forfeit their rights of prize. The testimony being irregular, it must appear, affirmatively, that it was taken by consent, where the irregularity consists, not in a mere omission of form, but in the incompetency or irrelevancy of the evidence. The testimony of the captors being excluded from the case, the violation of the neutral territory would appear uncontradicted. The text writers affirm the immunity of the neutral territory from hostile operations in its ports, bays and harbors, and within the range of cannonshot along its coasts.² Nor can it be used as a station from which to exercise hostilities.³ As to the authority by which the claim was interposed, the Spanish consul's was sufficient for that purpose; especially under the peculiar circumstances of the times when, on account of the unsettled state of the government in Spain, no minister from that country was received by our **438*** government, *but the former consuls were continued in the exercise of their functions by its permission. In one of the cases in the English books, the Portuguese consul was allowed to claim on account of violated territory, although it does not appear that he had any special instructions from his sovereign for that purpose.⁴ But even supposing the powers of a consul not adequate to this function, whence arises the necessity that the neutral government should interfere in general? Because the enemy proprietor is absolutely incapable of interposing a claim on this or any other ground. But here the incapacity of the claimant is removed, his *persona standi in judicio* being restored by the intervention of peace. He may, consequently, assert his claim upon every ground which shows that the capture, though of enemy's property, was originally unlawful and void.

Mr. D. B. Ogden and *Mr. Winder*, contra, contended, that the captors were admissible witnesses in this case, as they are in all cases respecting the circumstances of the capture; such as collusive and joint

captures, where the usual simplicity of the prize proceedings is necessarily departed from. So, also, their testimony is generally admitted on further proof.⁵ A claim founded merely upon the allegation of a violation of neutral territory is a case peculiarly requiring the *introduction of evidence from all **439** quarters, the captors being as much necessary witnesses of the transaction as are the captured persons. Every capture of enemy's property, wheresoever made, is valid, *prima facie*; and it rests with the neutral government to interfere, where the capture is made within neutral jurisdiction. The enemy proprietor has no *persona standi in judicio* for this or any other purpose. But here the suggestion of a violation of the neutral territory is not made by proper authority. All the cases show that a claim for this purpose can only be interposed by authority of the government whose territorial rights have been violated.⁶ The public ministers of that government may make the claim, because they are presumed to be fully empowered for that purpose. But a consul is a mere commercial agent, and has none of the diplomatic attributes or privileges of an ambassador; he must, therefore, be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government. A consul may, indeed, claim for the property of his fellow-subjects, but not for the alleged violation of the rights of his sovereign; because it is for the sovereign alone to judge when those rights are violated, and how far policy may induce him silently to acquiesce in those acts of the belligerent by which they are supposed to be infringed. There is only one case in the English books, where a claim of this sort appears to have been made *by **440** a consul; and from the report of that case it may be fairly inferred that he was specially directed by his government to interpose the claim.⁷ But even the Spanish government itself has not conducted with that impartiality between the belligerents which entitles it to set up this exemption.⁸ Its territory was, during the late war, permitted to be made the theatre of British hostility, and in various instances was violated with impunity. Spain was incapable, or unwilling, at that time, to maintain her neutrality in any part of her immense dominions. In this very case the captured vessel was not attacked; she was the aggressor, and, in self-defence, the privateer had not only a right to resist, but to capture. The local circumstances alone would have prevented the Spanish government from protecting the inviolability of its territory, on a desert coast, and out of the reach of the guns of any fortress. Bynkershoek⁹ and Sir William Scott hold, that a flying

1.—The *Adriana*, 1 Rob. 34; The *Haabet*, 6 Rob. 54; *L'Amitie*, Id. 299, note a.

2.—*Vattel*, L. 3, ch. 7, s. 132; Id. L. 1, ch. 23, s. 289; *Bynk. Q. J. Pub. L.* 1, c. 5; *Martens L. 8*, s. ch. 6, s. 6; *Azuni*, part 2, ch. 5, Art. 1, s. 15.

3.—The *Twee Gebroeders*, 3 Rob. 162; The *Anna*, 5 Rob. 332.

4.—The *Vrow Anna Catharina*, 5 Rob. 15.

5.—The *Maria*, 1 Rob. 340; The *Resolution*, 6 Rob. 13; The *Grotius*, 9 Cranch, 368; The *Sally*, 1 Gallis. 401; The *George*, The *Bothnea*, and The *Jahnstoft*, 1 Wheaton, 408.

Wheat. 3.

6.—The *Twee Gebroeders*, 3 Rob. 162, note; The *Diligentia*, Dodson, 412; The *Eliza Ann*, Id. 244.

7.—The *Vrow Anna Catharina*, 5 Rob. 15.

8.—The *Eliza Ann*, Dodson, 244, 245.

9.—*Q. J. Pub. L.* 1, ch. 8. Uno verbo: territorium communis amici valet ad prohibendum vim, quæ ibi inchoatur, non valet ad inhibendum, quæ, extra territorium inchoatur, dum ferret opus, in ipso territorio continuatur." This opinion of Bynkershoek, in which Casaregis seems to concur (*Disc.* 24, n. 11), is reprobated by several writers. *De Hebreu*, Part 1, ch. 4, sec. 15; *Azuni*, part 2, c. 4, art. 1; *Valin*, *Traité des Frises*, ch. 4, sec. 3, n. 4, art. 1; *Emeri-*

ly to the one party as to the other. It is a mistake to suppose that the common law doctrine, as to competency, is applicable to prize proceedings. In courts of prize, no person is incompetent merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. The cases cited at the argument distinctly support this position; and they are perfectly consistent with the principle by which courts of prize profess to regulate their proceedings. We are therefore of opinion that the attestations of the captors are legal evidence in the case, and it remains to examine their credit. And without entering into a minute examination, in this conflict of testimony, we are of opinion that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomat-^[446] ic agent of his sovereign *intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion, or proof, of any such delegation of special authority in this case; and therefore we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed. It is admitted that a claim by a public minister, or in his absence, by a *charge d'affaires*, in behalf of his sovereign would be good. But in making this admission, it is not to be understood that it can be made in a court of justice without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment.¹

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture made in a neutral territory is void; and, ^[447] *therefore, the title by capture being invalid, the British owner has a right to restitu-

tion. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him, and him only, it is to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well-established principles of public law.²

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defense. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the *coast without showing ^[448] her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. And the only remaining inquiry is, whether the captors have so conducted themselves as to have forfeited the rights given by their commission, so that the condemnation ought to be to the United States. There can be no doubt that if captors are guilty of gross misconduct, or laches, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially where the government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud, may readily be imagined in which it would become the duty of this court to enforce this principle in its utmost rigor. But it has never been supposed that irregularities, which have arisen from mere mistake, or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record from which we can infer that there was any fraudulent *suppression, ^[449] or any gross misconduct inconsistent with good faith; and, therefore, we are of opinion that condemnation ought to be to the captors.

2.—The same rule is adhered to in the prize practice of France, and was acted on in the case of *The Sancta Trinita*, a Russian vessel, captured within a mile and a half of the coast of Spain; but the counsel of prizes refused restitution, because the Spanish Government did not interpose a claim on account of its violated territory. *Bonnemant's Translation of De Habreu*, tom. 1, p. 117.

1.—See *Vivenash v. Becker*, 3 Maule and Selwyn, 284, as to the extent of the powers and privileges of consuls.

It is the unanimous opinion of the court that the decree of the Circuit Court be affirmed with costs.

Decree affirmed.

Cited.—11 Otto, 42; 1 Curt. 89; 1 Wood. & M. 488.

[COMMON LAW.]

BROWN v. JACKSON.

Although the grantees in a deed executed after, but recorded before, another conveyance of the same land, being *bona fide* purchasers without notice, are by law deemed to possess the better title; yet where L. conveyed to C. the land in controversy specifically, describing himself as devisee of A. S., by whom the land was owned in his life-time, and by a subsequent deed (which was first recorded) L. conveyed to B. "all the right, title, and claim, which he, the said A. S., had, and all the right, title and interest which the said S. holds as legatee and representative to the said A. S., deceased, of all land lying and being within the state of Kentucky, which cannot at this time be particularly described, whether by deed, patent, mortgage, survey, location, contract, or otherwise," with a covenant of warranty against all persons claiming under L., his heirs and assigns; it was held, that the latter conveyance operated only upon lands, the right, title, and interest of which was then in L., and which he derived from A. S., and consequently could not defeat the operation of the first deed upon the land specifically conveyed.

ERROR to the Circuit Court for the District of Kentucky.

450* This was an action of ejectment, brought by the defendant in error against the plaintiff in error, to recover the possession of certain lands in the state of Kentucky. To support this action, the plaintiff below showed the following title: A patent to Alexander Skinner; the will of Alexander Skinner, devising all his estate to Henry Lee; and a deed from Henry Lee to Adam Craig, conveying the tract of land in controversy specifically by metes and bounds, describing himself as devisee of Skinner; with a regular deduction of title from Craig to the plaintiff. The deed from Lee to Craig was dated the 23d of December, 1790; attested by three witnesses; acknowledged by the grantor on the 15th of December, 1795, before two justices of the peace in Virginia, and recorded in the Court of Appeals in Kentucky, on the 26th of July, 1796. The execution of this deed was proved by one of the subscribing witnesses. The defendant below produced in evidence a deed from Henry Lee to Henry Banks, dated the 5th of May, 1795, acknowledged before the mayor of Richmond, Virginia, on the 13th of May, 1795, and recorded in the Court of Appeals of Kentucky on the 11th of July, 1796, granting "all the right, title, and claim which he, the said Alexander Skinner, had, and all the right, title and interest which the said Lee holds as legatee and representative to the said Alexander Skinner, deceased, of all land lying and being within the state of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, **451*** survey, location, contract or *otherwise," with a covenant of warranty against all persons claiming under Lee, his heirs and assigns.

432

Upon this testimony the defendant's counsel moved the court to instruct the jury, that by virtue of the deed aforesaid, from Lee to Banks, first acknowledged and first recorded, the legal title was vested in the said Banks to the land in question; that the deed under which the plaintiff claimed was not operative and valid against the deed to Banks, and that the said deed to Banks showed such a legal title out of the plaintiff as that he could not maintain his action. The question of fact, whether the deed of Lee to Craig was duly executed on the day it bears date was left by the court to the jury, who found a verdict for the plaintiff, subject to the opinion of the court, upon the question of law arising in the cause. Judgment was thereupon rendered for the plaintiff by the court below, and the cause was brought to this court by writ of error.

The cause was argued by *Mr. Talbot* for the plaintiff in error, and by *Mr. Swann* for the defendant in error.

Todd, J. delivered the opinion of the court: In this case the question of fact, whether the deed of Henry Lee to Adam Craig was duly executed on the day it bears date, was left by the court to the jury, and upon the evidence, they properly found a verdict in favor of that deed, as an existing deed at that time.

The material question for the consideration of this *court is, whether, under the [**452** circumstances of this case, the deed of Henry Lee to Henry Banks, which was executed after, but recorded before, the deed of Lee to Craig has a priority over the latter.

This depends upon the construction of the terms of the conveyance from Lee to Banks; for if it conveys the same land as the deed to Craig, then the parties claiming under it, being *bona fide* purchasers, without notice of Craig's deed, are by law deemed to possess the better title.

It is necessary to bear in mind that Alexander Skinner, by his will, devised all his real estate to Lee, and that Lee, by his deed to Craig, conveyed the tract of land in controversy, specifically by metes and boundary, describing himself as devisee of Skinner. By his deed to Banks, he grants "all the right, title and claim, which he, the said Alexander Skinner, had, and all the right, title, and interest which the said Lee holds as legatee and representative to the said Alexander Skinner, deceased, of all land lying and being within the state of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, survey, location, contract, or otherwise;" and then follows a covenant of warranty against all persons claiming under Lee, his heirs and assigns.

A conveyance of the right, title, and interest in land, is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not then possessed by the party. If the deed to Banks had stopped after the words "all the right, *title, [**453** and claim which Alexander Skinner had," there might be strong ground to contend that it embraced all the lands to which Alexander Skinner had any right, title, or claim, at the

Wheat. 3.

time of his death, and thus have included the lands in controversy. But the court is of opinion that those words are qualified by the succeeding clause, which limits the conveyance to the right, title, and claim which Alexander Skinner had at the time of his decease, and which Lee also held at the time of his conveyance, and coupling both clauses together, the conveyance operated only upon lands, the right, title, and interest of which was then in Lee, and which he derived from Skinner. This construction is, in the opinion of the court, a reasonable one, founded on the apparent intent of the parties, and corroborated by the terms of the covenant of warranty. Upon any other construction, the deed must be deemed a fraud upon the prior purchaser; but in this way both deeds may well stand together, consistently with the innocence of all parties.

Judgment affirmed.

454*] * [COMMON LAW.]

EVANS v. EATON.

Under the 6th section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove at the trial that the machine, for the use of which, without license, the suit was brought, had been used previous to the alleged invention of the plaintiff. In several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant having given evidence as to some of the places specified, offered evidence as to others not specified. Held, that this evidence was admissible. But the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise.

Testimony, on the part of the plaintiff, that the

persons, of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for licenses to use the machine since his patent, ought not to be absolutely rejected, though entitled to very little weight.

Quere, Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of several machines separately, as well as a right to the exclusive use of those machines in combination.

However this may be, the act of the 21st January, 1808, ch. 117, "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery, and improvements, in the art of manufacturing flour, and in the several machines applicable to that purpose.

Quere, Whether Congress can constitutionally decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention.

Be this as it may, the act for the relief of Oliver Evans does not decide that fact, but leaves the question of invention and improvement open to investigation under the general patent law.

Under the sixth section of the patent law, ch. 156, if the thing secured by patent had been in use, or had been described in a public *work anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description or not.

Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvement in the art of manafaturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously discovered. But where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

The act for the relief of O. E. is engrafted on the general patent law, so as to give him a right to sue in the Circuit Court, for an infringement of his patent rights, although the defendant may be a citizen of the same state with himself.

ERROR to the Circuit Court for the District of Pennsylvania.

This was an action brought by the plaintiff in error, against the defendant in error, for an alleged infringement of the plaintiff's patent

NOTE.—One claim, construed to include every improvement in which the motive power is the electric or galvanic current, and the result is the making or printing intelligible characters, signs or letters, at a distance, was held to be broader than the patent laws allow, and invalid. *O'Reilly v. Morse*, 15 How. 62.

Both the process and the product may be included in one patent; but in such case the description of the invention in the specification and claims should disclose that the inventor had both results in his mind. *Welling v. Rubber Co.* 7, Off. Gaz. Pat. 608.

Where a prior patent taken out for a composition fails to specify, clearly, the proportions of ingredients required, no suit can be maintained upon it for infringement against persons manufacturing under a subsequent and sufficient patent for substantially the same composition. *Jenkins v. Walker*, 1 Holmes, 120.

There can be but one valid patent for one invention, though separate parts of such invention may be subjects of distinct patents, and although a patent for a process may already exist, still the product may be patented. *Jones v. Sewall*, 3 Off. Gaz. Pat. 330.

An inventor may claim in one patent a combination of devices when they are so connected as to operate in a certain way; and, in another, he may claim in combination with some other devices, another one, by means of which, especially, the operation so described is produced. *Wheeler v. McCormick*, 4 Off. Gaz. Pat. 622.

An inventor may have distinct patents for several distinct devices, although he may have included them all in one, making a separate claim for each device. *Ib.*

A patent may be adjudged void, when it appears that the patentee, in his specification, instead of

specifying distinctly what he has invented, has endeavored to anticipate, and include future inventions for the same object, and in so doing has rendered his specification, and adapted to mislead the public. *Carlton v. Bokes*, 17 Wall. 463.

Two patents interfere only when they claim, wholly or partially, the same invention. *Gold & Co. v. U. S.*, 6 Blatchf. 307.

Whoever first brings a machine to perfection and makes it capable of useful operation, is the real inventor and entitled to the patent; although others may previously have had the idea, and made some experiments towards putting it in practice. *Agawam Co. v. Jordan*, 7 Wall. 583; *Judson v. Bradford*, 16 Off. Gaz. Pat. 171.

The specification to accompany a patent for a new substance to be formed by means of chemical combinations of known materials, should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find out the exact proportions by experiment. The law requires the applicant to deliver a written description of the manner and process of making and compounding his newly-discovered compound. *Tyler v. Boston*, 7 Wall. 327.

Although an inventor has obtained a patent for a process, he may have another for the product. *Jones v. Sewall*, 3 Cliff. 563.

An invention is not complete, so as to entitle the inventor to claim letters patent, until it is embodied in a form capable of successful and useful operation. *Richardson v. Noyes*, 10 Off. Gaz. Pat. 507; *Lyman V. Co. v. Chamberlain*, *Ib.* 588.

A manifest improvement in a method of manufacturing, which requires invention for its accomplishment, however simple it may seem to be, is patentable. *Eppings v. Richie*, 23 Int. Rev. Rec. 319.

right to the use of his improved hopper-boy, one of the several machines discovered, invented, improved, and applied by him to the art of manufacturing flour and meal, which patent was granted on the 22d January, 1808. The defendant pleaded the general issue, and gave the notice hereafter stated. The verdict was rendered, and judgment given thereupon for the defendant in the court below; on which the cause was brought by writ of error to this court.

At the trial in the court below, the plaintiff

1.—“TO JAMES MADISON, ESQ., SECRETARY OF STATE:

The Petition of Oliver Evans, of the city of Philadelphia, a citizen of the United States, respectfully sheweth,

That your petitioner having discovered certain useful improvements, applicable to various purposes, but particularly to the art of manufacturing flour and meal, prays a patent for the same, agreeably to the act of Congress, entitled “an Act for the relief of Oliver Evans.”

The principles of these improvements consist:

1. In the subdivision of the grain, or any granulated or pulverized substance; in elevating and conveying them from place to place in small separate parcels; in spreading, stirring, turning and gathering them by regular and constant motion, so as to subject them to artificial heat, the full action of the air to cool and dry the same when necessary, to avoid danger from fermentation, and to prevent insects from depositing their eggs during the operation of the manufacture.

2. In the application of the power which moves the mill, or other principal machine, to work any machinery which may be used to apply the said principles, or to perform the said operations by constant motion and continued rotation, to save expense and labor.

The machinery by him already invented, and used for applying the above principles, consists of an improved elevator, an improved conveyor, an improved hopper-boy, an improved drill, and an improved kiln-drier. For a particular explanation of the principles, and a description and application of the machines which he has so invented and discovered, he refers to the specifications and drawings hereunto annexed; and he is ready, if the Secretary of State shall deem it necessary, to deliver models of the said machines.

OLIVER EVANS.

DESCRIPTION.

Of the several machines invented by Oliver Evans, and used in his improvement on the process of the art of manufacturing flour or meal from grain, and which are mentioned in his specification as applicable to other purposes.

No. 1.—THE ELEVATOR.

Plate vi. Fig. 1. A. B. represents an elevator for raising grain for the granary O. and conducting it by spouts into a number of different garnerers as may be necessary, where a mill grinds separate parcels for toll or pay. The upper pulley being set in motion, and the little gate A drawn, the buckets fill as they pass under the lower, and empty as they pass over the upper pulley, and discharge into the moveable spout B, to be by it directed to any of the different garnerers.

Fig. 2. Part of the strap and bucket, showing how they are attached.

A. a bucket of sheet iron, formed from the plate 8, which is doubled up and riveted at the corners, and riveted to the strap.

B. a bucket made of tough wood, say willow, from the form 9, being bent at right angles at E C, one side and bottom covered with leather, and fastened to the strap by a small strap of leather, passing through the main strap, and tacked to its sides.

C. a lesser bucket of wood, bottomed with leather, the strap forming one side of it.

D. a lesser bucket of sheet iron, formed from the plate 11, and riveted to the strap which forms one side of the bucket.

Fig. 6. The form of a gudgeon for the lower pulley.

7. The form of the gudgeons of the shaft of the upper pulley.

484

gave in evidence the several acts of Congress entitled respectively, “An act to promote the progress of useful arts, and to repeal the acts heretofore made for that purpose;” “An act to extend the privilege of obtaining patents, for useful discoveries and inventions, *to [*456 certain persons therein mentioned, and to enlarge and define penalties for violating the rights of patentees;” and “An act for the relief of Oliver Evans;” the said Oliver’s petition to the Secretary of State, for a patent, and the patent thereupon granted *to the said Oliver, dated [*457

12. The form of the buckle for tightening the elevator strap.

Fig. 17, plate vii., represents an elevator applied to raise grain into a granary, from a wharf, &c., by a horse.

16 represents an elevator raising the meal in a grist-mill.

18 represents an elevator wrought by a man.

Plate viii. 35, 36, represents an elevator raising grain from the hold of a ship.

33, 34, represents an elevator raising meal from three pair of stones, in a flour-mill, with all the improvements complete.

Plate ix. Fig. 1. CD represents an elevator raising grain from a wagon. E represents the moveable spout, and manner of fixing it, so as to direct the grain into the different apartments.

Plate x. 2, 3 and 11, 12 represents elevators, applied to raise rice in a mill for hulling and cleaning rice.

The straps of elevators are best made of white harness-leather.

No. II.—THE CONVEYOR.

Plate vi., fig 3, represents a conveyor for conveying meal from the millstones into the elevator, stirring it to cool at the same operation, showing how the flights are set across the spiral line to change from the principle of an endless screw to that of a number of ploughs, which answer better for the purpose of moving meal, showing also the lifting flights set broadside foremost, and the manner of connecting it to the lower pulley of the elevator which turns it.

Fig. 4. The gudgeon of the lower pulley of the elevator connected to the socket of the conveyor.

5. An end view of the socket, and the band which fastens it to the conveyor.

Plate viii. 37, 38, 4 represents a conveyor for conveying grain from a ship to the elevator 4, 5, with a joint at 36, to let it rise and lower with the tide.

44—45. A conveyor for conveying grain to different garnerers from an elevator.

31—32. A conveyor for conveying tall flour to the meal elevator, or the coarse flour to the eye of the stone.

Plate ix., Fig. 11, represents a conveyor for conveying the meal from two pair of stones, to the elevator connected to the pulley, which turns them both.

Plate x., 2, 11 represents conveyors applied to convey rice, in a rice-mill, from a boat or wagon to the elevator, or from the fan to an elevator

No. III.—THE HOPPER-BY.

Plate vii., Fig. 12, represents a hopper-boy complete for performing all the operations specified, except that only one arm is shown.

AB, the upright shaft; CED, the arms, with flights and sweeps.

E, the sweeper to fill the bolting hoppers HH.

CFF, the brace, or stay, for steadying the arms. P, the pulley, and W, the weight, that is to balance the arms, to make them play lightly on the meal, and rise or fall, as the quantity increases or diminishes.

ML, the leader; N, the hitch stick, which can be moved along the leading line, to shorten or lengthen it.

Fig. 13. SSS, the arms turned bottom up, showing the flights and sweeps complete at one end, and the lines on the other end show the mode for laying out for the flights, so as to have the right inclination and distance, according to the circle described by each, and so that the flights of one end may track between those of the other. The sweeps and the flights at each end of the arms are put on with a thumb-screw, so that they may be moved.

Wheat. 3.

the twenty-second day of January, in the year 458*] 1808; and further gave in evidence, *that an agent for the plaintiff wrote a note to the defendant, in answer to which he called on 459*] the *agent at Chambersburg, at the house of Jacob Snyder, on the ninth of August, 460*] 1818; there were a number *of millers present; the defendant then told the agent that he had got Mr. Evans's Book, a plate in 461*] the Millwright's Guide, and if the agent would take forty dollars, the defendant would 462*] give it him; the *defendant said that his

hopper-boy was taken from a plate in Mr. Evans's book; he said he would give no more, alleging that the hundred dollars the agent asked was too much; that the stream on which his mill was, was a small head of Conogochesage. The agent then declared, that if the defendant would not pay him by Monday morning he would commence a suit in the Circuit Court.

The plaintiff further gave in evidence, that another agent for the plaintiff was in the defendant's mill on the second of November,

and so that these flights may be reversed, to drive meal outwards from the centre, and at the same time trail it round the whole circle; this is of use sometimes, when we wish to bolt one quantity which we have under the hopper-boy, without bolting that which we are grinding, and yet to spread that which we are grinding to dry and cool, laying round the hopper-boy, convenient to be shoveled under it, as soon as we wish to bolt it.

Fig. 15. The form of the pivot for the bottom of the upright shaft.

14. The plate put on the bottom of the shaft to rest on the shoulder of the pivot; this plate is to prevent the arm from descending so low as to touch the floor.

Plate vii., Fig. 25, represents a hopper-boy attending two bolts in a mill, with all the improvements complete.

Plate ix. The hopper-boy is shown over QQ, Fig. 4 is the arm turned upside down, to show the flights and sweepers.

NO. IV.—THE DRILL.

Plate vi., Fig. 1. HG represents a drill conveying grain from the different garners to the elevator, in a mill for grinding parcels for toll or pay.

Plate vii., Fig. 16. Bd, a drill, conveying meal from the stones in a grist-mill to the elevator.

The strap of this machine may be made broad, and the substance to be moved may be dropped on its upper surface, to be carried and dropped over the pulley at the other end; in this case it requires one bucket, like those of the elevator, to bring up any that may spill off the strap.

For full and complete directions for proportioning all the parts, constructing, and using the above-described machines, see the book which I have published for that express purpose, entitled, "The Young Millwright and Miller's Guide." See plate viii., representing a mill, with three pair of millstones, with all the improvements complete, except the kiln-drier.

NO. V.—THE KILN-DRIER.

Plate ix., Fig. 2. A, the stove, which may be constructed simply of six plates, and inclosed by a brick wall lined with a mortar composed of pulverized charcoal and clay. B, the pipe for carrying off the smoke. CC, the air-pipes, connecting the space between the stove and wall with the conveyor. DD, the pipes for the heated air to escape.

The air is admitted at the air-hole below, regulated by a register as experience shall teach to be best, so as not to destroy the principle which causes the flour to ferment easily, and rise in the process of baking. The conveyors must be covered close; the meal admitted by small holes as it falls from the millstones. OLIVER EVANS.

Witness, } Sam'l H. Smith,
 } Jo. Galee, Jr.

I.—THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas Oliver Evans, of the city of Philadelphia, a citizen of the United States, hath alleged that he hath invented a new and useful improvement in the art of manufacturing flour and meal, by means of certain machines, which he terms an improved elevator, an improved conveyor, an improved hopper-boy, an improved drill, and an improved kiln-drier; which machines are moved by the same power that moves the mill or other principal machinery, and in their operation subdivide any granulated or pulverized substance, elevate and carry the same from place to place in small and separate parcels, spread, stir, turn and gather them by regular and constant mo-

tion, so as to subject them to artificial heat, and the air to dry and cool when necessary; a more particular and full description in the words of the inventor is hereby annexed in a schedule; which improvement has not been known or used before his application—has affirmed that he does verily believe that he is the true inventor or discoverer of the said improvement, and, agreeably to the act of Congress entitled, "An act for the relief of Oliver Evans," which authorizes the Secretary of State to secure to him by patent the exclusive right to the use of such improvement in the art of manufacturing flour and meal, and in the several machines which he has discovered, improved and applied to that purpose; he has paid into the treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are therefore to grant, according to law, to the said Oliver Evans, his heirs, administrators, or assigns, for the term of fourteen years, from the twenty-second day of January, 1808, the full and exclusive right and liberty of making, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the schedule hereto annexed, and is made a part of these presents.

In testimony whereof, I have caused these Letters to be made Patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, this twenty-second day of January, in the year of our Lord one thousand eight hundred and eight, and of the independence of the United States of America, the thirty-second.

[SEAL.]

TH. JEFFERSON.
By the President,
JAMES MADISON, Secretary of State.

City of Washington, to wit:

I DO HEREBY CERTIFY, that the foregoing Letters Patent were delivered to me on the twenty-second day of January, in the year of our Lord one thousand eight hundred and eight, to be examined; that I have examined the same, and find them conformable to law. And I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on this twenty-second day of January, in the year aforesaid.

C. A. RODNEY,
Attorney-General of the United States.

THE SCHEDULE.

Referred to in these letters patent, and making part of the same, containing a description, in the words of the said Oliver Evans, of his improvements in the art of manufacturing flour and meal.

"My first principle is to elevate the meal as fast as it is ground in small separate parcels, in continued succession and rotation, to fall on the cooling floor, to spread, stir, turn and expose it to the action of the air, as much as possible, and to keep it in constant and continual motion, from the time it is ground until it be bolted; this I do to give the air full action, to extract the superfluous moisture from the meal, while the heat, generated by the friction of grinding, will repel and throw it off, and the more effectually dry and cool the meal fit for bolting in the course of the operation, and save time and expense to the miller. Also to avoid all danger from fermentation by its laying warm in large quantities as is usual; and to prevent insects from depositing their eggs, which may breed the worms often found in good flour. And further to complete this principle so as to dry the meal more effectually, and to cause the flour to keep sweet a

1814, and saw a hopper-boy there, on the principles and construction of the plaintiff's hopper-boy. This witness had heard that a 463*) right was obtained under Pennsylvania, but did not know of any rights under Pennsylvania sold by the plaintiff; and did not know that it was erected in any mill after the patent under Pennsylvania. The defendant's 464*) hopper-boy had an upright shaft, with a leading arm, in the first place, and a large 465*) arm inserted with flights, and leading lines, and sweepers; a little board, for the pur-

pose of sweeping the meal in the *bolt- [*466 ing hoppers, and spreading it over the floor; a balance weight, to cause the arms to play up and down lightly over the meal. The leading arms were about 5 *feet long, and [*467 seemed to be in proportion, the arm about 14, and the length of the sweep about 9 inches. *And the defendant, having previously [*468 given the plaintiff written notice, that upon the trial of the *cause, the defendant would [*469 give in evidence, under the general issue, the following special matter, to *wit: "1st. [*470

longer space of time, I mean to increase the heat of the meal as it falls ground from the millstones, by application of heated air, that is to say, to kiln-dry the meal as it is ground, instead of kiln-drying the grain as usual. The flour will be fairer and better than if made from kiln-dried grain, the skin of which is made so brittle that it pulverizes and mixes with the flour. This principle I apply by various machines which I have invented, constructed, and adapted to the purposes hereafter specified, numbered 1, 2, 3, 4, 5.

My second principle is to apply the power that moves the mill or other principal machine to work my machinery, and by them to perform various operations which have always heretofore been performed by manual force, and thus greatly to lessen the expense and labor of attending mills and other works.

The application of those principles, including that of kiln-drying the meal, during the process of the manufacture, or otherwise to the improvement of the process of manufacturing flour, and for other purposes, is what I claim as my invention and improvement in the art, as not having been known or used before my discovery, knowing well that the principles once applied by one set of machinery, to produce the desired effect, others may be contrived and variously constructed, and adapted to produce like effects in the application of the principles, but perhaps none to produce the desired effect more completely than those which I have invented and adapted to the purposes, and which are hereinafter specified.

No. 1. THE ELEVATOR. Its use is to elevate any grain, granulated or pulverized substances. Its use in the manufacture of flour or meal is to elevate the meal from the millstones in small separate parcels, and to let it fall through the air on the cooling floor as fast as it is ground. It consists of an endless strap, rope or chain, with a number of small buckets attached thereto, set to revolve round two pulleys, one at the lowest, and the other at the highest point between which the substance is to be raised. These buckets fill as they turn under the lower, and empty themselves as they turn over the upper pulley. The whole is inclosed by cases or boards to prevent waste.

No. 2. THE CONVEYER. Its use is to convey any grain, granulated or pulverized substances, in a horizontal, ascending or descending direction. Its use in the process of the art of manufacturing flour, is to convey the meal from the millstones, as it is ground, to the elevator, to be raised, and to keep the meal in constant motion, exposing it to the action of the air; also in some cases to convey the meal from the elevator to the bolting hopper, and to cool and dry it fit for bolting, instead of the hopper-boy, No. 3; also to mix the flour after it is bolted; also to convey the grain from one machine to another, and in this operation to rub the impurities off the grain. It consists of an endless screw, set to revolve in a tube, or section of a tube, receiving the substance to be moved at one end, and delivering it at the other end; but for the purpose of conveying flour or meal, I construct it as follows: Instead of making it a continued spiral, which forms the endless screw, I set small boards, called flights, at an angle crossing the spiral line; these flights operate like so many ploughs following each other, moving the meal from one end of the tube to the other with a continued motion, turning and exposing it to the action of the air to be cooled and dried. Sometimes I set some of the flights to move broadside foremost, to lift the meal from one side to fall on the other, to expose it to the air more effectually.

No. 3. THE HOPPER-BOY. Its use is to spread any grain, granulated or pulverized substances,

over a floor or even surface, to stir it and expose it to the air to dry and cool it, when necessary, and at the same time to gather it from the circumference of the circle it describes, to or near the center, or to spread it from the center to the circumference, and leave it in the place where we wish it to be delivered, when sufficiently operated on. Its use in the process of manufacturing flour, is to spread the meal as fast as it falls from the elevator over the cooling floor, on the area of a circle of from eight to sixteen feet, more or less, in diameter, according to the work of the mill, to stir and turn it continually, and to expose it to the action of the air to be dried and cooled, and to gather it into the bolting hoppers, and to attend the same regularly. It consists of an upright shaft made round at the lower end, about two-thirds of its length, and set to revolve on a pivot in the centre of the cooling floor; through this shaft, say five feet from the floor, is put a piece called the leader, and the lower end of the shaft passes very loosely through a round hole in the centre of another piece called the arms, say from eight to sixteen feet in length; this last piece, revolving horizontally, describes the circle of the cooling floor, and is led round by a cord, the two ends of which are attached to the two ends of the arms, and passing through a hole at each end of the leader, so that the cord will receive to pull each end of the arms equally. The weight of the arms is nearly balanced by a weight hung to a cord, which is attached to the arms, and passes over a pulley near to the upper end of the upright shaft, to cause the arms to play lightly, pressing with only part of their weight on the meal that may be under it. The foremost edges of the arms are sloped upwards, to cause them to rise over and keep on the surface of the meal as the quantity increases; and if it be used separately and unconnected with the elevator, the meal may be thrown with shovels within its reach, while in motion, and it will spread it level, and rise over it until the heap be four feet high or more, which it will gather into the hoppers, always taking from the surface, after turning it to the air a great number of times. The under side of these arms are set with little inclining boards called flights, about four inches apart next the centre, and gradually closing to about two inches next the extremities, the flights of the one arm to track between those of the other, they operate like ploughs, and at every revolution of the machine they give the meal two turns towards the centre of the circle, near to which are generally the bolting hoppers. At each extremity of the arms there is a little board attached to the hindmost edge of the arm to move side foremost; these are called sweepers; their use is to receive the meal as it falls from the elevator, and trail it round the circle described by the arms, that the flights may gather it towards the centre from every part of the circle; without these, this machine would not spread the meal over the whole area of the circle described by the arms. Other sweepers are attached to that part of the arms which pass over the bolting hoppers, to sweep the meal into them.

But if the bolting hoppers be near a wall and not in the centre of the cooling floor, then in this case the extremity of the arms are made to pass over them, and the meal from the elevator let fall near the centre of the machine, and the flights are reversed to turn the meal from the centre towards the circumference, and the sweepers will sweep it into the hoppers. Thus this machine receives the meal as it falls from the elevator on the cooling floor, spreads it over the floor, turns it twice over at every revolution, stirs and keeps it in continual motion, and gathers it at the same operation into the bolting hoppers, and attends them regularly.

Wheat. 3.

That the improved hopper-boy, for which, *inter alia*, the plaintiff in his declaration alleges he 471*] has obtained a patent, was not originally discovered by the patentee, but had been in use anterior to the supposed discovery of the patentee, in sundry places, to wit, at the mill of George Fry and Jehu Hollingsworth, in Dauphin county, Pennsylvania; at Christian Stauffer's mill in Warwick township, Lancaster county, state of Pennsylvania; at Jacob Stauffer's mill in the same county; at Richard Downing's mill in Chester county, Pennsylvania; at Buffington's mill on the Brandywine; at Daniel Huston's mill in Lancaster county, Pennsylvania; at Henry Stauffer's mill in York county, Pennsylvania; and at Dihl's mill in the same county, or at some of the said places, and also at sundry other places in the said state of Pennsylvania, the state of Maryland, and 472*] elsewhere in the United States. 2d. That the patent given to the plaintiff, as he alleges in his declaration, is more extensive than

his discovery or invention, for that certain parts of the machine in said patent, called an improved hopper-boy, and which the plaintiff claims as his invention and discovery, to wit, the upright shaft, arms, and flights, and sweeps, or some of them, and those parts by which the meal is spread, turned and gathered at one operation, and also several other parts, were not originally invented and discovered by him, but were in use prior to his said supposed invention or discovery, to wit, at the places above mentioned, or some of them. 3d. That the said patent is also more extensive than the plaintiff's invention or discovery; for that the application of the power that moves the mill or other principal machine to the hopper-boy is not an original invention or discovery of the plaintiff, but was in use anterior to his said supposed invention or discovery, to wit, at the places above mentioned, or some of them. 4th. That the said patent is void, because it purports to give him an exclusive property in an improvement in

If the bolting reels are stopped, this machine spreads the meal and rises over it, receiving under it from one, two, to three hundred bushels of meal, until the bolts are set in motion again, when it gathers the meal into the hoppers, and as the heap diminishes, it follows it down until all is bolted. I claim as my invention the peculiar properties or principles which this machine possesses, viz. the spreading, turning and gathering the meal at one operation, and the rising and lowering of its arms by its motion, to accommodate itself to any quantity of meal it has to operate on.

NO. 4. THE DRILL. Its use is to move any grain, granulated or pulverized substance, from one place to another: it consists, like the elevator, of an endless strap, rope or chain, &c., with little rakes instead of buckets (the whole cased with boards to prevent waste) revolving round two pulleys or rollers. Its use in the process of the manufacture of flour, is to draw or rake the grain or meal from one part of the mill to another. It receives it at one pulley, and delivers it at the other, in a horizontal, ascending or descending direction, and in some cases may be more conveniently applied for that purpose than the conveyor. I claim the exclusive right to the principles, and to all the machines above specified, and for all the uses and purposes specified, as not having been heretofore known or used before I discovered them. They may all be united and combined in one flour mill, to produce my improvement on the art of manufacturing flour complete, or they may each be used separately for any of the purposes specified and allotted to them, or to produce my improvement in part according to the circumstance of the case.

NO. 5. THE KILN-DRYER. To kiln-dry the meal after it is ground, and during the operation of the process of manufacturing flour, I take a close stove of any common form, and inclose it with a wall made of the best non-conductor of heat, leaving a small space between the stove and the wall, to admit air to be heated in its passage through this space. I set this stove below the conveyor that conveys the meal from the millstones as ground into the elevator, and I connect the space between the stove and the wall to the conveyor tube by a pipe entering near the elevator, and I cover the conveyor close, and set a tube to rise from the end of the conveyor tube near the millstones, for the heated air to ascend and escape as up a chimney. I make fire in the stove, and admit air at the bottom of the space between it and the wall round it, to be heated and pass along the conveyor tube, meeting the meal which will be heated by the hot air, and the superfluous moisture will be more powerfully repelled and thrown off, and the meal will be dried and cooled as it passes through the operation of the elevator and hopper-boy. The flour will be fairer than if the grain had been kiln-dried, and it will keep longer sweet than flour not kiln-dried. I set all my machines in motion by the common means of cog and round tooth, and pinion straps, ropes, or chains, well known to every millwright.

Arrangement and connection of the several machines. Wheat. 8.

chines, so as to apply my principles to produce my improvements complete.

I fix a spout through the wall of the mill for the grain to be emptied into from the wagoner's bag, to run into a box hung at the end of a scale-beam to weigh a wagon load at a draught. From this box it descends into the grain elevator, which raises it to a granary over the cleaning machines, and as it passes through them, it may be directed into the same elevator to ascend to be cleaned a second time, and then descends into a granary, over the hopper of the millstones to supply them regularly, and as ground it falls from the several pair of millstones into the conveyers, where it is dried by the heated air of the kiln-drier, and is conveyed into the meal elevator, to be raised and dropped on the cooling floor, within reach of the hopper-boy, which receives and spreads it over the whole area of the circle which it describes, stirring and turning it continually, and gathering it into the bolting hoppers which it attends regularly. That part of the flour which is not sufficiently bolted by the first operation, is conveyed by a conveyor or drill, into the elevator, to ascend with the meal to be bolted over again, and that part of the meal which has not been sufficiently ground at the first operation, is conveyed by a conveyor or drill, and let run into the eye of the millstone to be ground over.

Thus the whole of the operations which are used to be performed by manual labor, is, from the time the wheat is emptied from the wagoner's bag, or from the ship's measure, until it enters the bolts, and the manufacture be completed in the most perfect manner, performed by the machinery moved by the power which moves the mill, and this machinery keeps the meal in constant motion during the whole process, drying and cooling it more completely, avoiding all danger from fermentation, and preventing insects from depositing their eggs, and performing all the operations of grinding and bolting to much greater perfection, making the greatest possible quantity of the best quality of flour out of the grain, saving much time and labor and expense to the miller, and preventing much from being wasted by the motion of the machines being so slow as to cause none of the flour to rise in form of dust, and be carried away by the air, and the cases of the machines being made close, prevents any from being lost."

OLIVER EVANS.

Witnesses } Samuel H. Smith,
 } Jo. Gales, Jr.

Washington County, District of Columbia, viz.:

THIS 4th day of November, 1807, personally appeared before me, a justice of the peace in and for said county, Oliver Evans, who, being duly affirmed according to law, declares that he is a citizen of the United States, and that his usual place of residence is in the city of Philadelphia, and that he verily believes that he is the true and original inventor of the improvements herein above specified, for which he solicits a patent.

OLIVER EVANS.

Affirmed before me,
SAM. H. SMITH.

the art of manufacturing meal, by means of a certain machine, termed an improved hopper-boy, of which the said plaintiff is not the original inventor or discoverer; parts of the machine in the description thereof referred to by the patent having been in use anterior to the plaintiff's said supposed discovery, to wit, at the places above mentioned, or some of them; and the said patent and description therein referred to contains no statement, specifications, 473* or description, *by which those parts, so used as aforesaid, may be distinguished from those of which the said plaintiff may have been the inventor, or discoverer, protesting at the same time that he has not been the inventor or discoverer of any of the parts of the said machine. 5th. That the improved elevator, described in the declaration, or referred to therein, was not originally discovered by the plaintiff, but was anterior to his said supposed discovery or invention, described in certain public works, or books, to wit, in Shaw's Travels; in the first volume of the Universal History; in the first volume of Mormer's Husbandry; in Ferguson's Mechanics; in Bossuet's Histoire des Mathematiques; in Wolf's Cours des Mathematiques; in Desagulier's Experimental Philosophy, and in Pronoy's Architecture Hydraulique, or some of them. 6th. That the said patent is more extensive than the invention or discovery of the plaintiff, because certain parts of the machine called an improved elevator, were anterior to the plaintiff's said supposed invention or discovery, described in certain public works, or books, to wit, the works or books above mentioned, or some of them; and that the said patent is void, because it neither contains or refers to any specification or description by which the parts so before described in the said public works may be distinguished from those parts of which the plaintiff may be the inventor or discoverer, protesting, at the same time, that he has not been the inventor or discoverer of any of the parts of the said machine;" gave in evidence the existence of hopper-boys prior to the plaintiff's alleged discovery at sundry mills in the 474* state of Pennsylvania, *mentioned in the said notice; and further offered to give in evidence the existence of hopper-boys prior to the plaintiff's alleged discovery, at sundry other mills in the state of Pennsylvania, not mentioned in the said notice; and the counsel for the plaintiff objected to the admission of any evidence of the existence of hopper-boys in the said mills not mentioned in the said notice. But the court decided that such evidence was competent and legal. To which decision the counsel for the plaintiff excepted. The plaintiff, after the above evidence had been laid before the jury, offered further to give in evidence, that certain of the persons mentioned in the defendant's notice, as having hopper-boys in their mills, and also certain of the persons not mentioned in the said notice, but of whom it had been shown by the defendant that they had hopper-boys in their mills, had, since the plaintiff's patent, paid the plaintiff for license to use his improved hopper-boy in the said mills respectively. But the counsel for the defendant objected to such evidence as incompetent and illegal, and the court refused to permit the same to be laid before the jury. To which decision the plaintiff's counsel excepted.

The court below charged the jury, that the patent contained no grant of a right to the several machines, but was confined to the improvement in the art of manufacturing flour by means of those machines; and that the plaintiff's claim must, therefore, be confined to the right granted, such as it was. That it had been contended that the schedule was part of the patent, and contained a claim to the invention of the peculiar properties and principles of the hopper-boy, as *well as the [475 other machines. But the court was of opinion, that the schedule is to be considered as part of the patent, so far as it is descriptive of the machines, but no farther; and even if this claim had been contained in the body of the patent, it would have conferred no right which was not granted by that instrument.

The court further proceeded to instruct the jury that the law authorized the President to grant a patent, for the exclusive right to make, construct, use, and vend to be used, any new and useful art, machine, manufacture, or composition of matter or any new and useful improvement in any art, machine, &c., not known or used before the application. As to what constitutes an improvement, it is declared that it must be in the principle of the machine, and that a mere change in the form or proportions of any machine shall not be deemed a discovery. Previously to obtaining the patent, the applicant is required to swear, or affirm, that he verily believes that he is the true inventor or discoverer of the art, machine, or improvement, for which he solicits a patent; and he must also deliver a written description of his invention, and of the manner of using it, so clearly and exactly as to distinguish the same from all other things before known, and to enable others, skilled in the art, to construct and use the same. That from this short analysis of the law, the following rules might be deduced: 1st. That a patent may be for a new and useful art; but it must be practical; it must be applicable and referable to something by which it may be proved to be useful; a mere abstract principle cannot be appropriated by patent. 2d. The discovery must not only be useful, but new; it must not have been *known or [476 used before in any part of the world. It was contended by the plaintiff's counsel, that the title of the patentee cannot be impeached, unless it be shown that he knew of a prior discovery of the same art, machine, &c.; and that true and original are synonymous terms in the intention of the legislature. But, as it was not pretended that those terms meant the same thing in common parlance, neither was it the intention of the legislature to use them as such. The first section of the law, referring to the allegations of the application for a patent, speaks of the discovery as something "not known or used before the application;" and in the 6th section it is declared, that the defendant may give in evidence that the thing secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery. 3d. If the discovery be of an improvement only, it must be an improvement in the principle of a machine, art, or manufacture, before known or used; if only in the form or proportion, it has not the merit of a discov-

ery which can entitle the party to a patent. 4th. The grant can only be for the discovery as recited and described in the patent and specification. If the grantee is not the original discoverer of the art, machine, &c., for which the grant is made, the whole is void. Consequently, if the patent be for the whole of the machine, and the discovery were of an improvement, the patent is void. 5th. A machine, or an improvement, may be new, and the proper subject of a patent, though the parts of it were before known and in use. The combination, therefore, of old machines, to produce 477*] a new *and useful result, is a discovery for which a patent may be granted.

The above principles would apply to most of the questions that had been discussed. It was strongly insisted upon by the defendant's counsel, that this patent is broader than the discovery; the evidence proving, that in relation to the hopper-boy, for the using of which this suit is brought, the plaintiff can pretend to no discovery beyond that of an improvement in a machine known and used before the alleged discovery of the plaintiff. This argument proceeded upon the supposition that the plaintiff had obtained a patent for the hopper-boy which was entirely a mistake. The patent was "for an improvement in the art of manufacturing flour," by means of a hopper-boy and four other machines described in the specification, and not for either of the machines so combined and used. That the plaintiff is the original discoverer of this improvement, was contested by no person, and, therefore, it could not with truth be alleged that the patent is broader than the discovery, or that the plaintiff could not support an action on this patent against any person who should use the whole discovery.

But could he recover against a person who had made or used one of the machines, which in part constitute the discovery? The plaintiff insisted that he could, because, having a right to the whole, he is necessarily entitled to the parts of which that whole is composed. Would it be seriously contended that a person might acquire a right to the exclusive use of a machine, because when used in combination with others, a new and useful result is produced, which he could not have acquired independent 478*] of that combination? *If he could, then if A were proved to be the original inventor of the hopper-boy B of the elevator, and so on, as to the other machines, and either had obtained patents for their respective discoveries, or choose to abandon them to the public, the plaintiff, although it was obvious he could not have obtained separate patents for those machines, might, nevertheless, deprive the original inventors, in the first instance, and the public, in the latter, of their acknowledged right to use those discoveries, by obtaining a patent for an improvement consisting in a combination of those machines to produce a new result.

The court further charged the jury, that it was not quite clear that this action could be maintained, although it was proved beyond all controversy that the plaintiff was the original inventor of this machine. The patent was the foundation of the action, and the gist of the action was the violation of a right which that

instrument had conferred. But the exclusive right of the hopper-boy was not granted by this patent, although this particular machine constitutes a part of the improvement of which the plaintiff is the original inventor, and it is for this improvement, and this only, that the grant is made. If the grant, then, was not of this particular machine, could it be sufficient for the plaintiff to prove in this action that he was the original inventor of it?

Again, could the plaintiff have obtained a separate patent for the hopper-boy, in case he were the original inventor of it, without first swearing, or affirming, that he was the true inventor of the machine? Certainly not. Has the plaintiff then taken, or could he have taken, such an oath in this case? Most assuredly he could not; because the prescribed form of the oath *is, that he is the inventor of the [479 art, machine, or manufacture, for which he solicits a patent. But since the patent which he solicited was not for the hopper-boy, but for an improvement in the manufacture of flour, he might, with safety, have taken the oath prescribed by law, although he knew at the time that he was not the true inventor of the hopper-boy; and thus it would happen that he could indirectly obtain the benefit of a patent right to the particular machine, which he could not directly have obtained, without doing what it must be admitted, in this case, he had not done.

But this was not all. If the law had provided for fair and original discoverers a remedy when their rights are invaded by others, it had likewise provided corresponding protection to others, where he has not the merit. What judgment could the District Court have rendered upon a *scire facias* to repeal this patent, if it had appeared that the plaintiff was not the true and original inventor of the hopper-boy? Certainly not that which the law has prescribed, viz., the repeal of the patent; because it would be monstrous to vacate the whole patent, for an invention of which the patentee was the acknowledged inventor, because he was not the inventor of one of the constituent parts of the invention, for which no grant is made. But the court would have no alternative but to give such a judgment, or, in effect, to dismiss the *scire facias*; and if the latter, then the plaintiff would have beneficially the exclusive right to a machine, which could not be impeached in the way prescribed by law, although it should be demonstrated that he was not either the true or the original inventor of it. And *supposing the [480 jury should be of opinion, and so find, that the plaintiff was not the original inventor of this machine, would not the court be prevented from declaring the patent void, under the provisions of the 6th section of the law, for the reason assigned why the District Court could not render judgment upon a *scire facias*? Indeed it might well be doubted whether the defence now made by the defendant could be supported at all in this action (if this action could be maintained), inasmuch as the defendant cannot allege, in the words of the 6th section, that the thing secured by patent was not originally discovered by the patentee, since, in point of fact, the thing patented was originally discovered by the patentee, although the hop-

per-boy may not have been so discovered. But if this defence could not be made, did not that circumstance afford a strong argument against this action? If the plaintiff was not the inventor of the parts, he had no right to complain that they were used by others, if not in a way to infringe his right to their combined effect. If he was the original inventor of the parts which constitute the whole discovery, or any of them, he might have obtained a separate patent for each machine of which he was the original inventor.

Upon the whole, although the court gave no positive opinion upon this question, they stated that it was not to be concluded that this action could be supported, even if it were proved that the plaintiff was the original inventor of the hopper-boy. But if an action would lie upon this patent for the violation of the plaintiff's right to the hopper-boy, still the plaintiff could not recover, if it had been shown to the satisfaction of the jury, that he was not the original discoverer of that machine.

It appeared, by the testimony of the defendant's witnesses, that Stauffer's hopper-boy was in use many years before the alleged discovery of the plaintiff; that the two machines differed from each other very little in form, in principle, or in effect. They were both worked by the same power which works the mill; and they both stir, mix, cool, dry, and conduct the flour to the bolting chest. Whether the flights and sweepers in the plaintiff's hopper-boy were preferable to the slips attached to the under part of the arm in Stauffer's; or whether, upon the whole, the former is a more perfect agent in the manufacture of flour than the latter, were questions which the court would not undertake to decide; because, unless the plaintiff was the original inventor of the hopper-boy, although he had obtained a separate patent for it, he could not recover in this action, however useful the improvement might be, which he had made in that machine. If the plaintiff had obtained a patent for his hopper-boy, it would have been void, provided the jury should be of opinion, upon the evidence, that his discovery did not extend to the whole machine, but merely to an improvement on the principle of an old one, and if this should be their opinion in the present case, the plaintiff could not recover.

It had been contended by the plaintiff's counsel, that the defendant, having offered to take a license from the plaintiff, if he would consent to reduce the price of it to \$40, he was not at liberty to deny that the plaintiff is the original inventor of this machine. This argument had no weight in it, not merely because the offer was rejected by the plaintiff's agent, and was, therefore, as if it had not been made, but because the law prevents the plaintiff from recovering, if it appear on the trial that he was not the original inventor. If the offer amounted to an acknowledgment that the plaintiff was the original inventor (and further it could not go), this might be used as evidence of that fact, but it would not entitle the plaintiff to a verdict, if the fact proved to be otherwise.

The plaintiff's counsel had also strongly insisted, that under the equity of the tenth section of the law, the defense set up in this case ought not to be allowed after three years from

the date of the patent. This argument might, perhaps, with some propriety, be addressed to the legislature, but was improperly urged to the court. The law had declared, that in an action of this kind, the defendant may plead the general issue, and give in evidence that the plaintiff was not the original inventor of the machine for which the patent was granted. The legislature has not thought proper to limit this defense in any manner; and the court could not do it.

But what seemed to be conclusive of this point was, that the argument would tend to defeat altogether the provision of the sixth section, which authorizes this defense to be made; for, if it could not be set up after three years from the date of the patent, it would be in the power of the patentee to avoid it altogether, by forbearing to bring suits until after the expiration of that period. And thus, although the law has carefully provided two modes of vacating a patent improvidently granted, the patentee, though not the original inventor, and, however surreptitiously he may have obtained his patent, may secure his title to the exclusive use of another's invention, if he can for three years avoid an inquiry into the validity of his title.

The last point was, that Stauffer's invention was abandoned, and, consequently, might be appropriated by the plaintiff. But if Stauffer was the original inventor of the hopper-boy, and chose not to take a patent for it, it became public property by his abandonment; nor could any other person obtain a patent for it, because no other person would be the original inventor.

To this charge the plaintiff's counsel excepted.

Mr. C. J. Ingersoll, for the plaintiff, premised, that this patent granted an exclusive right for fourteen years in the improvement in the art, by means of the five machines, and for the several machines; the peculiar properties of each in its practical results, and the improvement of the art by the combination of the whole. The proof of this position is, that the defendant uses the precise machine, copied from the plaintiff's publication, and offered to pay for it; but they differed in price, which led to the contesting the originality of the plaintiff's invention.

1. It is said, in the charge of the court below, that the action is founded on the patent, which contains no grant of a right to the several machines, but is confined to the improvement in the art, by means of those machines. The patent is to be made out in the manner and form prescribed by the general act. What are that manner and form? By reciting the allegations and suggestions of the petition, giving a short description of the invention, or discovery, and thereupon granting an exclusive right in the said invention or discovery. The manner and form of these letters patent are a recital of, 1st. The citizenship of the patentee. 2d. The allegations and suggestions of the petition, as to both the improvement and the machines in a short description, referring to the annexed schedule for one more full and particular in the inventor's own words. 3d. That he has petitioned agreeably to the special act. 4th. A grant of the said improvement. The description must be short and referential.

Wheat. &

It must be a description. By the first section of the act of the 10th of April, 1790, ch. 34, it was to be described clearly, truly, and fully; perhaps because the board, constituted by that law, was to decide whether they deemed the discovery or invention sufficiently useful or important for letters patent. The patent, by express reference, adopts the special act *in extenso*. The connecting terms *which* and *said*, bind the whole to the granting clause; the allegations and suggestions recited are part of the grant; the machines are the means of every end, particular as well as general; nor can there be any practical result without them. To confine such a patent to one general result from a combination of the whole machines, nullifies it. It is never so in practice, and would operate infinite injustice in other cases. 2. But the schedule is **485*** part of the patent in all cases; *in this case it is especially so. By the act of 1790, ch. 34, s. 6, the patent or specifications are *prima facie* proof of everything which it is incumbent on the plaintiff to establish; and by the existing law, the specification is considered as explanatory of the terms used in the patent, so as to limit or enlarge the grant.¹ But it is said in the grant, that the schedule annexed is made part of the patent. It is made so by the public agent to avoid trouble, litigation, and unnecessary recitals. The petition, schedule, and description, are all referred to, and incorporated with the patent. What does the law mean by a recital of allegations and suggestions? What more can a petitioner do than allege and suggest? He cannot shape or prescribe the manner and form of the grant. The charge denies that the schedule, at any rate, is more than descriptive of the machines, or that it would confer any right, even if claimed in the patent. But if no right would be conferred by insertion in the grant itself, what becomes of the argument which ascribes such potency to the grant? The charge says, the grant can only be for the discovery as recited and described in the patent and specification. The grant is not for the parts, because it is for the whole; not in their rudiments or elements; not for wheels, cogs, or weights, nor for wood, iron, or leather; but for the peculiar properties, the new and useful practical results from each machine, and the vast improvements from their combination in this art. The charge supposes it impossible to **486*** obtain a patent *for a hopper-boy, unless the plaintiff could swear that he invented that machine. But the oath is not a material, or at least, not an indispensable prerequisite.² 3. The special act for the relief of the plaintiff, decides him to be the inventor of the machines and improvements for which he has obtained a patent. By the constitution, art. 1, s. 8, Congress have power to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. This has been done by Congress in the instance of the plaintiff. The special act is an absolute grant to him, binding on all the community, and precluding any inquiry into the originality of the invention. It includes a monopoly in his invention, discovery, and improvements

in the art, and in the several machines discovered, invented, improved, and applied, for that purpose. The patent is to issue on a simple application in writing by the plaintiff, without any prerequisites of citizenship, oath, fee, or petition, specification and description to be filed. The act of 1793, ch. 156, requires all these, and then grants a patent for invention or discovery; whereas this grant is for that, and for improvements in the art, and in the several machines. It is a remedial act, and should receive a liberal construction to effectuate the intentions of the legislature.³ The patent is as broad as the law, if the grant be governed by the recital. Its construction is to be against the grantor, and according to the intent; nor is it *to be avoided by subtle distinctions; [**487** if there are two interpretations, the sensible one is to be adopted.⁴ 4. The improved hopper-boy of the plaintiff is the only new and useful discovery which was in evidence in the case; the court misconstrued the law in their charge in this respect, inasmuch as the true construction of it is not that the patentee shall be the first and original discoverer of a patentable thing, but "the true inventor" of such a thing; that such a thing was truly discovered and patented without knowledge of its prior use, or public employment, or existence; more especially where, as in the present instance, the controversy is not between conflicting patents, but between the true patentee of a new and useful patentable thing, and a person defending himself against an infringement, on the plea of its prior use by third persons who had no patent, and whose discovery, even if proved, was of a thing never in use or public existence, but in total disuse. The stat. 21 Jac. I., ch. 3, s. 6, an. 1623 grants the monopoly "of the sole working or making of any manner of new manufactures, within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such grant, shall not use," &c. It is contended, under our law, that the utility is to be ascertained as well as the originality; and that this, as well as that, is partly a question for the jury. The thing patentable must be useful, as well as new. The useful thing patented prevails over one, not useful nor patented, though in *previous partial existence. This is [**488** not the case of conflicting patentees; and to destroy this patent, the previous use must appear, there being no pretense of description in a public work. The title of the act is "for the promotion of the useful arts." The first section speaks of "any new and useful arts," not known or used, &c. The sixth, of that which "had been in use, or described in some public work anterior to the supposed discovery." What degree of use does the law exact? A use known or described in a public work. Not merely an experimental, or essaying; nor a clandestine, nor obscure use. It must be useful, and in use, perhaps in known, if not public use; something equivalent to filing a specification on record. Now, here utility was lost sight of in search of novelty. It seemed to be taken for granted, that proving the pre-exist-

1.—Whittemore v. Cutter, 1 Gallis. 437.

2.—Whittemore v. Cutter, 1 Gallis. 438.

Wheat. S.

3.—Whittemore v. Cutter, 1 Gallis. 430.

4.—Jenk. Cent. 138; Eystor v. Studd, Plowd. 467; The U. S. v. Fisher, 2 Cranch, 386, 399.

ence of an unpatented hopper-boy defeated the plaintiff's patent. The desuetude of the rival hopper-boy from inutility was established. The question was between a new and useful patented machine, and an useless and obsolete one never patented; and which, not being useful, never could be patented. But that the patentee's is useful nobody questions. At all events, the question of fact, whether in use, should have been left to the jury. The jury are substituted for the board, which, under the first law, was to decide whether the supposed invention was "sufficiently useful and important" for a patent. The court below suppose Stauffer to have given his discovery to the public. But it fell into disuse; there was nothing to give. Stauffer did not know its **489** value; if he ^{had} abandoned a field with unknown treasure in the ground, could he afterwards claim the treasure? ¹ 5. The defendant's testimony of the use of hopper-boys in mills, not specified in his notice, was erroneously admitted. The object of the provision in the 6th section of the patent law of 1793, ch. 156, was to simplify the proceedings, and to enable the defendant to give in evidence under his notice, what he would otherwise be obliged to plead specially. The sufficiency of the notice is, therefore, to be tested by the rules of special pleading; which, though technical, are founded in good sense and natural justice, and are intended to put the adverse party on his guard as to what the other intends to rely upon in his defense. But such a notice as this could not answer that purpose. 6. The plaintiff's testimony of the payment for licenses to use his improved hopper-boy ought not to have been rejected. It ought to have been admitted as circumstantial evidence entitled to some weight.

Mr. Hopkinson and Mr. Sergeant, contra. 1. The admissibility of evidence of the use of the hopper-boy, anterior to the plaintiff's alleged invention, in mills not specifically mentioned in the notice, depends upon the construction that may be given to the 6th section of the act of the 21st of February, 1793, ch. 156, taken in connection with the notice. This section is substituted for the 6th section of the act of the 10th of April, 1790, ch. 34. The office of the section, **490** *in each of these acts, is twofold: 1st. To state what shall constitute a defense. 2d. To state the manner in which the defendant may avail himself of it. And whatever difficulties may exist (if any there be) in the construction of the section, arise from the combination of this twofold object. That this was the object of the section is perfectly obvious. The general issue would be a denial of the allegation contemplated by the 5th section of the act of 1793, and the 4th of the act of 1790. If the acts had stopped there, it is manifest that the defendant could have had no defense, but what was legally within the scope of the general issue. The 10th section would not have availed him, because, the limitation of time, and the grounds for repealing a patent upon a *scire facias*, are totally different from those which ought to constitute a defense to the action. The patent may be opposed, in an action, upon the ground that the patentee is not the original in-

ventor; but it can be repealed only upon the ground that he is not the true inventor. Fraud (proof that it was surreptitiously obtained) is the necessary basis in the one case, but error and mistake is equally available in the other. Neither could the defendant avail himself of the provisions in the prior part of the act. For, these are merely directory, and they terminate in the provision made by the 5th section, which would have been conclusive. The 6th section is, therefore, a proviso to the 5th. The 6th section of the act of 1790, made the patent *prima facie* evidence only, which would have opened the inquiry as to the truth of the invention. It appears, then, that the object of the proviso was, in the first place, ^{to settle} **491** what should constitute a defense. These matters would not have been within the scope of the general issue, by the rules of pleading. They would have presented the subject of a special plea in bar. The act, therefore, at the same time provides that they may be given in evidence under the general issue. The design, in this respect, was to save the necessity of special pleading on the one hand, and on the other, to give a reasonable notice. Does the law require the evidence to be set out? No. And yet, if surprise is to be fully guarded against, this ought certainly to be stated, in order that the plaintiff may prove that it is false, or proceeds from corrupt witnesses, &c. Is it then necessary that all the particulars should be given, the state, county, township, town, street, square, number of the house? The law does not require it. What certainty, then, is required in the notice? The answer is obtained by ascertaining the use and intention of the section, which were to save the necessity of special pleading. What, then, must be alleged in a special plea? Not the evidence or facts, but the matter of defense, which may be that the plaintiff was not the true inventor, but that the invention was before his supposed discovery. You must state what is the ground and essence of the defense, and nothing more; all else is surplage. *e. g.* That the plaintiff was not the true inventor of the hopper-boy, but the same was in use, prior to his supposed discovery, at the mill of A. Now, its being in use at the mill of A is not of the essence of the defense, for it is as good if used at the mill of B; the essence is, that it was used before. The defendant, ^{then}, would be entitled to **492** lay the place under a *videlicet*, and of course would not be obliged to prove it, but might prove any other. If, then, the law did not mean to increase the difficulty of the defendant, the same may be done in a notice. Consider the inconveniences of a contrary practice. A machine has been used in a foreign country; the country, town, and place, may be unknown. Shall I, therefore, be deprived of the benefit of my invention? Again, *it is known*, I am bound to give thirty days' notice before trial, and no more. *Cui bono*, that I should mention a town or place in England? The intention is, that the plaintiff shall come prepared to prove where his invention was made, and not to disprove the defendant's evidence; that he shall have notice of the kind of defense intended, in order that he may shape his case accordingly. If notice is given that the defendant will give in evidence, that the plaintiff's machine was used

1.—Grotius de J. B. ac P. l. 3, ch. 20, s. 28.

before his supposed discovery; this is notice of special matter, tending to prove that it was not invented by him. The law does not require a statement or description of the special matter, but notice that special matter will be given in evidence, tending to prove certain facts. There is no reciprocity in the contrary rule. The declaration is general; it does not specify the date of the invention, the place of the invention, nor the evidence or facts by which the originality and truth of the invention are to be proved. Yet these are all extremely important to the defendant, to enable him to prepare his defense. As to the breach, it is equally general; it does not state the time, except as a mere **493*** matter of form, by which ***the** plaintiff is not bound. It does not state the place, except by the very liberal description necessary for the venue, but which is not at all binding. And, finally, the rule contended for is impracticable, consistently with the purposes of justice; for it may, without any fault of the defendant, deprive him of the benefit of a perfectly good defense, upon a mere requisition of form, which he cannot possibly comply with. The notice states the use of the hopper-boy at a number of mills, specially described by the state, county, and name of the proprietor, "and at sundry other places in the said state of Pennsylvania, the state of Maryland, and elsewhere in the United States." It is not alleged, nor could it be, that the defendant had the knowledge that would have enabled him to extend the specification. Nor is it alleged that he could have acquired the knowledge by any exertion he might have made; on the contrary, the course he has taken is indicative of perfectly fair intention. The exception is, that the defendant was permitted to give evidence that the hopper-boy "had been used at sundry other mills in Pennsylvania," precisely in the words of the notice. To sustain this exception, then, the court must decide that this cannot in any case be done. But if it cannot be shown that in a single supposable case this would work injustice, and defeat the law, it is sufficient. Now, it is very clear that in many cases this may be precisely the state of the party's knowledge, and all he can obtain, and it may be precisely the state of the evidence. Suppose a witness should know that hopper-boys were used in sundry mills, but not their precise local **494*** situation, name of owner, &c. Or, suppose he should have seen a hopper-boy that bore the most evident marks of having been used in a mill, or mills. The effect of such evidence is quite another question; its competency and relevancy are for the court; its credibility, and the inferences of fact that are to be made from it, are for the jury. The same supposition would apply to its having been described in a public work. Is it necessary to give the title of the book, name of the author, and number of the edition? This may be impracticable. The defendant may have a witness who has seen the thing in use in a foreign country, and not be able to give a single particular; or who has seen it described in a foreign work, of which he can give no further account. Such evidence, if credited, would be entirely conclusive; and yet he could have no benefit of it, because he had not done what was impossible. But even if the witness knows all these particu-

Wheat. 3.

lars, the defendant has no means of compelling him to disclose them before the trial. The rules of pleading aim to establish a convenient certainty on the record, by giving the party notice of what is alleged, and furnishing evidence of what has been decided. In many instances, they fall short of this, their avowed design; in none do they go beyond it. For the purpose of preventing surprise, they are wholly ineffectual; they give no notice of particular facts, of evidence, of witnesses. The corrective of the evil, if evil there be, is to be found in the exercise of the general superintending authority of the court, applied to cases where there may really be surprise or fraud. So in this case, if there really had been surprise ***(fraud is [*495** out of the question), the court had the power to grant a new trial. This power is an amply sufficient corrective; and its existence affords a decisive answer to the argument drawn from the possible injustice that may be done. 2. The exception to the refusal to admit evidence of the payment for the use of licenses will be easily disposed of. The fact to be established on the one side, and disproved on the other, was, that the hopper-boy was in use before the alleged invention or discovery of Evans. The evidence offered had no bearing whatever upon the question of fact. If believed, it went no further than to show that those who had paid thought it best to pay; a decision that might be equally prudent, whether the fact was, or was not, as alleged. Such testimony would be more objectionable than the opinion of the witness; for it would be only presumptive proof of opinion, without the possibility of examining its grounds. As *opinion*, it would be inadmissible; as evidence of opinion, it would be still more objectionable. 3. The plaintiff's patent can only be considered in one of three points of view. 1st. As a patent for the improvement in the art of manufacturing flour; that is, for the combination. 2d. As a patent for the combination, and also for the several machines; that is, a joint and several patent. 3d. As a patent simply for the several machines. It is very clear that the patent itself is for the combination only; though it is equally clear that by the terms of the law he might have obtained a patent for the whole, and also for the several parts. That this is the necessary construction ***of the patent**, is plain from the patent **[*496** itself, taken in connection with the act of the 21st of January, 1808, ch. 117. The act authorizes a patent to be issued for his improvements in the art of manufacturing flour, and in the several machines, &c. The matters are plainly different. They are the subject of distinct patents, to be obtained in the "manner and form" prescribed by the act of 1793, ch. 156. The object of the special act was to put Evans upon the same footing as if his former patent had not been issued; but it did not mean to dispense with any of the requisites of the general law. With the general requisite (that he was inventor) it could not dispense; the constitution did not permit it. By the general law, improvement in an art, and improvement in a machine, are distinct patentable objects. This patent is only for the improvement in the art of manufacturing flour, and the recital of the special act, and the words "which" and "said" do not at all help it. It is true, it is an improve-

ment operated by means of the machines, but not exclusively. The result may be secured, without securing the means. This patent was granted to the plaintiff; was received by him; and must be presumed to be according to his application and his oath. The oath is, that he is the true inventor of the "improvements above specified;" which term is applied in the specification, as in the patent, only to the art. But it is said the specification is a part of the patent, and limits or enlarges it, as the case may be. Mr. Justice Story, in the case which has been cited, only says, that the specification **497*** "may control the generality of the patent." But the specification in the case now before the court does not claim the machines. If the patent was for a combination, the plaintiff's action was gone; he could not maintain it against a person using one of the machines. If the patent was for the combination, and also for the several machines, that is, a joint and several patent, then the patentee might proceed upon it as the one or the other, according to the nature of the alleged invasion. If he proceeded upon it for a breach of the right to the combination, he must show the originality of invention, and might be defeated by opposite proof. If for a breach of the right to any one of the machines, he might be defeated by showing that he was not the original inventor of the machine. So, if it be considered a several patent; that is, as if he had five distinct patents. But, in no conceivable case can he stand upon any but one of these three grounds, nor claim to have the benefit of a larger, or even of a different patent. 4. From this analysis, which is necessary to prevent confusion, we come to inquire into the nature of the case presented to the court for decision, and to which the charge was to be applied; premising, 1st. That no exception can be taken to what the court did not give in charge to the jury; and, 2d. That no exception can be taken to an opinion, however erroneous, that had no bearing upon the issue to be decided by the jury. It is apparent from the record that the action of the plaintiff was founded upon **498*** the alleged "use, by the defendant, of a machine called a hopper-boy, of which the plaintiff claimed to be the inventor; that the evidence on both sides applied to this allegation, and to this alone; the plaintiff claiming to be the inventor, and the defendant denying it. The charge of the court noticed the several arguments that had been used at the bar, and examined the general question as to the character of the patent; upon which, however, as it had not been discussed, no opinion was given. This is clear; for if an opinion had been expressed, it must have been that the action was not maintainable. Nothing short of that would have been material. But the court left the case to the jury, as of an action that was maintainable, and instructed them as to the principles by which it was to be decided; which negatives the conclusion of any opinion having been given, that the action was not maintainable. If the defendant had required the court to charge that the action was not maintainable, and they had charged that it was, or declined to charge at all, he would have had ground of exception. But the plaintiff cannot complain, because he

has what is equivalent to a decision in his favor. 5. The statute of James (21 Jac. I., c. 3), A. D. 1623, confined monopolies to the first and true inventors of manufactures not known or used before. One hundred and seventy years had elapsed when our act passed; commerce and the arts had made such advances, such facilities had been created for the diffusion of knowledge, that everything known by use, or described in books, might be considered as common property. It would have been strange to adopt a different *principle. The act of Con- **499** gress does not. It is a mistake to suppose there is in this respect any difference between the act of Congress and the act of Parliament. One says "useful" inventions, the other "new and useful;" but both have the expressions "not used or known before." A patent can only be upon an allegation that the applicant has invented something new and useful. Its novelty may certainly be questioned; perhaps its usefulness. But where the defense is, that the thing was known or used before, is it necessary to prove the usefulness of the thing so known or used? The act does not require it; nor is there any good reason why the patentee should be permitted to controvert it.

Mr. Harper, in reply, insisted, 1. That the court below had erred in admitting testimony of the use of the plaintiff's machine in mills not specified in the notice. The statute was not framed with a view to the benefit of the defendant alone. The notice to be given is not that vague, indistinct, general notice, which is set up on the other side. It must be an effectual, useful notice; such a notice as may put the patentee on his guard, and enable him to see what are the precise grounds of defense. It must be more specific than a mere transcript of the particular class of grounds of defense, such as suppression of parts, redundancy, &c. The circumstances of the time, the place when and where used, and by what persons, are essentially necessary in order to enable the patentee to meet the defense. The burden of proof is, in effect, thrown upon the patentee; and the law *intended that he **500** should meet it fairly. Such a notice as that given in this case would not be good, if put into the form of a special plea. The degree of certainty required in a plea, in the statement of the time and place when and where material facts have happened, is one of the most difficult questions of the law; but these circumstances must always be laid, and must be proved as laid, whenever it is essential to enable the other party to maintain his case. There is a distinction between the matter of defense and the evidence by which it is to be maintained. A notice of the particulars of the evidence is not required, but of the time and place where the former use of the machine in question occurred. Nor is this unreasonable; for it is highly improbable that anybody would be able to testify as to the minute particulars of an invention, without being able to remember in what work he had seen it described, or to state in what place and at what time he had seen it used. 2. The special act for the plaintiff's relief is a distinct, substantive, independent grant, declaring the plaintiff to be the original inventor, and as such, entitled to a patent. It contains

1.—Whittemore v. Cutter, 1 Gallis. 437.

no reference to the general patent law, nor does it reserve any right in others to contest the originality of his invention. The defendant, therefore, cannot say that the plaintiff is not the inventor, though he may deny that he has violated the plaintiff's rights as inventor. Congress is not confined by the constitution to any particular mode of determining the fact who are inventors or authors. It is true, a patent or copyright can only be granted to an inventor or author; but the originality of the **501*** invention *or authorship may be determined by Congress itself, upon such testimony as it deems sufficient; or by an administrative act, by the decision of some board or executive officer; or lastly, by a judicial investigation, according as the legislative will may prescribe either of these several modes. The act of Parliament, 15 Geo. III, for the relief of Watt & Boulton, the inventors of the improved steam-engine, and extending the term of their patent for twenty-five years, contained an express provision that every objection in law competent against the patent should be competent against the act, "to all intents and purposes, except so far as relates to the term thereby granted." The act of Congress for the relief of Oliver Evans contains no such provision. The conclusion, therefore, is, that the legislature meant to quiet him in his claim, after he had so long enjoyed it, and in consideration of his peculiar merits, and of his former patent having been vacated for informality. 3. The court below instructed the jury that the patent was not for any one machine, but for the combined effect of the whole; though they concluded by leaving it upon the prior use, still the intimation that the action could not be maintained, even though the prior use was not proved, did not leave the fact to the jury free from bias. Though not a positive direction to the jury to find for the defendant, it had the effect of a nonsuit. The wishes of the grantee, and the intention of the grantor, both extended as well to a patent for **502*** the several machines *as to a patent for the combined effect of the whole. The word "improvement," though in the singular number, extends not only to the plaintiff's improvement in the art of manufacturing flour, but to his improvement in the several machines by means of which the operations of the art are conducted. This was a patent for an improvement on the particular machine in question, and not for its original invention. In this respect it is like that of Watt & Boulton for their improvement on the steam-engine. 4. The prior use, which is to defeat a patent, ought to be a public use. The defense here set up, under the 6th section of the patent law of 1793, ch. 156, was, that the patentee was not the original discoverer, and that the thing had been in use, &c. But how else could it be shown that he was not the discoverer, but by showing that it had before been in public use? A mere secret furtive use would not disprove the fact of his being the original discoverer. If this were so, then the art of printing and gun-powder were not invented in Europe, because they had been before used in a sequestered corner of the globe, like China. But

there is a distinction between a first discovery and an original discovery. The art of printing was originally discovered in Germany, though it was first invented in China. So the plaintiff would not cease to be the original inventor of the hopper-boy, even if it had been proved that another similar machine had been before privately used in a single mill. It ought, therefore, to have been left to the jury to find for the plaintiff, if they believed that the use was a secret use.

*MARSHALL, *Ch. J.*, delivered the **[503]** opinion of the court:

In this case exceptions were taken in the Circuit Court, by the counsel for the plaintiff in error.

1st. To the opinion of the court, in admitting testimony offered by the defendant in that court.

2d. To its opinion in rejecting testimony offered by the plaintiff in that court.

3d. To the charge delivered by the judge to the jury.

Under the 6th section of the act for the promotion of useful arts, and to repeal the act heretofore made for that purpose, the defendant pleaded the general issue, and gave notice that he would prove at the trial, that the improved hopper-boy, for the use of which, without license, this suit was instituted, had been used previous to the alleged invention of the said Evans, in several places (which were specified in the notice), or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." Having given evidence as to some of the places specified in the notice, the defendant offered evidence as to some other places not specified. This evidence was objected to by the plaintiff, but admitted by the court; to which admission the plaintiff's counsel excepted.

The 6th section of the act appears to be drawn on the idea that the defendant would not be at liberty to contest the validity of the patent on the general issue. It therefore intends to relieve the defendant from the difficulties of pleading, when it allows him to give in *evidence matter which does not **[504]** affect the patent. But the notice is directed for the security of the plaintiff, and to protect him against that surprise to which he might be exposed, from an unfair use of this privilege. Reasoning merely on the words directing this notice, it might be difficult to define, with absolute precision, what it ought to include, and what it might omit. There are, however, circumstances in the act which may have some influence on this point. It has been already observed, that the notice is substituted for a special plea; it is further to be observed, that it is a substitute to which the defendant is not obliged to resort. The notice is to be given only when it is intended to offer the special matter in evidence on the general issue. The defendant is not obliged to pursue this course. He may still plead specially, and then the plea is the only notice which the plaintiff can claim. If, then, the defendant may give in evidence on a special plea the prior use of the machine at places not specified in his plea, it would seem to follow that he may give in evidence its

use at places not specified in his notice. It is not believed that a plea would be defective which did not state the mills in which the machinery alleged to be previously used was placed.

But there is still another view of this subject which deserves to be considered. The section which directs this notice, also directs that if the special matter stated in the section be proved, "judgment shall be rendered for the defendant, with costs, and the patent shall be declared void." The notice might be intended not only for the information of the plaintiff, **505** *] but for the purpose of spreading on the record the cause for which the patent was avoided. This object is accomplished by a notice which specifies the particular matter to be proved. The ordinary powers of the court are sufficient to prevent, and will, undoubtedly, be so exercised, as to prevent the patentee from being injured by the surprise.

This testimony having been admitted, the plaintiff offered to prove that the persons, of whose prior use of the improved hopper-boy the defendant had given testimony, had paid the plaintiff for licenses to use his improved hopper-boy in their mills since his patent. This testimony was rejected by the court, on the motion of the defendant, and to this opinion of the court, also, the plaintiff excepted.

The testimony offered by the plaintiff was entitled to very little weight, but ought not to have been absolutely rejected. Connected with other testimony, and under some circumstances, even the opinion of a party may be worth something. It is, therefore, in such a case as this, deemed more safe to permit it to go to the jury, subject, as all testimony is, to the animadversion of the court, than entirely to exclude it.

We come next to consider the charge delivered to the jury.

The errors alleged in this charge may be considered under two heads:

1st. In construing the patent to be solely for the general result produced by the combination of all the machinery, and not for the several improved machines, as well as for the general result.

2d. That the jury must find for the defendant, **506** *] ant, if they "should be of opinion that the hopper-boy was in use prior to the invention of the improvement thereon by Oliver Evans.

The construction of the patent must certainly depend on the words of the instrument. But where, as in this case, the words are ambiguous, there may be circumstances which ought to have great influence in expounding them. The intention of the parties, if that intention can be collected from sources which the principles of law permit us to explore, are entitled to great consideration. But before we proceed to this investigation, it may not be improper to notice the extent of the authority under which this grant was issued.

The authority of the executive to make this grant is derived from the general patent law, and from the act for the relief of Oliver Evans. On the general patent law alone, a doubt might well arise, whether improvements on different machines could regularly be comprehended in the same patent so as to give a right to the exclusive use of the several machines separately, as well as a right to the exclusive use of those machines in combination. And if such a patent

would be irregular, it would certainly furnish an argument of no inconsiderable weight against the construction. But the "act for the relief of Oliver Evans" entirely removes this doubt. That act authorizes the Secretary of State to issue a patent, granting to the said Oliver Evans the full and exclusive right, in his invention, discovery, and improvements in the art of manufacturing flour, and in the several machines *which he has invented, dis- **507** covered, improved, and applied to that purpose.

Of the authority, then, to make this patent co-extensive with the construction for which the plaintiff's counsel contends, there can be no doubt.

The next object of inquiry is, the intention of the parties, so far as it may be collected from sources to which it is allowable to resort.

The parties are the government, acting by its agents, and Oliver Evans.

The intention of the government may be collected from the "act for the relief of Oliver Evans." That act not only confers the authority to issue the grant, but expresses the intention of the legislature respecting its extent. It may fairly be inferred from it, that the legislature intended the patent to include both the general result and the particular improved machines, if such should be the wish of the applicant. That the executive officer intended to make the patent co-extensive with the application of Oliver Evans, and with the special act, is to be inferred from the reference to both in the patent itself. If, therefore, it shall be satisfactorily shown from his application to have been the intention of Oliver Evans to obtain a patent including both objects, that must be presumed to have been also the intention of the grantor.

The first evidence of the intention of Oliver Evans is furnished by the act for his relief. The fair presumption is, that it conforms to his wishes; at least, that it does not transcend them.

The second, is his petition to the Secretary of State, *which speaks of his having **508** discovered certain useful improvements, and prays a patent for them, "agreeable to the act of Congress, entitled, 'An act for the relief of Oliver Evans'." This application is for a patent co-extensive with the act.

This intention is further manifested by his specification. It is not to be denied that a part of this specification would indicate an intention to consider the combined operation of all his machinery as a single improvement, for which he solicited a patent. But the whole taken together, will not admit of this exposition. The several machines are described with that distinctness which would be used by a person intending to obtain a patent for each. In his number 4, which contains the specification of the drill, he asserts his claim, in terms, to the principles, and to all the machines he had specified, and adds, "they may all be united and combined in one flour-mill, to produce my improvement in the art of manufacturing flour complete, or they may be used separately for any of the purposes specified and allotted to them, or to produce my improvement in part, according to the circumstances of the case."

Being entitled by law to a patent for all and each of his discoveries; considering himself, as

Wheat. 3.

he avers in his specification and affirmation, as the inventor of each of these improvements; understanding, as he declares he did, that they might be used together so as to produce his improvement complete, or separately, so as to produce it in part; nothing can be more improbable than that Oliver Evans intended to obtain a patent solely for their combined operation. His affirmation, which is annexed to his specification, confirms this reasoning. To the declaration that he is the inventor of these improvements, he adds, "for which he solicits a patent."

With this conviction of the intention with which it was framed, the instrument is to be examined.

The patent begins with a recital, that Oliver Evans had alleged himself to be the inventor of a new and useful improvement in the art of manufacturing flour, &c., by the means of several machines, for a description of which reference is made to his specifications.

It will not be denied that if, the allegation of Oliver Evans was necessarily to be understood as conforming to this recital, if our knowledge of it was to be derived entirely from this source, the fair construction would be, that his application was singly for the exclusive right to that improvement which was produced by the combined operation of his machinery. But in constructing these terms, the court is not confined to their most obvious import. The allegation made by Oliver Evans, and here intended to be recited, is in his petition to the Secretary of State. That petition is embodied in, and becomes a part of the patent. It explains itself, and controls the words of reference to it. His allegation is not "that he has invented a new and useful improvement," but that he has discovered certain useful improvements. The words used by the department of state in reciting this allegation, must then be expounded by the allegation itself, which is made a part of the patent.

The recital proceeds, "which improvement has not been known," &c. These words refer clearly to the improvement first mentioned and alleged in the petition of Oliver Evans, and are of course to be controlled in like manner with the antecedent words, "by that petition." This part of the recital is concluded by adding, that Oliver Evans has affirmed, that he does verily believe himself to be the true inventor or discoverer of the said improvement.

But the affirmation of Oliver Evans, like his petition, is embodied in the grant, and must, of course, expound the recital of it. That affirmation is, that he does verily believe himself to be the true and original inventor of the improvements contained in his specification.

In every instance, then, in which the word *improvement* is used in the singular number throughout the part of the recital of this patent, it is used in reference to a paper contained in the body of the patent, which corrects the term, and shows it to be inaccurate.

The patent, still by way of recital, proceeds to add, "and agreeably to the act of Congress, entitled 'an act for the relief of Oliver Evans,' which authorizes the Secretary of State to secure to him, by patent, the exclusive right to the use of such *improvement* in the art of manufacturing flour and meal, and in the several machines

which he has discovered, improved, and applied to that purpose; he has paid into the treasury, &c., and presented a petition to the Secretary of State, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose."

*To what do the words "said improvement" relate? The answer which has been given at the bar is entirely correct. To the improvement mentioned in the statute and in the petition, to both of which direct reference is made. But in the statute, and in the petition, the word used is "improvements," in the plural. The patent, therefore, obviously affixed to the word *improvement*, in the singular, the same sense in which the plural is employed, both in the statute and in the petition. We are compelled from the whole context so to construe the word in every place in which it is used in the recital, because it is constantly employed with express reference to the act of Congress, or to some document embodied in the patent, in each of which the plural is used.

When, then, the words "said improvement" are used as a term of grant, they refer to the words of the recital, which have been already noticed, and must be construed in the same sense. This construction is rendered the more necessary by the subsequent words, which refer for a description of the improvement to the schedule. It also derives some weight from the words "according to law," which are annexed to the words of grant. These words can refer only to the general patent law, and to the "act for the relief of Oliver Evans." These acts, taken together, seem to require that the patent should conform to the specification, affirmation, and petition of the applicant.

It would seem as if the claim of Oliver Evans was rested at the Circuit Court, on the principle that a grant for an improvement, by the combined operation of all the machines, necessarily included a right to the distinct operation of each part, inasmuch as the whole comprehends all its parts. After very properly rejecting this idea, the judge appears to have considered the department of state, and the patentee, as having proceeded upon it in making out this patent. He supposed the intention to be, to convey the exclusive right in the parts as well as in the whole, by a grant of the whole; but as the means used are in law incompetent to produce the effect, he construed the grant according to his opinion of its legal operation.

There is great reason in this view of the case, and this court has not discarded it without hesitation. But as the grant, with the various documents which form a part of it, would be contradictory to itself; as these apparent contradictions are all reconciled by considering the word "improvement" to be in the plural instead of the singular number; as it is apparent that this construction gives to the grant its full effect, and that the opposite construction would essentially defeat it, this court has, after much consideration and doubt, determined to adopt it as the sound exposition of the instrument.

The second error alleged in the charge, is in directing the jury to find for the defendant, if they should be of opinion that the hopper-boy was in use prior to the improvement alleged to be made thereon by Oliver Evans.

This part of the charge seems to be founded on the opinion that if the patent is to be considered as a grant of the exclusive use of dis-513*] tinct improvements *it is a grant for the hopper-boy itself, and not for an improvement on the hopper-boy.

The counsel for the plaintiff contends, that this part of the charge is erroneous, because, by the "act for the relief of Oliver Evans," Congress has itself decided that he is the inventor of the machines for which he solicited a patent, and has not left that point open to judicial inquiry.

This court is not of that opinion. Without inquiring whether Congress, in the exercise of its power "secure for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries," may decide the fact that an individual is an author or inventor, the court can never presume Congress to have decided that question in a general act, the words of which do not render such a construction unavoidable. The words of this act do not require this construction. They do not grant to Oliver Evans the exclusive right to use certain specified machines; but the exclusive right to use his invention, discovery, and improvements; leaving the question of invention and improvement open to investigation, under the general patent law.

The plaintiff has also contended, that it is not necessary for the patentee to show himself to be the first inventor or discoverer. That the law is satisfied by his having invented a machine, although it may have been previously discovered by some other person.

Without a critical inquiry into the accuracy with which the term *invention* or *discovery* may be applied to any other than the first in-514*] ventor, the court *considers this question as completely decided by the 6th section of the general patent act. That declares, that if the thing was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee, judgment shall be rendered for the defendant, and the patent declared void.

Admitting the words "originally discovered" to be explained or limited by the subsequent words, still, if the thing had been in use, or had been described in a public work, anterior to the supposed discovery, the patent is void. It may be that the patentee had no knowledge of this previous use or previous description; still his patent is void; the law supposes he may have known it; and the charge of the judge, which must be taken as applicable to the testimony, goes no farther than the law.

The real inquiry is, does the patent of Oliver Evans comprehend more than he has discovered? If it is for the whole hopper-boy, the jury has found that this machine was in previous use. If it embraces only his improvement, then the verdict must be set aside.

The difficulties which embarrass this inquiry are not less than those which were involved in the first point. Ambiguities are still to be explained, and contradictions to be reconciled.

The patent itself, construed without reference to the schedule and other documents to which it refers, and which are incorporated in it, would be a grant of a single improvement; but

construed with those *documents, it has [*515 been determined to be a grant of the several improvements which he has made in the machines enumerated in his specification. But the grant is confined to improvements. There is no expression in it which extends to the whole of any one of the machines which are enumerated in his specification or petition. The difficulty grows out of the complexity and ambiguity of the specification and petition. His schedule states his first principle to be the operation of his machinery on the meal from its being ground until it is bolted. He adds "this principle I apply by various machines, which I have invented, constructed, and adapted to the purposes hereafter specified."

His second principle is the application of the power that moves the mill to his machinery.

The application of these principles, he says, to manufacturing flour, is what he claims as his invention or improvement in the art.

He asserts himself to be the inventor of the machines, and claims the application of these principles to the improvement of the process of manufacturing flour, and other purposes, as his invention and improvement in the art.

The schedule next proceeds to describe the different machines as improved, so as to include in the description the whole machine, without distinguishing his improvement from the machine as it existed previous thereto; and in his fourth number, he says, "I claim the exclusive right to the principles, and to all the machines above specified, and for all the uses and purposes specified, as not having been heretofore known or used before I discovered them."

*If the opinion of the court were to [*516 be formed on the schedule alone, it would be difficult to deny that the application of Oliver Evans extended to all the machines it describes. But the schedule is to be considered in connection with the other documents incorporated in the patent.

The affirmation which is annexed to it avers, that he is the inventor, not of the machines, but of the improvements herein above specified.

In his petition he states himself to have discovered certain useful improvements, applicable to the art of manufacturing flour, and prays a patent for the same; that is, for his improvements, agreeably to the act of Congress, entitled, "an act for the relief of Oliver Evans." After stating the principles as in his schedule, he adds, "the machinery consists of an improved elevator, an improved conveyor, an improved hopper-boy, an improved drill, and an improved kiln-drier."

Although, in his specification, he claims a right to the whole machine, in his petition he only asks a patent for the improvements in the machine. The distinction between a machine, and an improvement on a machine, or an improved machine, is too clear for them to be confounded with each other.

The act of Congress, agreeably to which Evans petitions for a patent, authorizes the Secretary of State to issue one, for his improvements in the art of manufacturing flour, "and in the several machines which he has invented, discovered, improved, and applied to that purpose."

*In conformity with this act, this [*517 Wheat. 3.

schedule, and this petition, the Secretary of State issues his patent, which, in its terms, embraces only improvements. Taking the whole together, the court is of opinion that the patent is to be constructed as a grant of the general result of the whole machinery, and of the improvement in each machine. Great doubt existed whether the words of the grant, which are expressed to be for an improvement or improvements only, should be understood as purporting to be a patent only for improvements; or should be so far controlled by the specification and petition as to be considered as a grant for the machine as improved, or in the words of the schedule and petition, for "an improved elevator, an improved conveyor, an improved hopper-boy, an improved drill, and an improved kiln-drier." The majority of the court came at length to the opinion that there is no substantial difference, as they are used in this grant, whether the words grant a patent for an improvement on a machine, or a patent for an improved machine; since the machine itself, without the improvement, would not be an improved machine. Although I did not concur in this opinion, I can perceive no inconvenience from the construction.

It is, then, the opinion of this court, that Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered.

518*] *In all cases where his claim is for an improvement on a machine, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

Some doubts have been entertained respecting the jurisdiction of the courts of the United States, as both the plaintiff and defendant are citizens of the same state. The 5th section of the act to promote the progress of useful arts, which gives to every patentee a right to sue in a circuit court of the United States, in case his right be violated, is repealed by the 3d section of the act of 1800, ch. 179 (xxv.), which gives the action in the Circuit Court of the United States, where a patent is granted "pursuant" to that act, or to the act for the promotion of useful arts. This patent, it has been said, is granted, not in pursuance of either of those acts, but in pursuance of the act "for the relief of Oliver Evans." But this court is of opinion that the act for the relief of Oliver Evans is engrafted on the general act for the promotion of useful arts, and that the patent is issued in pursuance of both. The jurisdiction of the court is therefore sustained.

As the charge delivered in the Circuit Court to the jury differs in some respects from this opinion, the judgment rendered in that court is reversed and annulled, and the cause remanded to the Circuit Court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

Judgment reversed.

519*] *JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Pennsylvania, Wheat. 8. U. S., Book 4.

and was argued by counsel. On consideration whereof, this court is of opinion that there is error in the proceedings of the said Circuit Court in this, that the said court rejected testimony which ought to have been admitted; and also in this, that, in the charge delivered to the jury, the opinion is expressed that the patent, on which this suit was instituted, conveyed to Oliver Evans only an exclusive right to his improvement in manufacturing flour and meal, produced by the general combination of all his machinery, and not to his improvement in the several machines applied to that purpose; and also, that the said Oliver Evans was not entitled to recover, if the hopper-boy, in his declaration mentioned, had been in use previous to his alleged discovery. Therefore, it is considered by this court that the judgment of the Circuit Court be reversed and annulled, and that the cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.¹

See S. C., 1 Pet. C. C. 322; 3 Wash. C. C. 443; 7 Wheat. 356.

Cited—7 Wheat. 424, 450, 468, 470; 6 How. 484, 485; 14 How. 548, 550, 561; 12 Wall. 671; 1 Pet. C. C. 216; 1 Blatchf. 27; 2 Blatchf. 7; 3 Blatchf. 181; 2 Paine, 100; 1 Wood. & M. 308; 3 Wood. & M. 27; Bald. 300, 312, 322; 1 Story, 567; 2 Story, 171; 3 Wash. 413, 425; 427, 429, 430, 431, 440, 455; 4 Wash. 217; 1 Mason, 475; 2 Biss. 16; 2 Cliff. 373; 3 Cliff. 364.

*[CHANCERY.]

[*520

LENOX ET AL. v. PROUT.

The indorser of a promissory note, who has been charged by due notice of the default of the maker, is not entitled to the protection of a court of equity as a surety; the holder may proceed against either party at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding an execution against the maker.

By the statute of Maryland of 1763, ch. 23, s. 8, which is perhaps only declaratory of the common law, an indorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights by obtaining an assignment of the holder's judgment against the maker.

The answer of a defendant in chancery, though he may be interested to the whole amount in controversy, is conclusive evidence, if uncontradicted by the testimony of any witness in the cause.

A PPEAL from a decree of the Circuit Court for the District of Columbia.

The facts of this case were as follows: William Prout, the plaintiff in the court below, on the 29th of July, 1812, indorsed, without any consideration, a promissory note made by Lewis Deblois, in his favor, for \$4,400, payable in thirty days after date. This note was discounted by the defendants, as trustees for the late bank of the United States, for the accommodation and use of the maker, and not being paid, an action was brought against him, and another against the indorser, in the name of the trustees, and judgment rendered therein in the same Circuit Court, in the term of December, 1818.

In the April following, Prout, fearful of Deblois' failure, called on the defendant and Davidson, who was agent of the other defendants, and requested him to issue a *fieri*

1.—See Appendix, note II.

facias on the judgment against Deblois, promising to show the marshal property on which to levy. On the 16th of April, or thereabouts, Davidson directed an execution of that kind to issue, and Prout, on being apprised thereof, offered to point out to the marshal property of the defendant, and to indemnify him for taking and selling the same. But before anything farther was done, Davidson countermanded this execution, and on the 2d of May, 1814, or thereabouts, a *ca. sa.* was issued against Deblois by the clerk through mistake, and without any order of Davidson or the other defendants. This was served on Deblois on the 10th of May, who afterwards took the benefit of the insolvent laws in force within the district of Columbia, the effect of which was to divide all his property among his creditors, whose demands were very considerable. It appears, from the evidence, probable that if the *feri facias* had been prosecuted to effect, a great part of the money due on the judgment against Deblois, which had been recovered on the note indorsed by Prout, would have been raised, and the latter, in that case, would have had to pay but a small sum on the one against him. But as matters stood, little or nothing was expected from the estate of Deblois; and, of course, no part of the judgment against Prout could be satisfied in that way, but the whole still remained due and unpaid.

The *feri facias* appears to have been countermanded *the day after it was received by the marshal, of which Prout had notice soon after.

On these facts, the Circuit Court decreed that the appellants should be perpetually enjoined from proceeding at law on the judgment which they had obtained against Prout, and that they should also pay him his costs of suit to be taxed. From this decree the defendants below appealed to this court.

Mr. Key, for the appellants, argued, that this being a negotiable instrument, the liability of the plaintiff below, after notice of non-payment by the maker, was no longer conditional, and depending on the default of the maker; so that the holders of the note could proceed against him alone, without taking any steps against the maker. That therefore they were not bound to issue the *feri facias* against Deblois, on the application of the plaintiff. That having issued it, they had a right to countermand it, provided they did not place the plaintiff in a worse situation than he was in before it was issued. That the *fi. fa.* was not countermanded with any view to injure the plaintiff, but because the agent had ascertained that the trustees of the bank were not bound to issue the *fi. fa.* in the first instance, and that it was neither right nor safe for the bank to give thereby a preference to the plaintiff over other indorsers of Deblois. And that the plaintiff was not placed in a worse situation by countermanding the *fi. fa.*; but had it in his power, under the act of assembly of Maryland of 1783, ch. 23, to tender the amount of the note to the agent of the bank, and obtain an assignment of the judgment, [*523*] by which he might have secured himself, by levying on the property still in the possession of Deblois.

Mr. Jones and Mr. Law for the respondent and plaintiff below, argued, that the plaintiff be-

ing a mere gratuitous surety, was entitled to the protection of a court of equity. That even in a court of law, it had been determined that where the holder of a bill gave an indulgence to the acceptor, after judgment, the indorser was discharged.¹ That of all forms of suretyship, that by indorsement emphatically entitles the surety to protection. The relative obligations between the holder and indorser require the former, in the first instance, to look to the drawer for payment, and to give notice of his default to the indorser. The relief given by courts of equity to sureties on a bond is derived from the common law principles in favor of indorsers. A surety has a right to come into equity, and compel the creditor to proceed against the principal debtor.² If the party for whose benefit a contract is made prevents its execution, the contract is rescinded. The contract between the holder and indorser is, that the former shall seek payment of the maker before he resorts to the indorser. If he disables the maker from paying, the indorser is discharged. If the holder of the bill, or note, gives time to the acceptor or maker, in prejudice of the indorsers, without *their concur- [*524] rence, they will be discharged from all liability, although they may have been previously charged by notice of non-payment.³ The doctrine of equity, that a surety is discharged by any indulgence shown to the principal by the creditor in prejudice of the surety, is applicable to every species of suretyship, whether absolute or collateral; and whether the liability of the co-obligors, sureties, or indorsers, has been fixed by judgment or not.⁴ If giving time, staying execution, or taking new security, in consideration of indulgence, releases the surety, how much more ought he to be discharged by the countermand of an execution on which the money might have been levied. The statute of Maryland is only in affirmance of the pre-existing rules of equity. Nor does it apply to this case; the issuing of the *feri facias*, at the plaintiff's solicitation, being a waiver of all right to demand a compliance with the act.

Mr. Key, in reply, insisted, that a court of equity would not relieve in such a case as this, even if the plaintiff was to be considered as a gratuitous surety. That the cases cited of co-obligors, or sureties, in bonds, were not pertinent. This is a commercial contract. The drawer of the note having made default, and the indorser having had legal notice of non-payment, becomes liable absolutely. His engagement ceases to become collateral and contingent, and he is converted into a principal debtor. The punctuality of *commer- [*525] cial dealings, and the preservation of paper credit requires that it should be so. An indulgence given to the maker can no more discharge the indorser, when thus fixed, than an indulgence to him will discharge the maker. The law does not require that the holder should take any active measures of diligence; nor can a

1.—*English v. Darley*, 2 Bos. & Pull. 61.

2.—*Nisbet v. Smith*, 2 Bro. Ch. Cas. 578; *Rees v. Berrington*, 2 Ves., Jun., 540.

3.—*Chitty on Bills*, 300 Am. ed. 1817.

4.—*Nisbet v. Smith*, 2 Bro. Ch. Cas. 578; *Rees v. Berrington*, 2 Ves., Jun., 540; *Law v. The E. I. Company*, 4 Ves. 824.

single case be found where a court of equity has compelled him to take any such measures.

LIVINGSTON, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:

The only ground on which this decree can be sustained is, that the countermand by Davidson of the *feri facias* which had issued on the judgment against Deblois, absolved the complainant from all liability on the one which had been recovered against him on the same note; and this has been likened to certain cases between principals and sureties; but it does not fall within any of the rules which it has been thought proper to adopt for the protection of the latter. Although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged without timely notice of non-payment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or if he issues an execution, he is at liberty to make choice of the one [526*] which he thinks will be *most beneficial to himself, without any consultation whatever with the indorser on the subject; nor ought he to be restrained, by any fear of exonerating the indorser, from countermanding the service of any execution which he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. And the reason is obvious; for, by the judgment they have both become principal debtors, and if the indorser suffers any injury by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment obtained against the maker. By an act of Maryland, it seems expressly provided—which is, perhaps, only declaratory of the common law—that an indorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it.

But it is alleged, that in this case there was a positive agreement on the part of Mr. Davidson with Mr. Prout, to issue a *feri facias*, and proceed therein, and that by not doing so, the latter was thrown off his guard, and lost the opportunity of an indemnity out of the estate of Deblois. Without deciding what might have been the effect of such an agreement, it is sufficient to say that there is no evidence of it. Mr. Davidson expressly denies that he agreed with the complainant, or even promised him to issue a *feri facias* against the estate of Deblois, and that he went no further than to say that he would consult his lawyer. Not being able immediately to find his lawyer, [527*] and not knowing whether some advantage might not be taken if he refused to comply with the complainant's request, he directed a *feri facias* to be issued, which, for reasons assigned by him, was afterwards recalled. To this answer of Mr. Davidson, it is supposed, by the complainant's counsel, no credit is due, because his com-

mission on the sum in question gave him an interest in the controversy, and he might be answerable over to his principal for his conduct in this business. *Non constat*, that he would be entitled to any commission on this sum. It is quite as probable he was acting under a fixed salary, which would not be affected by the event of the suit; and as to his responsibility, none could exist, if he had acted within the scope of his authority; and if he had transcended his power as agent, it would hardly be fair that his constituents should suffer by his act. But admitting both objections, and they will not affect the verity of his answer; for if he had a direct interest in the event of the suit, and to the extent of the whole sum in controversy, still his denial of a fact directly alleged in the bill would be entitled to full credit, according to the rules of a court of equity, where not a single witness has been produced to disprove it, and where the circumstances of the case, and his own conduct, render his account a very probable one. If he had not been made a defendant, which was not a very correct course, he might have been examined as a witness for the other defendant, or for the complainant; but, having been made a defendant, and being the only one acquainted with the transaction, the court is of *opinion [528*] that his answer, uncontradicted as it is, is proof against the complainant of the non-existence of any such agreement as he alleges was made between them, in relation to the issuing of the *feri facias*. Nor would Mr. Prout have suffered by the withdrawing of the *feri facias*, which is the burden of his complaint, if he had done what he might and ought to have done. He had sufficient notice of this fact, before the *ca.* was served, to have called and paid the judgment against him, and thus have obtained a control over the one which had been recovered against Deblois. If he had done this, instead of censuring the conduct of Davidson, he might have issued a *feri facias* himself, and secured a property, which, if it has not been applied towards his relief, is owing more to his own neglect in not paying, in time, a debt justly due from himself, than to any other cause whatever.

A person so regardless of his interest, as well as duty, as Mr. Prout has been, who has not only refused to pay a note indorsed by him when due, but has put the holders to the trouble, delay, and expense, of proceeding to judgment against him, has but little right to be dissatisfied if a court of equity shall not think itself bound by any extraordinary exertions of its powers, to extricate him from a difficulty and loss which he might so easily have avoided.

The decree of the Circuit Court is reversed, and the complainant's bill must be dismissed, with the costs of that court, to be paid by the complainant to the defendant.

*Decree reversed.*¹

Cited—10 Pet. 209; 5 How. 206; 22 Wall. 568; 3 Cranch. C. C. 147; 2 McLean, 58; 1 Cliff. 278; 1 Bald. 491, 496; 5 Dill. 142.

1.—*Vide ante*, p. 148, *Lanusse v. Barker*, note a.

529*]

*[LOCAL LAW.]

BURTON'S LESSEE v. WILLIAMS ET AL.

The state of North Carolina, by her act of cession of the western lands of 1789, ch. 3, recited in the act of Congress of 1790, ch. 33, accepting that cession, and by her act of 1803, ch. 3, ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the state of Tennessee, upon entries made before the cession.

But it seems that the holder of such a grant may resort to the equity jurisdiction of the United States courts for relief.

ERROR to the Circuit Court of East Tennessee.

This was an action of ejectment, brought by the plaintiff in error, to recover the possession of 5,000 acres of land, lying in Maury county, in the state of Tennessee, and granted to the lessor of the plaintiff by the state of North Carolina, on the 14th of July, 1812. The grant was founded on an entry made on the 27th of October, 1788, in the land-office of North Carolina, commonly called John Armstrong's office; on a warrant of survey issued from the same office on the 10th of July, 1784; and on a survey made on the 26th of February, 1812, under an act of the legislature of North Carolina, passed in 1811. The lands lay in that part of Tennessee in which the disposition of the vacant and unappropriated lands is reserved to the United States by the act of Congress of the 18th of April, 1806, ch. 530*] 31. This title was offered *in evidence by the plaintiff at the trial, and was objected to by the defendant, who claimed under a grant from Tennessee. The evidence was rejected by the court below; on which the plaintiff excepted, and the cause was brought by writ of error to this court.

Mr. Harper, for the plaintiff, argued, that the state of North Carolina, under the conditions of her act of 1789, ch. 3, for ceding the western lands of the United States, had a right to perfect grants on all such entries as this, at any time after the cession, and not merely within the time which was limited by the then existing laws of North Carolina; the conditions of the cession being recited and confirmed in the act of Congress of the 2d of April, 1790, ch. 33; accepting that cession. That the act of North Carolina of 1803, ch. 3, for ceding this right to the state of Tennessee, with the assent of Congress, was wholly inoperative and void, for want of that assent; Congress not having assented simply and unconditionally, as was intended by the legislature of North Carolina, but having coupled its assent with conditions destructive of the rights of that state and her citizens, under the act of cession. That consequently, the act of Congress of the 18th of April, 1806, ch. 31, being founded on this act of North Carolina, and on the act of Tennessee of 1804, ch. 14, which rests on the same basis, is without authority and void. That even if the act of North Carolina of 1803, ch. 3, were operative, it merely gives the state of Tennessee concurrent power with North Carolina for perfecting these *titles, and does not divest the power of the latter state. And that if the power granted to Tennessee by this act was absolute and exclusive, while it existed, it re-

verted to North Carolina, when Tennessee, by assenting to the conditions imposed by Congress in the act of April 18th, 1806, ch. 31, disabled herself from exercising this power or procuration, according to the terms and intentions of the grant from North Carolina.¹

Mr. Campbell, contra, contended, that the state of North Carolina, by her act of 1803, ch. 3, transferred to Tennessee all the power to issue grants reserved by her in the act of cession of 1789, on the conditions that the state of Tennessee should agree to said act as a compact between the two states, and that the assent of Congress should be obtained thereto. Tennessee did agree to the act, by her own act of 1804, ch. 14, and the assent of Congress was given thereto by the act of the 18th of April, 1806, ch. 31. Consequently, the state of North Carolina had no power to issue the grant in question. That the provisions in the act of Congress of the 18th of April, 1806, ch. 31, relate only to the final disposition of the vacant lands in Tennessee, remaining after all the claims from North Carolina are satisfied, according to the conditions of the cession act, and do not impair the right acquired under titles derived from the latter state. That the transfer of power to perfect grants from North Carolina to Tennessee vested *it in the [*532 latter, unconditionally and exclusively; and the power having once vested, cannot revert, or be divested. The authorities cited, as to reversion of powers, upon a breach of the conditions on which they were granted, are wholly inapplicable to transactions between independent communities and states. But even supposing the same rules in this respect were to be applied to their acts, as to those of private individuals, he contended, that Tennessee had performed the condition as near to the intent as might be, and that whatever is an equitable, ought to be considered a legal execution of a power.² That the public documents, necessary to enable Tennessee to execute the power in question, were delivered to that state, according to the compact of 1803; and that it was executed by her from 1806 to 1811, with the apparent acquiescence of North Carolina, which state ought not, therefore, now to be permitted to object that the assent of Congress thereto had not been sufficiently given. That this assent was deemed necessary to comply with that provision in the constitution, art. 1, sec. 10, which declares, that "no state shall, without the consent of Congress, enter into an agreement or compact with another state," and because the United States had an interest in the subject-matter of the compact. This assent was not intended for the benefit, or to secure the interests, of North Carolina; and the approbation of Congress having been sufficiently manifested, that state has no *right to object to the mode in which [*533 the assent was given. That by her act of cession, the state of North Carolina reserved the right to issue grants, only in conformity to her then existing laws, but not to pass new statutes on the subject, like that of 1811. And that the state of Tennessee, by an act passed in 1812,

1.—Co. Litt. 52, 202; Shep. Touchstone, 283.

2.—Co. Litt. 217. *Zouch v. Woolster et al.*, 3 Burr. 1136; *Earl of Darlington v. Pultney*, Cowp. 200.

declared this grant, and all others issued under similar circumstances, void; and provided, that they should not be read as evidence of title in any court of the state; thus asserting her exclusive right under the compact of 1803 to issue grants for lands within the state.

JOHNSON, J., delivered the opinion of the court: This case originates in a collision of interest and opinion between the states of North Carolina and Tennessee, and the United States, relative to their respective rights, in certain instances, to perfect titles to the soil of Tennessee. North Carolina, in the year 1812, issued the grant set up on the trial in behalf of the plaintiff. Both Tennessee and the United States contend, that North Carolina has relinquished the right to issue such a grant. And North Carolina replies, that her cession was conditional, and that the condition has been violated, or that the *casus federis* has never arisen.

The whole difficulty arises from the obscure wording, or doubtful construction, of the act of Congress of April 18th, 1806. But, after comparing all the acts of the respective states upon the subject, reviewing the events which led to the passage of that act of Congress, and determining the motives which influenced [534*] *the party in making the compact, which the act of Congress contains, we are of opinion that an exposition may be given perfectly consistent with good faith, and leaving to North Carolina no reasonable ground for complaint. We here disavow all inclination, on the part of this court, to interfere, unnecessarily, in state altercations; we enter into the consideration of such collisions only so far as to secure individual right from being crushed in the shock. But in all such discussions the questions necessarily arise, what has a state granted? and what was the extent of its power to grant? Those questions cannot be avoided.

It will be recollected that the state of Tennessee originally constituted a part of the state of North Carolina; that in the year 1789 the latter state made a cession, both of soil and sovereignty, to the United States, of all the soil and country now comprised within the limits of Tennessee; and that in the year 1796, the state of Tennessee was admitted into the Union. Previous to the act of cession, North Carolina had made title to a considerable portion of the soil of Tennessee, under circumstances which attached the title to a designated portion of soil, so that nothing more was necessary to vest a complete legal title, but what, in contemplation of her laws, was a mere formality, a survey and grant. In other instances she had issued warrants for a specified quantity of land, but under which the holder had not yet definitively fixed his landmarks, so that he did not hold land, but only the evidence of a right to acquire land. These, and several other descriptions [535*] *of land-titles, as they are called, the act of cession makes provision for securing to the individual, to the full extent to which he was entitled under the laws of North Carolina. The words of the deed of cession are these: "Where entries have been made agreeably to law, and titles under them not perfected by grant or otherwise, then, and in that case, the Wheat. 3.

governor for the time being, shall, and he is hereby required to perfect, from time to time, such titles, in such manner as if this act had never been passed. And that all entries made by, or grants made to all and every person or persons whatsoever, agreeably to law, and in the limits hereby intended to be ceded to the United States, shall have the same force and effect as if such cession had not been made; and that all and every right of occupancy and pre-emption, and every other right reserved by any act or acts, to persons settled or occupying lands within the limits of the lands hereby intended to be ceded as aforesaid, shall continue to be in full force in the same manner as if the cession had not been made, and as conditions upon which the said lands are ceded to the United States;" and "further it shall be understood," &c., making a provision for the case of persons who shall lose the benefit of a location because of its having been laid on a place previously located, and declaring that "they shall be at liberty to remove the location of such entry or entries, to any lands on which no entry has been specifically located, or on any vacant lands included within the limits of the lands hereby intended to be ceded."

*Thus, under the act of cession, the [536 United States held the right of soil in the vacant lands of Tennessee, qualified by the right which the state of North Carolina retained of perfecting the inchoate titles created under her own laws.

When the act was passed, admitting the state of Tennessee into the Union, Congress omitted to insert any express provision respecting unappropriated land; and on this circumstance the state of Tennessee set up a claim to all such land within her designated limits. But still she was embarrassed in the use of her supposed acquisition, by the rights which North Carolina retained of perfecting her own land titles, and she could not obtain from a state a cession of that right without the consent of Congress. This afforded the United States ultimately the means of resuming, in part, the soil that they were supposed inadvertently to have ceded to Tennessee, and was the ground-work of the compact which is exhibited in the act of 1806. The state of North Carolina in the meantime had passed an act in 1808, entitled "an act to authorize the state of Tennessee to perfect titles to land reserved to this state by the cession act," but expressly subject to the assent of Congress; and the two great objects of the act of Congress of 1806, as avowed in the title, are "to authorize the state of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" or, in other words, to enable the state of Tennessee to acquire the absolute unqualified right (so far as it comported with *private right) of [537 appropriating the soil within its limits, and, *eodem flatu*, to enter into a partition of that soil with the United States, connected with the rights thus acquired from North Carolina. And such in effect is the operation of the compact of 1806. The two contracting parties commence with drawing a line across the state, and then stipulate that the soil to the westward shall be vested absolutely in the United States, and that to the eastward in Tennessee. Now,

it is absurd to suppose, that when the United States proposed to acquire to themselves the absolute dominion over the soil to the westward, that they would have withheld that assent, without which Tennessee could not acquire it, and, of course, could not convey it to the United States. The words in which the assent of Congress is expressed, are found in the close of the 2d section; they are these, "to which said act the assent of Congress is hereby given, so far as is necessary to carry into effect the objects of this compact." But these latter words, although at first view they may appear to be restrictive, really in their operation, as here applied, must give the utmost latitude to that assent; because, nothing short of that latitude would give effect to the provisions of the compact. And upon considering the act of North Carolina, to which they refer, it will obviously appear that those restrictive words were introduced with a view to another object. There are several provisions of mere detail contained in that act; these could take effect without the assent of Congress, and to those provisions these restrictive words must have had reference.

538* *But, it is contended, that in the very compact between the United States and Tennessee, the conditions of the act of cession have been violated, and the state of North Carolina was authorized to resume her rights. Without admitting either the premises or conclusion of this argument, we may be permitted to observe, that it is at least a perilous doctrine. That the members of the American family possess ample means of defence under the constitution, we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away; and the difficulty and danger of applying to the contracts of independent states, the principles of the common law relative to conditions, would, if necessary, incline this court to consider words of condition, in such cases, as words of contract. In this instance, the state of North Carolina has asserted the common law right of entering for condition broken, and the unfortunate consequences may well be held up as a warning to others.

But in this case, the words used are not words of condition. On the contrary, the words of condition used with relation to the provision for securing vested freehold rights are dropped, and those applied to the other class of rights are appropriate only to stipulation or contract, "it shall be understood," &c., are the words as expressed in the quotation from that act. All the operation, then, which can be given to the provisions of the cession act, on the subject of these floating rights, is that of the stipulations of a treaty; and all the obligations resulting from those provisions, as well on behalf of the United States as of Tennessee, *was, that it should be honorably and in good faith executed. And this has been done. No more control has been exercised over those floating claims than North Carolina might have exercised, and no obligation which North Carolina acknowledged with regard to those rights have been violated.

The injuries complained of are, that these floating rights have been restricted in their original range, so as not to be permitted now to be located to the westward of the line of de-

marcation, and that they have also been restricted to the eastward by the stipulations of Tennessee, to make certain appropriations for schools. But this reasoning is founded upon two assumptions that cannot possibly be admitted, to wit: That North Carolina herself could not, if she had thought proper, have made these appropriations before the act of cession, and that after the act of cession, the United States could not have set apart any portion of the unlocated land for specified purposes; or, in fact, have issued any grants or warrants for unappropriated lands, until these floating claims had finally found a place of rest, after landing and embarking again a hundred times. It would have been nugatory under such circumstances to have made a cession of territory. These claims were not forgotten; Tennessee stipulates to make provision for them on her side of the line, and the United States to make provision on the other side, if Tennessee cannot satisfy them; so that the whole country is in fact open to the holders of these rights; but they are only in the first instance directed to a particular tract of country to make their selections.

*With regard to the objection, that **[540]** the appropriation of these lands was made to a single state, when they were expressly given for the use of the United States, including North Carolina, there is certainly nothing in it; for the erection of a state may have appeared to Congress the most beneficial general purpose to which those lands could be appropriated; nor can the prohibition to locate warrants on the Cherokee lands be objected to, when it is considered that it was actually illegal under the laws of North Carolina; and the stipulation is expressly made in subservience to the laws of that state.

Upon the whole, we are decidedly of opinion that the state of North Carolina has parted with the power to issue this grant, and could not resume it. But although we must decide against the action of the plaintiff in this case, because it rests upon that grant, it must not be inferred that we think unfavorably of his right to the land. On the contrary, we have no doubt, as far as appears in this record, of the obligation on the United States to make provision for issuing a grant in his favor; and in the meantime the courts of the United States are not without resources in their equity jurisdiction to afford him relief.

Judgment affirmed.

Cited—12 Pet. 725, 745; 14 Pet. 413.

*[COMMON LAW.]

[541]

MURRAY'S LESSEE v. BAKER ET AL.

The term "beyond seas," in the proviso or saving clause of a statute of limitations, are equivalent to "without the limits of the state" where the statute is enacted; and the party who is without those limits is entitled to the benefit of the exception.

THIS was an action of ejectment brought by the plaintiff in error in the Circuit Court for the District of Georgia, to recover the pos-

Wheat. 3.

session of certain lands lying in that state. At the trial, a special verdict was found, as follows:

"We find that the lessors of the plaintiff have not been in the state of Georgia since the defendants, or their ancestors, came into possession of the premises sued for. We further find that the ancestors of the defendants possessed the land from about the year 1791 until his death, which happened about February last, and that the defendant, his children, and legal representatives, have been in possession thereof from that time. If the court are of opinion that the case of the plaintiffs is excepted from the operation of the act of limitations of this state, passed the 21st day of March, 1787, then we find for the plaintiffs, with ten cents damages; but if the court are of a contrary opinion, then we find for the defendants."

The judges of the court below divided on a motion that judgment should be entered up for *542** the plaintiffs *on this verdict, and the question was thereupon certified to this court.

The statute of limitations in question is as follows:

"Be it enacted, &c., that all writs of *formedon* in descender, remainder and reverter of any lands, &c., or any other writ, suit or action, whatsoever, hereafter to be sued or brought, by occasion or means of any title heretofore accrued, happened or fallen, or which may hereafter descend, happen or fall, shall be sued or taken within seven years next after the passing of this act, or after the title and cause of action shall or may descend or accrue to the same, and at no time after the said seven years. And that no person or persons that now hath, or have, any right or title of entry into any lands, &c., shall at any time hereafter make any entry but within seven years next after the passing of this act, or after his or their right or title shall or may descend or accrue to the same; and in default thereof, such person so not entering, and his heirs, shall be utterly excluded and disabled from such entry after to be made. Provided, nevertheless, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath, or shall have such right or title of entry, be, or shall be, at the time of such right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, that then such person or persons, and his and their heir, and heirs, shall or may, notwithstanding the said seven years are expired, bring his, her, or their action, or *543** make his, her, or their entry, *as he, she, or they might have done before this act; so as such person or persons, or his, her, or their heir and heirs, shall, within three years next after his, her, or their full age, discovery, coming of sound mind, enlargement out of prison, or returning from beyond seas, take benefit of and sue for the same, and at no time after the said three years."

Mr. Berrien, for the plaintiff, argued that the term "beyond seas," in the statute of limitations, was not to be construed literally, according to its geographical import, but liberally and with reference to the protection which this

clause of the statute was intended to afford. "Beyond seas," and "out of the state," are analogous expressions, and must have the same construction.¹ The expression "beyond seas" has been borrowed from a corresponding statute in Great Britain, where it has a local or geographical aptitude, which it does not possess here. The phraseology of the English statutes has been modified to adapt it to the varying circumstances of that nation. Anterior to the accession of the first James, the northern part of the island was held by Scotland in distinct sovereignty, and in this state of things, the expression "beyond seas" would have been unapt. A resident of Scotland, though that country was then foreign to England, would not have been within the proviso of the statute. Accordingly, we find that the corresponding expression in the statutes passed anterior to this *period, is "out of the realm." And Mr. *[544]* Justice Wilmot, in pronouncing his opinion in the case of *The King v. Walker*,² observes, that "the legislature, by altering the phraseology of the statute from 'out of the realm' to 'beyond seas' at this precise period, seems to have pointed to the case of a dwelling in Scotland." During the war of our revolution, the British army was in possession of part of the state of New York. It has been held there that the maker of a promissory note, who was within the British lines during such occupancy, and departed with the British army at the close of the war, was out of the state during that time, and, therefore, not entitled to plead the statute in bar; and that the cause of action accrued only upon his coming into the state, after the peace. "The party was out of the jurisdiction of the state. He was *quasi* out of the realm. He was where the authority, which was exercised, was derived, not from the state, but from the King of Great Britain by right of conquest."³ So, in this case, the plaintiffs were never within the jurisdiction of the state; and if, in the language of the Chief Justice first cited, *beyond seas* and *out of the state* are analogous expressions, they are entitled to bring their action at any time within three years after coming into the state. The opposite construction would involve the absurdity of refusing the protection of the statute to a person living in Chili, because access can be had to that remote country by land; whilst it is extended *to a person resid- *[545]* ing in the neighboring West India island, because the seas must be passed in order to reach the latter.

No counsel appeared to argue the cause on the other side.

JOHNSON, J., delivered the opinion of the court: This is an action of ejectment. The defense set up is the act of limitations of the state of Georgia. The only question which the case presents is, whether the plaintiff, who resided in Virginia, comes within the exception in the act in favor of persons "beyond seas."

On this question, the court are unanimously of opinion, that to give a sensible construction to that act, the words "beyond seas" must be held to be equivalent to "without the limits of

1.—Per Chief Justice Marshall. *Faw v. Roberdeau's ex'rs*. 3 Cranch, 174, 177.

Wheat. 3.

2.—1 W. Bl. 286.

3.—Sleght v. Kane, 1 Johns. Cas. 76, 81.

the state," and order this opinion to be certified to the Circuit Court of the District of Georgia.

Certificate for the Plaintiff.

Cited—11 Wheat. 386; 6 Pet. 300; 7 Otto, 637.

546*]

*[PRIZE.]

THE AMIABLE NANCY.

The district courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 28th June, 1812, ch. 430. (CVII.)

On an illegal seizure, the original wrong-doers may be made responsible beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages.

An item for loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, rejected.

The probable or possible profits of an unfinished voyage afford no rule to estimate the damages, in a case of marine trespass.

The prime cost or value of the property lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case.

An item for the ransom of the vessel and cargo, which had been subsequently seized by another belligerent (as alleged for want of papers), of which the vessel had been deprived by the first captors, rejected under the particular circumstances of the case.

THIS was a suit for a marine trespass, commenced in the District Court for the southern district of New York, by the libelants and appellants, who were the owner, master, supercargo, and crew of the Haytian schooner *Amiable Nancy*, against the defendants, who were the owners of the private armed American vessel *Scourge*.

The libel states, that the *Amiable Nancy* and her cargo belonged to the libellant, Peter Joseph Mirault, of Port-au-Prince, in the 547*] island of Hayti, or St. Domingo; *that the vessel, with a cargo of corn, sailed from Port-au-Prince about the 7th of October, 1814, on a voyage to Bermuda, and in the prosecution thereof, about the twenty-fourth day after sailing, in latitude 25 degrees north, was obliged, by stress of weather, to bear away for Antigua, there to refit and again proceed on the said voyage; that whilst proceeding toward Antigua, about the 4th of November, in the

same year, in latitude 17 degrees 54 minutes north, and in longitude 62 degrees 42 minutes west, the said Haytian schooner was boarded by an armed boat's crew from the private armed American brig *Scourge*, commanded by Samuel Eames, and owned by the defendants; that Jeremy C. Dickenson, the first Lieutenant of the said brig, with the said armed boat's crew, then and there took possession of the *Amiable Nancy*, and robbed and plundered the libelants, respectively, of divers articles of wearing apparel, money, and other valuable effects of a great value, being all that the libelants, at the time of the boarding as aforesaid, were possessed of; and also robbed and plundered the said schooner of her papers, notwithstanding that Samuel C. Lathrop, the officer commanding the marines of the aforesaid private armed brig, and who accompanied the said armed boat's crew, had reported to the said Jeremy C. Dickenson that he had examined the said papers; that they were perfectly in order, and that the said schooner was a Haytian schooner as aforesaid; that the said armed boat's crew also robbed and plundered the said schooner of divers articles belonging to her tackle and apparel, to wit, of a log reel and line, *lines and cordage, and, also, of [*548 poultry; and greatly ill-treated the libelants, and, in particular, knocked down and greatly bruised the libellant, Frederick Roux, and put the libelants in bodily fear and danger of their lives; that about twelve o'clock of the same night, the armed boat's crew aforesaid left the *Amiable Nancy*, and the said schooner was permitted to proceed on her course as aforesaid, and did so proceed, but her papers were not restored, nor any other article of apparel, money, nor any of the valuable effects of which the said schooner and libelants had been robbed and plundered, although the said captain and supercargo did frequently and urgently remonstrate with the boarding officer upon the impropriety of such conduct as aforesaid; and did then and there state, that the said schooner could not proceed without her said papers; but, notwithstanding the remonstrances of the said libelants, nothing whatever which had been taken from the said schooner, and from the libelants, was restored. That the libellant, Galien Amie, was not permitted to go on board of the said private armed brig, although he earnestly requested permission so to do, with the intent to complain to the commander of the said private armed brig, of the conduct of his said armed boat's crew, and of requesting him to cause the papers and articles taken as aforesaid, to be restored to the libelants and the said schooner. That the said schooner continued

NOTE.—In cases of illegal capture. Profits of a voyage broken up not an item of damages. *Schooner Lively*, 1 Gall. 314, 335; *Anna Maria*, 2 Wheat. 327.

The measure of damages is the value of the property injured or destroyed, and interest from the time of the trespass, with ten per cent. added where sale was under disadvantageous circumstances or not at port of destination. *Del Col v. Arnold*, 3 Dall. 333; *Apollon*, 9 Wheat. 362; *La Amistad De La Ruea*, 5 Wheat. 385.

Same principle in cases of collision. *Williamson v. Barrett*, 13 How. 101; *Smith v. Condry*, 1 How. 28; *The New Jersey Olcott*, 44; *The Narragansett Olcott*, 246; at port of destination ten per cent. not added; *The Cassius*, 2 Story, C. C. 81.

Insurance sometimes a proper item. *The Anna Maria*, 2 Wheat. 327.

In wilful collision there may be punitive damages. *Ralston v. State Rights*, *Crabbe*, 22.

Where vessel is destroyed by collision, measure of damages is value of vessel and freight. *The Ann Caroline*, 2 Wall. 538; *The Rebecca*, *Blatchf. & H.* 347.

When injured, the cost of restoring her to her former condition, and in this various items are to be considered, determined by the circumstances of the case. *Rhode Island*, *Abb. Adm.* 100; *The Catherine v. Dickinson*, 17 How. 170; *The New Phila.* 19 How. 315.

Wheat. 3.

on her course as aforesaid, and on or about the morning of the 8th of November, in the year aforesaid, arrived at the entrance of the harbor of St. Johns, in the Island of Antigua, when she was seized and detained by His Britannic Majesty's *guard-brig Spider, on account of the want of her papers; and both the vessel and cargo were, for the same reason, libeled and proceeded against in the vice-admiralty prize court in the said Island. That the *Amiable Nancy* was detained in the possession of the said guard-brig Spider until the 24th of November; and in consequence of an agreement previously made between the captors aforesaid and the said supercargo, which he was advised to make, in order to avoid the further detention, deterioration of the cargo, and total loss of the same, as of the said schooner, the schooner and her cargo were condemned as good and lawful prize, and were immediately delivered up to the libellant, the supercargo aforesaid, on an engagement to pay to the said captors the sum of \$1,000, and all law and court charges, to a great amount, to wit, to the amount of about \$542.21, which said compromise, law and court charges together, amounted to the sum of \$1,542.21, which the libellant, Frederick Roux, was obliged to pay, and did actually pay, in order to procure the liberation of the said vessel and cargo. And in order to pay the same, the said last-mentioned libellant was obliged to pay, and did pay the further sum of \$536.44, by selling bills to procure specie to make the said payment; beside which, the said cargo of corn sustained a loss of \$1,200, by its detention in port as aforesaid, deterioration and fall in price; and the owner of said schooner did sustain further loss by the breaking up of his said voyage, and the said schooner being obliged to leave Antigua in ballast, although a full freight was offered to \$550*] him. That in consequence of *the robbery and plunder of the said schooner, and the ill-treatment of the libellants, and the capture and detention, as aforesaid, heavy loss and damage accrued to the libellants, respectively, amounting in the whole to \$15,000.

The libel then prays, that the defendants, as the owners of the *Scourge*, may be decreed to pay to the libellants the damages respectively sustained by them by the illegal conduct of the said boat's crew, with all other charges and expenses thereby incurred, and losses therefrom accruing, and for such other relief as may be suited to the case.

The defendants, by their answer and plea, admit that they were, at the time mentioned in the libel, the owners of the *Scourge*, which was regularly commissioned as a private armed vessel during the late war; and that, whilst cruising on the high seas, she met with the said Haytian schooner; but they do not admit that the plundering, outrages, and other unlawful acts mentioned in the libel, were committed as therein charged; they do, however, admit, that the said schooner was boarded by a crew from the *Scourge*, under the belief that she was an enemy, and that some improper acts were committed by some of the said crew; but they deny their responsibility therefor, especially as the said crew, or some of them, were punished for their improper conduct.

Samuel C. Lathrop, captain of marines on *Wheat*. 8.

board the *Scourge*, proved, that whilst the said vessel was on a cruise, they fell in with the *Amiable Nancy*, about the 4th or 5th of November, 1814, and boarded her; that Lieut. Dickenson and himself, with twelve *or [*551 thirteen of the crew, went in the boarding boat, under the command of Lieut. Dickenson, and that as soon as the boat came alongside of the schooner, Dickenson and himself went on board of her, and all the men but one followed; that the men immediately commenced plundering the vessel, which Dickenson saw, and took no measures to prevent; that the witness examined her papers, and found her to be a Haytian schooner, and that they were all regular, and so reported to Lieut. Dickenson. That the boat's crew ought not to have gone on board of the schooner at all; but Dickenson did not order them back, and permitted them to proceed in breaking into the cabin, breaking open the trunks of the captain and supercargo, plundering their contents, and the schooner's crew of their clothes and effects, and throwing them in bundles into the boat alongside the schooner; that the captain and supercargo complained to Dickenson of the conduct of his crew, and especially of their destruction of the schooner's papers; and the supercargo also complained of being knocked down; but Dickenson took no notice of their complaints, and suffered the boat's crew to continue their plundering two hours on board of the schooner, though he had examined the schooner's papers, and made his report, as before stated, in ten minutes after going on board.

Commissions were issued to Antigua and Port-au-Prince to take testimony on the part of the libellants. Under the Antigua commission, it was proved, that the *Amiable Nancy* and her cargo were seized libeled, and condemned at Antigua, on account of her *want of [*552 papers. That the supercargo compromised with the captors for \$1,000, and court charges \$542.21, which he was advised to do, as most for the interest of the owner. That it was necessary to pay this amount in specie, which could only be raised by a sale of the bills for which the cargo was sold, and was done at a loss of \$536.44; that other sums were disbursed for the vessel, making in the whole \$2,127.60. During the detention of the vessel, the price of corn fell a dollar a bushel, and the cargo was injured by the search of the schooner, made by the Spider's crew, which occasioned a loss of \$1,200. The expenses of the schooner at Antigua were proved to be \$414. The value of the articles plundered from the vessel, captain, supercargo and crew, was proved by one of the witnesses, and by the protest; also, the ill-treatment and personal violence complained of.

Under the commission to Port-au-Prince, it was proved that the libellant, Peter Joseph Mirault, was the owner of both the schooner and cargo, and that the schooner was a Haytian vessel, regularly documented as such. The detention and plunder of the schooner, by the boat's crew of the *Scourge*, is fully and particularly proved by one of the seamen on board of the schooner. The object of the voyage to Bermuda, and the loss sustained in consequence of its being broken up, are also proved.

On the hearing of the cause in the District

Court, it was referred to the clerk, or his deputy, to associate with him two merchants, and report the damages sustained by the libelants. The deputy clerk accordingly associated **553*** with him two respectable merchants, one chosen by each of the parties, who reported the damages as follows:

Money paid for redeeming vessel and cargo, at Antigua, after condemnation, - - -	\$2,137 00
Loss sustained on sales of the cargo of corn, at Antigua, in consequence of the capture, - - -	1,200 00
Detention, wages of the crew at Antigua, in consequence of seizure by the Spider brig, occasioned by the loss of ship's papers, - - -	414 00
Articles plundered from the schooner Amiable Nancy, - - -	25 00
Money and effects plundered from M. Roux, the supercargo, - - -	470 00
Money and effects plundered from the officers and crew of the Amiable Nancy: - - -	
From Captain Aime, - - -	\$100 00
Moriset, mate, - - -	80 00
E. Lenau, - - -	54 00
J. J. Loiseau, - - -	53 00
Michael, - - -	10 00
Sayou, - - -	7 00
	304 00
	\$4,540 00

554* Loss sustained in consequence of the expenses occasioned by the seizure and condemnation in Antigua, growing out of the Amiable Nancy having been deprived of her papers by the acts of the officers and crew of the Scourge, as proved by the deposition of Samuel Dawson, and F. Lavaud, of Port-au-Prince, - - -

8,500 00
\$8,040 00

Interest on this sum, from 1st January, 1815, till the 1st July, 1817, at 8 per cent. per annum, - - -

1,206 07
\$9,246 07

Allowance for M. Roux's expenses to and from Port-au-Prince, Antigua, Boston, &c.; detention in New York, loss of time, and other incidental expenses, procuring evidence, and attending the trial, - - -

1,500 00
\$10,746 07

This report was confirmed by the court, and it was further ordered by the court, that the defendant should pay to the libellant, for personal injuries, as follows:

To the supercargo, five hundred dollars, - - -	\$500
To the captain, one hundred dollars, - - -	100
555* To the mate, one hundred dollars, - - -	100
To the sailor, fifty dollars, - - -	50
	\$750

And that the defendants should pay to the libelants one thousand dollars for the commission claimed by the supercargo, Frederick Roux, seven hundred and fifty dollars for counsel fees, the proctor's costs, and the costs of court.

The defendants appealed from the decision of the District Court to the Circuit Court for the Southern District of New York, where it was heard in September term, 1815, and the following decree made:

This appeal having been argued, &c., this court, after mature deliberation thereon, do order, adjudge, and decree, that the sentence of the District Court, which has been appealed from, be reversed. and this court proceeding to

458

assess the damages in this cause, make the following allowances, that is to say:

To the Owner of the Schooner.

1. For expenses during her detention at Antigua, in conformity with the estimate of the consignee, \$300 00	
2. For expenses of the mate and supercargo while there, according to the testimony of the same witnesses, - - -	70 00
3. For articles plundered from schooner, - - -	25 00
*Interest on these sums at 10 per cent. from 1st of January, 1815, to 1st September, 1817, two years and eight months, - - -	108 94
	498 94

To the Master of the Schooner.

1. For articles taken from him - - -	100 00
The same interest on this sum - - -	28 66
2. For personal injuries, - - -	100 00
	228 66

To the Supercargo.

1. For articles plundered of him, - - -	470 00
The like interest on this sum, - - -	114 32
2. For personal wrongs, - - -	500 00
	1,084 32
3. For his expenses in collecting testimony at Antigua, Port-au-Prince, &c., and attending trial, - - -	750 00

To the Mate.

1. For the property lost by him, - - -	80 00
The like interest on this sum, - - -	21 32
2. For injury to his person, - - -	100 00
	201 32

To Lenau, the Sailor.

1. For property robbed of him, - - -	54 00
The like interest on this sum, - - -	14 40
2. For injury to his person, - - -	50 00
	118 40
	\$2,879 64

*It is therefore further ordered and directed, That there be paid by the appellants, to the respondents and libelants, the said sum of \$2,879.64, in the manner and proportions following, that is to say—to the libellant, Peter Joseph Mirault, owner of the schooner and cargo, the sum of \$498.94; to the libellant, Gallien Amie, master of the schooner, the sum of \$226.66; to the libellant, Frederick Roux, the supercargo, the sum of \$1,834.32; to the libellant, Anthony Moriset, the mate, the sum of \$201.32; to the libellant, Elie Lenau, one of the mariners, the sum of \$118.40.

And it is further ordered, adjudged, and decreed, That the appellants pay the further sum of \$750 for counsel fees in the District Court; and that they also pay the proctor's costs in the said court, and the costs of that court, to be taxed.

And it is further ordered and decreed, That each party pay his own costs in this court; from which decree the libelants appealed to this court.

This cause was argued by *Mr. Sergeant* and *Mr. Baldwin* for the appellants, and by *Mr. D. B. Ogden* for the respondents.*

STORY, J., delivered the opinion of the court: The jurisdiction of the District Court to entertain this suit, by virtue of its general [*558] admiralty and maritime jurisdiction, and independent of the special provisions of the prize

1.—They cited *The Lucy*, 3 Rob. 208; *The Narcissus*, 4 Rob. 17; *The Lively*, 1 Gallis. 315.

2.—He cited *Del Col v. Arnold*, 3 Dall. 333.

act of the 26th of June, 1813, ch. 107, has been so repeatedly decided by this court that it cannot be permitted again to be judicially brought into doubt.¹ Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an **559*** adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages. While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment, cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

As the respondents have not appealed from the decree of the Circuit Court, that decree, so far as it allows damages against them, is not re-examinable here. And the only inquiry will be, whether any of the items allowed by the District Court were improperly rejected by the Circuit Court.

And first, as to the item of \$1,200, for losses sustained in the sale of the cargo at Antigua. This loss is said to have been occasioned partly by the deterioration of the corn by sea damage, the mixing of the damaged with the sound corn by the improper conduct of the crew of the Spider brig, of war, and partly by a fall of the price of corn during the detention of the vessel at Antigua. We are of opinion that this item was properly rejected. The injury to **560*** the corn was in no degree attributable to the improper conduct of the officers and crew of the privateer. The vessel was actually bound to Antigua at the time when she was met by the privateer, under a necessity occa-

sioned by stress of weather, and the fall of the market there is precisely what would have arisen upon the arrival of the vessel under ordinary circumstances. Unless, therefore, the sale of the corn was compelled at Antigua, solely by the misconduct of the privateer (which, in our opinion, was not the case), the claim for such loss cannot be sustained.

Another item is \$3,500, for the loss of the supposed profits of the voyage on which the *Amiable Nancy* was originally bound. In the opinion of the court, this item also was properly rejected. The probable or possible benefits of a voyage, as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for profits has been expressly overruled; and in *Del Col v. Arnold* (3 Dall., 383), and *The Anna Maria* (2 Wheat. Rep., 327), it was, after strict consideration, held, that the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete ***indemnity** for all possible injuries; but **[561]** it has certainty and general applicability to recommend it, and in almost all cases, will give a fair and just recompense.

The next item is \$2,127 60, for the ransom of the vessel and cargo, and the payment of the costs of court. The evidence upon this head is not very satisfactory in its details. It is asserted that the vessel was seized for the want of papers, but whether as prize of war, or to enforce a municipal forfeiture, is not distinctly stated; and no copy of the proceedings of the court is produced to clear up a single doubt or obscurity. Nor does it appear whether the compromise was made before or after the libel was filed; and it is admitted that it was made without taking the advice of counsel, upon the mere opinion of a merchant at Antigua, who supposed that a condemnation would certainly ensue. Upon what legal grounds this opinion could be reasonably entertained, it is extremely difficult to perceive. Assuming that the vessel and cargo were seized as prize of war, it cannot for a moment be admitted that the mere want of papers could afford a just cause of condemnation. It might be a circumstance of suspicion; but explained (as it must have been) by the preparatory examinations of the officers and crew, and by the fact of a voluntary arrival, it is difficult to suppose that there could be any judicial hesitation in immediately acquitting the property. And the farthest that any prize court could, by the utmost straining, be presumed to go, would be to order further proof of the proprietary interest. It would be ***the highest injustice to the British [562]** courts to suppose that the mere want of papers, under such circumstances, could draw after it the penalty of confiscation. We do not, therefore, think that the ransom was justifiable or reasonable. The utmost extent of loss to which the owner was liable, was the payment of the

1.—*Vide ante*, Vol. II. Appendix, note 1, p. 5. The jurisdiction of the admiralty, as a court of prize, has been recently reviewed in England, on an application to the Court of Chancery for a prohibition, in which it was determined, that this jurisdiction does not depend upon the prize act or commission, nor cease with the cessation of hostilities; but that it extends to all the incidents of prize, and to an indefinite period after the termination of the war. *Ex parte Lynch et al.*, 1 Maddock's Rep. 15.

costs and expenses of bringing the property to adjudication; and for such costs and expenses, as far as they were incurred and paid, the owner is now entitled to receive a recompense. In this respect, the decree of the Circuit Court ought to be amended.

The item for the supercargo's commission was also properly rejected. It does not appear, with certainty, to what sum he was entitled; and under the circumstances, if lost (which is not satisfactorily shown), the commissions were not lost by any act for which the respondents are liable. The sum allowed for the travel, attendance, and expenses of the supercargo in procuring testimony, by the Circuit Court, is, in our judgment, an adequate compensation.

The sum of \$44 was (probably by mistake) deducted by the Circuit Court from the expenses at Antigua. This sum is to be re-instated.

To the decree of the Circuit Court there are, consequently, to be added the following sums, viz.:

For expenses and costs of court at Antigua, \$542.21

The loss on the exchange to pay that sum, (say) \$188.

The short allowance of expenses, \$44.

In the whole, amounting to the sum of \$774.21, on which interest, at the rate of 6 per cent., is to be allowed from the time of payment up to the time of this judgment. And the decree of the Circuit Court is to be reformed accordingly.

Decree reformed.

Modifying decree in 1 Paine, 111.

Cited—5 Wheat. 389; 13 How. 113; Abb. Adm. 10; Crabbe, 48; Blatchf. & H. 22, 10, 297; 2 Mason, 122; 14 Blatchf. 489; 8 Story, 474; Olcott, 446; 1 Bald. 144; McAll. 109; 2 Ben. 50; 7 Ben. 127; 3 Ware, 107; 2 Wood. & M. 548.

[CHANCERY.]

CRAIG v. LESLIE ET AL.

R. C., a citizen of Virginia, being seized of real property in that state, made his will: "In the first place, I give, devise, and bequeath unto J. L." and four others, "all my estate, real and personal, of which I may die seized and possessed in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years credit, and my real estate on one, two, and three years credit, provided satisfactory security be given by bond and deed of trust. In the second place, I give and bequeath to my brother T. C., an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made, and I hereby declare the aforesaid J. L. and the four other persons, "to be my trustees and executors for the purposes aforementioned." Held, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien.

Equity considers land, directed in wills, or other instruments, to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

Where the whole beneficial interest in the land or money, thus directed to be employed, belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money for the land at his election, if he elect before the conversion is made.

But in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his life-time.

The case of *Roper v. Radcliffe*, 9 Mod. 167, examined; distinguished from the present case; and, so far as it conflicts with it, overruled.

THIS was a case certified from the Circuit Court for the District of Virginia, in which the opinions of the judges of that court were opposed on the following question, viz.: Whether the legacy given to Thomas Craig, an alien, in the will of Robert Craig, is to be considered as a devise, which he can take only for the benefit of the commonwealth, and cannot hold; or a bequest of a personal chattel, which he could take for his own benefit.

This question grows out of the will of Robert Craig, a citizen of Virginia, and arose in a suit brought on the equity side of the Circuit Court for the District of Virginia, by Thomas Craig, against the trustees named in the will of the said Robert Craig, to compel the said trustee to execute the trusts, by selling the trust fund, and paying over the proceeds of the same to the complainant.

The clause in the will of Robert Craig, upon which the question arises, is expressed in the following terms, viz.: "In the first place, I give, devise, and bequeath unto John Leslie," and four others, "all my estate, real and personal, of which I may die seized or possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell [*565] my personal estate to the highest bidder, on two years credit, and my real estate on one, two and three years credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother, Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him accordingly as the payments are made, and I hereby declare the aforesaid John Leslie," and the four other persons, "to be my trustees and executors for the purposes aforementioned."

The Attorney-General of Virginia, on behalf of that state, filed a cross bill against the plaintiff in the original suit, and the trustee; the prayer of which is to compel the trustee to sell the trust estate, so far as it consists of real estate, and to appropriate the proceeds to the use of the said commonwealth, by paying the same into its public treasury.

The will of Robert Craig was proved in June, 1811, and the present suit was instituted some time in the year 1815.

Mr. Nicholas (Attorney-General of Virginia), argued, that most, if not all nations, have imposed some restrictions upon the capacity of aliens, to hold property within the territory of the nation. The law of England and the law of Virginia being the same in this respect, there is no want of reciprocity, and there is a peculiar fitness in extending the same rule to British subjects in this country, as is imposed on American citizens in England. By the law of [*566] England an alien cannot take a freehold by inheritance; he may take by purchase, but cannot hold; it escheats to the crown upon an inquest

Wheat. 3.

of office. Nor is this incapacity confined to a freehold interest; it extends to leaseholds, and any the smallest interest in lands.¹ The severity of this rule has been relaxed only for the benefit of commerce, and that very partially. An alien merchant may take a lease for years of a house for habitation, but not of lands, &c. And no other alien can even take a lease of a house for habitation.² The rule may be considered as illiberal, and inconsistent with the enlightened spirit of the age; but its wisdom may be vindicated on many grounds; and it can only be dispensed with by the legislative will, or by compact with foreign nations. As Lord Mansfield said of the laws against the Papists, "whether the policy be sound or not, so long as they continue in force they must be executed by courts of justice according to their true intent and meaning. The legislature only can vary or alter the law."³ The property in question consisted of real estate, which remained in specie, at the time of the deviser's death. The devise of a trust in lands cannot operate for the benefit of an alien. No equitable fiction can change the specific quality of the property. It is the settled doctrine of the common law, that an alien *cestui que* **567*** *trust* can only take for the king's use.⁴ All the reasons of policy which incapacitate him from holding a legal estate in lands, equally apply to disable him from holding an equitable estate in the same species of property; it is the usufruct, of which the law aims to deprive him. Trust estates are governed by precisely the same rules as legal estates. "The forum where it is adjudged," says Lord Mansfield, speaking in a court of equity, "is the only difference between trusts and legal estates. Trusts here are considered, as between the *cestui que trusts* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership and as legal estates, except when it can be pleaded in bar of this right of jurisdiction. Whatever would be the rule of law if it was a legal estate, is applied in equity to a trust estate."⁵ Again, speaking of the case of *Banks v. Sutton*, he says, "So that I take it by the great authority of this determination on clear law and reason, *cestui que trust* is actually and absolutely seized of the freehold in consideration of this court; and that, therefore, the legal consequence of an actual seizure of the freehold, shall in this court follow for the benefit of one **568*** in the *past."⁶ The *cestui que trust*, in the present case, takes an interest which extends to the whole estate, with an election to take it as land. Nobody but he can compel the trustees to sell, and they may hold the trust, and apply it for the benefit of the *cestui que trust* forever. This is precisely the mode in which the monastic and other ecclesiastical in-

stitutions, perverted the invention of uses, in order to evade the statutes of mortmain, and they might be applied in the same manner to evade the disability of aliens to hold a legal estate in real property. Even supposing this to be a personal trust; it is a devise of the profits growing out of land, which would, until a sale, accumulate for the advantage of an alien, and is equivalent to a devise of the land itself to an alien.⁷ There is nothing compulsory upon the trustees to sell, and by collusion between them and the *cestui que trust*, the sale might be postponed forever, whilst an alien enjoyed the profits of the lands, and transmitted them to his representative. But this devise of the proceeds of the sale of lands was, in effect, a devise of real property. The leading case on this subject⁸ is strongly fortified by subsequent decisions.⁹ In *Roper v. Radcliffe*, it was solemnly determined *that lands given in trust, or [**569** devised to pay debts and legacies, shall be deemed as money in respect to creditors, but not in respect to the heir at law or residuary legatee, in respect to whom they shall be deemed in equity as lands; and that, consequently, the residue in that case being devised to persons incapable of holding an interest in lands, the devise was void. The application of this principle to the present case is obvious. Nor can the consequence of forfeiture be avoided by the *cestui que trust* electing to take the property as money. The exercise of the right of election for such a purpose was denied in *Roper v. Radcliffe*, and in the *Attorney-General v. Lord Weymouth*. The rights of the commonwealth may be enforced in a court of equity, because the disability of an alien to hold lands for his own benefit is not considered as a penal forfeiture, but arises merely from the policy of the law. It has, therefore, been adjudged in equity, that he cannot demur to the discovery of any circumstances necessary to establish the fact of alienage.¹⁰

Mr. Wickham, contra, argued, that this was a mere question as between the heirs and personal representatives. If the property in question be real property in the view of a court of equity, it is admitted that an alien cannot hold it. But, on the other hand, if it be personal property, it cannot be denied that he may take and hold it. If, as between citizens, *it [**570** be personal property, it must be so as respects aliens. A court of law can only look to the legal quality of the property. At law the interest is vested in the trustee; but a court of equity takes notice of the title of the *cestui que trust*, as beneficially interested, and regards the quality of the estate as respects his interest only. It is incontestible, that there may be personal trusts of real property. Such are the familiar instances of trusts for the payment of

1.—Co. Litt. 2, b. Hargrave's notes, Calvin's case, Co. Rep. Part 7, 18, b.

2.—Ib.

3.—Foote v. Blount, Cowp. 466.

4.—The King v. Holland, Styles, 20; Alleyn, 14 Rolle's Abr. 154, 534; The Attorney-General v. Sir George Sands, 130, 131; 3 Ch. Rep. 33; Hobart, 214; 1 Mod. 17; Hardres, 466; Cro. Jac. 512; Gilbert on Uses and Trusts, 243; 1 Com. Dig. 300; 1 Bac. Abr. let. C., tit. Alien, 132; Harrison's case, Mr. Jefferson's correspondence with Mr. Hammond, State Papers, Walte's ed., Vol. I., p. 374.

Wheat. 8.

5.—Burgess v. Wheate, 1 W. Bl. 160.

6.—Id. 161, 162.

7.—1 Salk. 228; 1 Eq. Cas. Abr. 98, 1 Ves., 41; Co. Litt. 46, a. Cro. Eliz. 190.

8.—Roper v. Radcliffe, 9 Mod. 167, 181.

9.—The Attorney-General v. Lord Weymouth, Ambler, 20; Davers v. Dewes, 3 P. Wms. 46; Hill v. Filkins, 2 P. Wms. 8; 10 Mod. 483; The King v. The Inhabitants of Wivelingham, Doug. 737.

10.—The Attorney-General v. Duplessis, Parker, 144, 5 Bro. Parl. Cas. 91.

debts and legacies charged on land; trusts for raising portions, and bankrupt's estates; in all of which the property goes to the personal representatives, without any question as to the citizenship or alienage of the *cestui que trust*. It is an elementary principle, which lays at the very foundation of the doctrines of equity, that land directed to be sold and converted into money, and money directed to be employed in the purchase of land, are considered as that species of property into which they are directed to be converted.¹ And it is immaterial in what manner the direction is given, whether by will or deed; or in what state the property is found—in land or not.² The argument on the other side, that the alien having the right **571*** to elect that the property should not be sold, therefore it must be considered as land, may be answered by another, equally good. That having the right to say it shall be sold, it must, therefore, be considered as money. But, it is denied that an alien has an election to make it real property. As an infant cannot make an election for want of capacity;³ so an alien cannot elect to take, because he cannot hold real property. The right of election is a benevolent principle, applying for the benefit, not for the injury of parties.⁴ The *cestui que trust*, in this case, has elected to take it as money, by his bill praying for a sale. But, supposing him to have been silent, the elementary writers lay down the rule that it remains personal property. As the party who has his election may determine to take the property as land to be sold for his benefit, or money to be invested in land, the question can only arise between the heirs and personal representatives. Some cases, which appear to be exceptions to the rule, confirm it. Such are the cases of a resulting trust to the heir, where the purposes of the trust are fulfilled, or at an end;⁵ the cases where the union of title to the estate, as real and personal, extinguishes the demand,⁶ and the cases where the intention is obscure. The rule extends to all cases where the quality of **572*** money is imperatively fixed on land by the will or deed. As to *Roper v. Radcliffe*, its analogy to the present case is remote; it has always been considered a very questionable case; and it is not to be put in competition with the more direct authorities already cited. By the act of Parliament, under which that case was determined, a Catholic cannot even purchase; but at common law, an alien may not only purchase, but hold against all the world, except the crown. That case is not confirmed by Lord Chancellor King, in *Davers v. Dewes*. On the contrary, he says, that if the point, "were *res integra*, it would be, indeed, very questionable."⁷ Its reasoning is also questioned by Lord Mansfield.⁸ The case of the *Attorney-General v. Lord Weymouth*⁹ does not

fortify it, and has no analogy to the case now before the court. Here is no devise of the annual perception of profits, but the *cestui que trust* is entitled to the proceeds of the sale of the land as a sum in gross; and there is no precedent for confiscating profits of an estate purchased by an alien, which profits were actually received before office found. Nor can the argument that, by collusion between the trustee and the alien *cestui que trust*, the latter may go on forever receiving the profits of land, be supported; because it is arguing against a right from its possible abuse (always an unsound mode of reasoning), and, because the same thing may happen between an alien and any ostensible owner of land. All that a **[573]** court of equity, in any case, could do, would be to refuse to decree the land to the alien, and compel him to relinquish his claim unless he took money. But equity will not aid to enforce a confiscation. Thus, where the testator directed money to be laid out in land, the money not having been laid out, Lord Rosslyn held, that the crown, on failure of heirs, had no equity against the next of kin to have it laid out in real estate in order to claim by escheat.¹⁰

The *Attorney-General*, in reply, admitted, that in considering the legal operation of the devise, the national character of the devisee was to be laid out of view; and that the estate, which its terms would pass, could not be varied by any consideration of that character. As an alien is capable of taking (though not of holding) a direct fee in the lands, he is also capable of taking any lesser estate than a fee, under any modification of trust, express or implied. There is nothing, therefore, in the character of an alien to repel, or even to narrow, the legal operation of the terms of the devise. Whatever estate they would pass to a citizen, the same they will pass to an alien. What estate, then, would pass to a citizen? It is said, a personal estate only, because, the testator having directed the land to be sold, has stamped upon it the character of personal property. But this is not the whole effect of the terms of the devise. They give to the legatee the option of taking the land; and, in so do- **[574]** ing, they give him an interest in the land itself. This option thus cast upon the legatee is not the effect of any act to be done by him. To create the right of election, it is not necessary that he should actually elect, or that he should be able to elect. The mistake on the other side results from confounding the right of election with the exercise of that right. The right to choose is the legal effect of the devise, and stamps a character on the estate. The fact of electing is a subsequent act, which may or may not take place; but which, whether done or not, cannot alter either the character of the devise or the option which it casts upon

1.—*Doughty v. Bull*, 2 P. Wms. 323; *Attorney-General v. Johnston*, Amb. 580; *Yates v. Compton*, 2 P. Wms. 308; *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 501; *Ackroyd v. Smithson*, Id. 503; *Berry v. Usher*, 11 Ves. 87; *Robinson v. Taylor*, 2 Bro. Ch. Cas. 589; *Williams v. Coade*, 10 Ves. 500; *Biddulph v. Biddulph*, 12 Ves. 160.

2.—*Edwards et al. v. Countess of Warwick*, 2 P. Wms. 171; *Biddulph v. Biddulph*, 12 Ves. 160; *Thornton v. Hawley*, 10 Ves. 129.

3.—*Seely v. Jago*, 1 P. Wms. 389; *Earlom v. Saunders*, Amb. 241.

4.—*Grimmitt v. Grimmer*, Amb. 210.

5.—*Hewitt v. Wright*, 1 Bro. Ch. Cas. 86; And see 18 Ves. 191; 18 Ves. 174; 1 Ves. & Beames, 272.

6.—*Pultney v. Lord Darlington*, 1 Bro. Ch. Cas. 228.

7.—3 P. Wms. 46.

8.—*Foone v. Blount*, Cowp. 467.

9.—Amb. 20.

10.—*Walker v. Denne*, 2 Ves., Jun., 170.

everyone capable of taking under it, or the legal estate in the lands which this option creates. The option thus given to the devisee by the terms of the will is an operative principle, which, whether exercised or not, still gives *eo instanti* that the will takes effect, an interest in the lands, which, if the devisee be incapable of holding, they pass to the commonwealth. So far is the effect of this option from awaiting an act of election to be done by the devisee, and depending on such act, that it has been decided where a subsequent election had been made to take as money, by persons disabled to hold the interest in land, that the act of election came too late to change the character of the devise, which, by virtue of the option it carried with it, had thrown upon the devisee an estate in the lands the instant the will itself began its operation. It is true that the decision in *Roper v. Radcliffe* is founded on a particular act of Parliament against Papists: but this is no objection **575*** if the act of Parliament creates precisely the same disabilities in respect to the Catholics which the common law had created in relation to aliens. For if their respective disabilities as to land be the same, a devise of lands to one will receive precisely the same construction as a devise of lands to the other. The object of the stat. of 11th and 12th of William III., ch. 4, was to render Papists aliens, in regard to lands in England. The stability of the government being supposed to depend upon this policy, "the design of the maker of this law," says Lord Chief Justice Parker, "was, first, to get the lands of this kingdom out of the hands of Papists." "And, secondly, to prevent them from making any new acquisition." The first object does not relate to aliens; but the second applies precisely to them, and the provisions of the act, as to Papists, are substantially the same with those of the common law as to aliens. It is not, however, the disabilities of either, which are to affect the construction of this devise; that construction is first to be made on the terms of the devise itself, and then whatever legal consequence would result from the disability of the one, will equally result from that of the other. In *Roper v. Radcliffe*, it was held that, though lands devised to be absolutely sold for the payment of debts and legacies were to be considered as money, so far as creditors and legatees were concerned, yet, as to the residuary devisee they were to be considered as lands, because of his option to prevent the sale by paying the **576*** debts and legacies, or his *option to have a decree for the sale of so much only as the debts and legacies should require; and, it was determined in that case, that the residuum devised to the Papists should be considered as land, and, therefore, within the prohibition of the statute. The authority of this case has been repeatedly recognized in subsequent decisions, all of which concur to show that, though a devise of lands to be sold is considered as personal estate, as to creditors and specific legatees, yet it is considered as land in respect to the heirs and residuary legatees.¹ And

1.—9 Mod. 191.

2.—*Hill v. Filkins*, 2 P. Wms. 6; *Davers v. Dewes*, 3 P. Wms. 46; *Carriock v. Fergus*, 2 P. Wms. 362; 2 Bro. Parl. Cas. 412; 2 P. Wms. 4; *The Attorney-General v. Lord Weymouth*, Amb. 20; *The King v. The Inhabitants of Wivelingham*, Doug. 737.

Wheat. 8.

where none of it is wanting for the payment of debts and legacies, the whole may be retained as land. This doctrine is founded on the right of election, resulting from the devise. But no actual election need be made to produce the legal effect; it is the same, though the parties are disabled to elect; they cannot defeat its operation by electing to take as money; and where nothing is done indicative of an election, the principle still operates.

WASHINGTON, J., delivered the opinion of the court: The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of *Virginia, [**577**] that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make, is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself.

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner* (1 Bro. Ch. Cas., 497) the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money, or money *land. [**578**] The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. (See *Dougherty v. Bull*, 2 P. Wms., 320; *Yeates v. Compton*, Id., 358; *Trelawney v. Booth*, 2 Atk., 307.)

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

Thus, where the whole beneficial interest in the money in the one case, or in the land in the

other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

579* *If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his life-time.

In the case of *Kirkman v. Mills* (18 Ves.), which was a devise of real estate to trustees upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testators, three daughters, A, B and C. The estate was, upon the death of A, B and C, considered and treated as personal property, notwithstanding the *cestui que trust*, after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held, that without some act, it must be considered as being in the state in *which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of *Edwards v. The Countess of Warwick* (2 P. Wms., 171), which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in *tail male*, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his *parol* disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court

is called upon to decide, and would render any further investigation of it useless, were it not for the case of *Roper v. Radcliffe*, which was cited, and mainly relied upon, by the counsel for the state of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise *should [*581 appoint, and for want of such appointment, for the benefit of the said John Roper and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being Papists. The decree of the Court of Chancery, which was in favor of the Papists, was, upon appeal to the House of Lords, reversed, and the title of the heir at law sustained; six judges against five being in his favor.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are: *1. That land devised to trustees, [*582 to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from

some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir at law, as the old use not disposed of. Such was the case of *Crewe v. Bailey* (3 P. Wms., 20), where the testator, having two sons, A and B, and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave £200 to A, the eldest son, at the age of 21, and the residue to his four younger children. A [583*] died before the age of 21, in consequence of which, the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was, in effect, the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of *Ackroyd v. Smitton* (1 Bro., Ch. Cas., 508) is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. (*Hewitt v. Wright*, 1 Bro., Ch. Cas., 88.)

But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yeates v. Compton* (2 P. Wms., 305); in which the chancellor says that the intention of the will was to give away all from the heir, and turn the land into personal estate, and that this was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decree the heir to join in the sale of the land, and the money [584*] arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of *Fletcher v. Ashburner*, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the cases of *Emlyn v. Freeman*, and *Crewe v. Bailey*, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and

entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of, remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of *Roper v. Radcliffe* is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay [585 the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust* of the whole beneficial interest in the money to arise from the sale of the land may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

But the court cannot accede to the conclusion which, in *Roper v. Radcliffe*, is deduced from the establishment of the above principles. The conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life-time, the property will then assume the character of land. But if he does not make this election, the property retains its character of personalty to every intent and purpose. The cases before cited seems to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the con- [586 clusion made in the unqualified terms used in the case of *Roper v. Radcliffe*.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition, it should be shown that the right or privilege of election is so indissolubly united with the devise as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true that equity will extend this privilege in all cases to the *cestui que trust*. It will be refused if he be an infant. In the case of *Seeley v. Jago* (1 P. Wms., 389); where money was devised to be laid out in land in fee, to be settled on A, B and C, and their heirs, equally to be divided. On the death of A, his infant heir, together with B and C, filed their bill claiming to have the money, which was decreed accordingly as to B and C; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that

such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foone v. Blount* (Cowp., 467), Lord Mansfield, who is compelled to acknowledge the authority of *Roper v. Radcliffe* in par-^{587*} allel cases, *combats the reasoning of Chief Justice Parker upon this doctrine of election with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

The case of *Walker v. Denne* (2 Ves., Jun., 170), seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts*, though a *feme covert*, was held, a sufficient indication of her intention that it should continue personal, against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election^{588*} where it is desired, *and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land. In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and, consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of *Roper v. Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

The incapacities of a Papist under the English statute of 11 and 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take.

His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any *such interest, [⁵⁸⁹ but the will or deed itself, which attempts to pass it, is void. In *Roper v. Radcliffe*, it was strongly insisted that the money given to the Papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so (and it is not material in this case to affirm or deny that position), then the will of John Roper in relation to the bequest to the two Papists was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestible. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.¹ In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could upon the principles of a court of equity, *have elected to take [⁵⁹⁰ the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper v. Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield, in the case of *Foone v. Blount*, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of *The Attorney-General and Lord Weymouth* (Ambler, 20) was also pressed upon the court, as strongly supporting that of *Roper v. Radcliffe*, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against Papists, and the chancellor so considered it; for, he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and encumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as *Roper v. Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case the chancellor avoids expressing

1.—*Vide ante*, p. 12, Jackson, *ex dem.* State of New York v. Clarke, note c.

any opinion upon the question, whether the \$591*] money to arise from the sale of *the land was to be taken as personalty or land; and, although he mentions the case of *Roper v. Radcliffe*, he adds, that he does not depend upon it, as it was immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole, we are unanimously of opinion that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

Cited—10 Pet. 568; 5 How. 269, 270; 12 How. 107; 19 Wall. 174, 177; 1 Bald. 173, 185, 186.

[CHANCERY.]

CAMERON v. M'ROBERTS.

The circuit courts have no power to set aside their decrees in equity on motion, after the term at which they are rendered.

Where M'R., a citizen of Kentucky, brought a suit in equity, in the Circuit Court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E. without any designation of citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff: it was held, that if a joint interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause. But that if a distinct interest vested in C. C. so that substantial justice (so far as he was concerned) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

APPEAL from the Circuit Court for the District of Kentucky.

\$592*] *John M'Roberts, stated in the pleadings to be a citizen of the state of Kentucky, brought his suit in equity, in the District Court of Kentucky (said court then having by law the jurisdiction of a circuit court), against Charles Cameron, stated to be a citizen of Virginia, and Ephraim Jackson, Samuel Emerson, and other parties named in the bill, without any designation of citizenship. The defendant, Cameron, was not served with process, but appeared and answered the bill, as did the other defendants. The cause was heard, and at the November term of said court, in 1804, a final decree was pronounced for the plaintiff, M'Roberts.

In 1805, the defendant, Cameron, filed a bill of review, which is now pending, and at the May term of the Circuit Court, of 1811, moved the court to set aside the decree, and to dismiss the suit, because the want of jurisdiction appeared on the record; and upon the allegation that the said Jackson, Emerson, and the other parties to the bill, were, in fact, citizens of the state of Kentucky. On which motion the following questions arose:

1st. Has the Circuit Court power and jurisdiction over a judgment or decree, so as to set the same aside after the term at which it was pronounced?

2d. If it has, could it be exercised after the lapse of five years?

3d. Had the District Court jurisdiction of the cause as to the defendant, Cameron, and the

other defendants? If not, had the court jurisdiction as to the defendant, Cameron, alone?

*Upon which questions the judges of [*593 the Circuit Court being divided in opinion, the same were ordered to be certified to this court.

The cause was argued at the last term by *Mr. M. D. Hardin* for the plaintiff, M'Roberts; no counsel appearing for the defendant.

At the present term of this court it was ordered to be certified to the Circuit Court for the District of Kentucky as follows, viz.:

CERTIFICATE.—This cause came on to be heard on the statement of facts contained in the record, and on the questions on which the opinions of the judges of the Circuit Court were opposed, and which were, therefore, at the request of one of the parties, adjourned to this court, and was argued by counsel. On consideration whereof this court doth order it to be certified to the Circuit Court of the United States for the District of Kentucky.

1st. That in this case the court had not power over its decree, so as to set the same aside on motion after the expiration of the term in which it was rendered.

2d. Consequently, such power cannot be exercised after the lapse of five years.

3d. If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) *could be done [*594 without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

Cited—10 Wheat. 188 (n); 7 Pet. 262; 12 Pet. 492; 6 How. 38, 40; 17 How. 140, 141, 508; 18 How. 511; 6 Wall. 285; 22 Wall. 245; 1 Wood. & M. 23, 38, 63, 65; 2 Wood. & M. 232; 1 Blatchf. 306; 12 Blatchf. 290; 1 McLean, 331; 3 McLean, 498; 4 McLean, 242; 1 Bald. 416; 2 Abb. U. S. 554; 2 Sumn. 347, 349; 5 Ben. 416; 6 Bank. Reg. 18; McAll. 28; 4 Wash. 598; Woolw. 308.

[CHANCERY.]

CRAIG ET AL. v. RADFORD.

If, under the Virginia land law, the warrant must be lodged in the office of the surveyor at the time when the survey is made, his certificate, stating that the survey was made by virtue of the governor's warrant, and agreeably to the royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time.

The 8th section of the act of Virginia of 1748, entitled "An act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions.

A survey made by the deputy-surveyor is, in law, to be considered as made by the principle surveyor.

An alien may take, by purchase, a freehold estate which cannot be devoted on the ground of alienage, but by inquest of office or some legislative act equivalent thereto.

A defeasible title, thus vested, during the war of the revolution, in a British-born subject, who has never become a citizen, is completely protected and confirmed by the 9th article of the treaty of 1794, between the United States and Great Britain.

THIS cause was argued at the last term by *Mr. M. D. Hardin* and *Mr. Talbot* for the appellant, and by *Mr. B. Hardin* for the respondent.

WASHINGTON, J., delivered the opinion of **595*** the court: This is an appeal from a decree of the Circuit Court for the District of Kentucky, made in a suit in chancery, instituted by the appellee against the appellants, whereby the latter were decreed to convey to the former certain parts of a tract of land, granted to them by the commonwealth of Virginia, to which the appellee claimed title, under a junior patent, founded on a prior warrant and survey.

The warrant to William Sutherland (under whom the appellee claims) bears date the 24th of January, 1774, and was issued by the Governor of Virginia, by virtue of the proclamation of the King of Great Britain, of 1763. Under this warrant, one thousand acres of land, lying in Fincastle county, on the south side of the Ohio River, were surveyed on the 4th day of May, 1774, by Hancock Taylor, deputy-surveyor of that county, and a grant issued for the same by the commonwealth of Virginia, to the said William Sutherland, bearing date the 5th of August, 1788. The appellee derives his title as devisee under the will of his father, William Radford, to whom the said tract of land was conveyed, by William Sutherland, on the 18th of February, 1799.

The appellants claim parts of the aforesaid tract of land, under entries made upon treasury warrants, in the year 1780, which were surveyed in 1785, and patented prior to the 26th of May, 1788.

It is admitted by the parties, 1st. That William Sutherland was a native subject of the King of Great Britain, and that he left Virginia prior to the year 1776, and has never **596*** since returned to the United States. 2d. That Hancock Taylor was killed by the Indians in 1774, and that he never did return the surveys made by him to the office of Preston, the principal surveyor of Fincastle county, but that A. Hemptonstrall, one of the company, took possession of his field notes, after his death, and lodged them in Preston's office; and that it was Taylor's usual practice to mark all the corners of his surveys.

The correctness of the decree made in this cause is objected to on various grounds.

1st. Because it does not appear that Hancock Taylor had in his possession, or under his control, a warrant authorizing him to execute this survey for William Sutherland.

2d. Because there is not only an absence of all evidence to prove that the survey, for Sutherland, was made and completed on the ground, but that it appears, from the evidence of Hemptonstrall, that no such survey was actually made. This witness states that he attended Hancock Taylor on this survey as a marker, and sometimes as a chain carrier. He proves the beginning corners and the five first lines of the survey, ending at four chestnut trees, the mark of which lines were plainly discernible when this tract was surveyed, under an order of the Circuit Court made in this cause. But he adds that the subsequent lines of the survey were not run; and the surveyor who executed the order of the Circuit Court reports that he met with no marked line, or corner trees, after he left the four chestnuts.

3d. It is objected, in the third place, that the **597*** survey, *not having been completed by the deputy-surveyor, the court ought to infer

that the lines actually run were merely experimental; and, in such a case, it is contended that the principal surveyor could not make and certify a plat of the survey on which a grant could legally be founded.

It appears to the court that these objections were fully examined and overruled in the case of *Taylor and Quarles v. Brown* (5 Cranch, 284).

It was there decided, 1. That if, in point of law, the warrant must be lodged in the office of the surveyor at the time when the survey is made, his certificate, which states that the survey was made by virtue of the governor's warrant, and agreeably to His Majesty's royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time. In this case the warrant, under which Sutherland's survey was made, is described in the certificate with sufficient certainty to prove that the officer in making the survey acted under its authority. 2. It was decided that the 6th section of the act of Virginia, passed in the year 1748, entitled, "an act directing the duty of surveyors of lands," upon which the second objection made in that case, and in this, is founded, is merely directory to the officer, and that it does not make the validity of the survey to depend upon the conformity of the officer to its requisitions. This construction of the above section appears to the court to be perfectly well founded. The owner of the warrant has no power to control the conduct of the surveyor, whose duty it is to execute it, and it would therefore be unreasonable to deprive him of the *title which the warrant confers upon **598** him, on account of the subsequent neglect of that officer. If the omission of the surveyor to "see the land plainly bounded by natural bounds or marked trees," which the law imposes upon him as a duty, cannot affect the title of the warrant holder, it would follow that his omission to run all the lines of the survey on the ground, which the law does not in express terms require him to do, ought not to produce that effect. If the surveyor, by running some of the lines, and from adjoining surveys, natural boundaries, or his personal knowledge of the ground, is enabled to protract the remaining lines, so as to close the survey, no subsequent locator can impeach the title founded upon such survey, upon the ground that all the lines were not run and marked. The legislature may undoubtedly declare all such surveys to be void; but no statute to this effect was in force in Virginia at the time when this survey was made.

3. The third objection made to this decree appears to be substantially removed by the opinion of this court on the third point in the case above referred to. It was there decided that the survey, though in fact made by the deputy-surveyor, was in point of law to be considered as made by the principal, and, consequently, that his signature to the plat and certificate was a sufficient authentication of the survey to entitle the person claiming under it to a grant.

As to the distinction taken at the bar between that case and this, upon the ground that in this the survey was merely experimental, and was not intended to be made in execution of the warrant, there is certainly *nothing in **599** it. It is by acts that the intention of men, in

the absence of positive declarations, can best be discovered. The survey made by Taylor was adopted by the principal surveyor, as one actually done in execution of the warrant to Sutherland, and it would be too much for this or any other court to presume that a contrary intention prevailed in the mind either of the principal or deputy-surveyor, and on that supposition to pronounce the survey invalid.

The last objection made to this decree is, that as a British subject, Wm. Sutherland could not take a legal title to this land under the state of Virginia, and, consequently, that the grant to him in 1788 was void, and was not protected by the treaty of 1794, between the United States and Great Britain.

The decision of this court in the case of *Fairfax's devisee v. Hunter's lessee* (7 Cranch, 608) affords a full answer to this objection. In that case the will of Lord Fairfax took effect in the year 1781, during the war, and Denny Martin, the devisee under that will, was found to be a native born British subject, who had never become a citizen of any of the United States, but had always resided in England.

It was ruled in that case, 1st. That although the devisee was an alien enemy at the time of the testator's death, yet he took an estate in fee under the will, which could not, on the ground of alienage, be divested but by inquest of office, or by some legislative act equivalent thereto. 2d. That the defeasible title thus vested in the **600*** alien devisee was completely *protected and confirmed by the ninth article of the treaty of 1794.

These principles are decisive of the objection now under consideration. In that case, as in this, the legal title vested in the alien by purchase during the war, and was not divested by any act of Virginia, prior to the treaty of 1794, which rendered their estates absolute and indefeasible.

Decree affirmed with costs.

Cited—14 Pet. 412; 2 Wood. & M.

[PRACTICE.]

ROSS v. TRIPLETT

This court has no jurisdiction of causes brought before it, upon a certificate of a division of opinions of the judges of the Circuit Court for the District of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgment and decrees of the latter.

THIS cause was brought from the Circuit Court for the District of Columbia, upon a certificate that the opinions of the judges of that court were divided upon a question which occurred in the cause, under the judiciary act of 1802, ch. 291 (xxxi.), s. 6. It was submitted without argument.

It was ordered to be certified to the Circuit Court for the District of Columbia, as follows:

601* *CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Columbia, and on the question certified, on which the Wheat. 3.

judges of that court were divided, and was argued by counsel. On consideration whereof this court is of opinion that its jurisdiction extends only to the final judgments and decrees of the said Circuit Court. It is therefore considered by this court that the cause be remanded to the said Circuit Court for the District of Columbia, to be proceeded in according to law.

Cited—5 Pet. 206.



[INSTANCE COURT.]

THE NEPTUNE. HARROD ET AL., Claimants.

Libel under the 27th section of the registry act of 1792, ch. 148 (l), for the fraudulent use by a vessel of a certificate of registry, to the benefit of which she was not entitled. Vessel forfeited.

The provisions of the 27th section apply as well to vessels which have not been previously registered as to those to which registers have been previously granted.

APPEAL from the District Court of Louisiana.

This cause was argued by *Mr. D. B. Ogden* and *Mr. C. J. Ingersoll* for the appellants and claimants, and by the *Attorney-General* for the United States.

*DUVALL, J., delivered the opinion [***602** of the court: The ship Neptune, owned and commanded by Captain Myrick, arrived at New Orleans from London on the 20th of October, 1815. On the next day he appeared, in company with George M. Ogden, one of the appellants, at the custom-house, and reported the Neptune as a registered vessel of the United States, belonging to Wilmington, North Carolina, where, he alleged, and it was so stated in the manifest, she was registered. He declared, at the same time, that he had lost the register in ascending the Mississippi, and required a new one to be issued in lieu of it. Captain Myrick had made a protest before a notary public to that effect, and offered to take the oath required by the 18th section of the act, entitled, an act concerning the registering and recording of ships or vessels, but was taken sick, and, in a few days afterwards, died without taking it.

George M. Ogden administered on the estate of Captain Myrick, and on the 22d of November, the court of probates ordered a sale of the effects of the intestate, which was made on the 5th of December following, at which sale Messrs. Harrod and Ogdens became the purchasers of the Neptune, for \$7,500.

On the 12th of January, 1816, Messrs. Harrod and Ogdens addressed a letter to the collector, requesting to be informed whether a register could be granted for the ship Neptune, on the owners taking the oath prescribed by law. The collector replied, by letter dated the 20th, that a register had been refused the ship Neptune, on the ground that the oath offered to *show the loss of a former register [***603** was insufficient, inasmuch as it contained an assertion that the register lost was granted at the port of Wilmington in North Carolina, and

by a letter from the collector of that port, information had been received that no such register was ever issued from his office. The collector was afterwards examined as a witness in the cause, and declared on oath to the same effect.

George M. Ogden, one of the owners, afterwards applied at the collector's office for a register, offering to take an oath, the form of which he had prepared, varying from the form of the oath required by law; he was informed by the collector it was not sufficient, and that unless he would take the oath in the form prescribed by the registry act, a register could not be granted. Mr. Ogden pressed the form of the oath which he had tendered, but was again told it could not be received. Mr. Ogden had been shown the letter from the collector at Wilmington, and had been informed of its contents by the attorney for the district. Nevertheless, he appeared in the collector's office on the 22d of January, 1816, and took the oath required by law, relying, as he said, on the oath which Captain Myrick had taken, as the ground of his oath; and a register issued in form to the owners, Richard Peniston, master. In this oath he deposed, that "being owner in part and having charge of the ship or vessel called the Neptune, the said ship or vessel had been, as he verily believed, registered according to law by the name of Neptune, and that a certificate thereof was granted by the collector of the district of Wilmington in the 604*] state of *North Carolina, which certificate had been lost and destroyed by accidentally falling overboard in the river Mississippi."

On the part of the owners, John M'Cauley, mate of the Neptune, deposed, that on her voyage from London to New Orleans, he had seen the register of the ship Neptune frequently, and before the issuing of the new register he had assured Mr. Ogden he had seen it, and that he believed it to be dated at Wilmington, North Carolina, and that it was lost, by accident, from the pocket of the captain in the river Mississippi; and that he had no reason to doubt it a genuine one. M'Cauley being asked, "Did Captain Myrick tell you on his return from town that he had shown the register to Messrs. Harrod and Ogdens?" answered: "He said he had laid the pocket-book containing it on the desk." The carpenters, who repaired the Neptune, certified that, in their opinion, she was built in the United States.

The Neptune cleared out at the custom-house of New Orleans, on the 9th day of February, 1816, when she was immediately seized by the collector, as forfeited to the United States, and libeled for a breach of the 27th section of the act of Congress of the 31st of December, 1792, ch. 146 (I.), entitled, "An act concerning the registering and recording of ships or vessels." Upon these facts, the Neptune, together with her tackle, apparel and furniture, was, by the sentence of the District Court, condemned as forfeited to the United States. From this decree the owners appealed to this court.

605*] *The question for the decision of this court must depend upon the true construction of the act before mentioned. If the appellants have, in all respects, complied with the requisites of that act, they have incurred no forfeit-

ure; if any of its provisions, which inflict a forfeiture of the vessel for a non-compliance, have been violated, a forfeiture will ensue.

By the first section of the act, it is provided, that ships or vessels of the United States shall not continue to enjoy the benefits and privileges appertaining to such ships or vessels, longer than they shall continue to be wholly owned and be commanded by a citizen, or citizens, of the United States.

The third section directs that all vessels, thereafter to be registered, shall be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel usually resides; and the name of the vessel, and of the port to which she belongs, shall be painted on her stern.

The fourth section prescribes the substance of the oath to be taken in order to the registry and contains a clause of forfeiture, in case any of the matters of fact, which shall be within the knowledge of the party swearing, shall not be true. The fifth section makes it the duty of all the owners, resident within the United States, to take a like oath within ninety days after the granting the register.

*The ninth section directs the collector of each district to keep a record of all ships and vessels to which registers shall have been granted, and prescribes the form of the register. The tenth section directs a copy of each register to be transmitted to the register of the treasury, who shall cause a record of them to be kept.

The eleventh section directs the course of proceeding, in case a vessel be purchased by a citizen before registry, and contains a clause of forfeiture in case of false swearing.

By the thirteenth section it is enacted, that if the certificate of registry of any vessel shall be lost, destroyed, or mislaid, the master, or other person having the charge or command of her, may make oath, or affirmation, before the collector of the district, where such vessel shall first be, after such loss or destruction; and the form of the oath is prescribed. It is an essential part of the oath, that in it shall be stated the name of the collector, and the port at which the former register was granted.

The fourteenth section requires, that when a registered vessel shall be sold or transferred to a citizen of the United States, she shall be registered anew by her former name; and if not registered anew, she shall not be entitled to the privileges or benefits of a ship of the United States.

By the twenty-seventh section it is provided, that if any certificate of registry or record shall be fraudulently, or knowingly, used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of the act, such ship or vessel shall *be [*607 forfeited to the United States, with her tackle, apparel and furniture.

In the argument of this case, it was admitted by the counsel for the appellants that the register was improperly obtained, but it was denied that the vessel became thereby forfeited under

the 27th, or any other section of the registry act. And it was contended that the owner having a register issued by the collector, was proof that it was not fraudulently obtained. In support of this position, the case of *The Anthony Mangin* was cited from 3 Cranch, 337.

To this it was replied, that the appellants purchased the *Neptune* knowing that she was without a register. That it was alleged to have been granted to the former owner by the collector for the port of Wilmington, in North Carolina, and that it was lost. The appellants knew that information had been received from the collector at Wilmington, that a register for the *Neptune* had never been issued at that port; and that, therefore, it was fraudulently obtained, and used for the *Neptune*, not then entitled to the benefit of it.

The case of *The Anthony Mangin* does not support the argument of the appellant's counsel. In that case an action was brought by the United States against Grundy and Thornburgh, for money had and received for the use of the United States by the defendants, as assignees of *Aquila Brown, Junior*, a bankrupt, it being money received by the defendants for the sale of the ship *Anthony Mangin*, which ship the United States alleged was forfeited by reason **608***] *that *Brown*, in order to obtain a register for her as a ship of the United States, had falsely sworn that she was his sole property, when he knew that she was in part owned by an alien. There was no proceeding *in rem* against the vessel. It was a suit against the assignees of *Brown* for the value of the vessel; and the court decided that an action for the value could only be supported against the person who had taken the oath.

It is evident from the facts in this case, that *George M. Ogden*, when he applied for a register for the *Neptune*, did not believe that he could with safety take the oath required by law; because he had prepared an oath varying in form from the oath required, which he pressed the collector to be permitted to take, but which the collector refused to administer. And the collector was of opinion, until he consulted the district-attorney, that he ought not to be permitted to take the oath prescribed, as he could not do it without swearing to a fact which was known to be untrue. For this reason he refused to administer the oath to Captain Myrick in his life-time.

There are strong grounds for the belief that the *Neptune* never had a genuine register. She is represented in the manifest to have been built at Boston, to be owned by Captain Myrick, of New York, and that she belonged to the port of Wilmington, in North Carolina. If she had been built at Boston, and belonged at the time to a person residing in New York, it is more than probable that, pursuant to the provisions of the third section of the act, she would have been registered at one of those **609***] places. If Captain *Myrick or the present owners had been desirous of obtaining correct information on the subject, it would have been furnished on application to the treasury department. All registers are transmitted regularly to the register of the treasury to be registered in his office.

It should be recollected that the mate of the *Neptune* testified that Captain Myrick, after *Wheat. 3.*

returning from the house of Messrs. Harrod & Ogdens to his vessel, said he had left his pocket-book containing the register on their desk. Hence, it is rational to conclude, either that Captain Myrick had no register or that if he had one, it would not bear inspection.

Upon the whole, the court are of opinion that the register was fraudulently and knowingly used for the *Neptune*, when she was not entitled to the benefit of it; and that she is forfeited for a violation of the provisions of the 27th section of the registry act; and that the provisions of that section apply as well to vessels which have not been previously registered as to those to which registers have been previously granted.

Decree affirmed.

DECREE.—This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, it is decreed and ordered that the decree of the District Court of Louisiana in this case be, and the same is hereby affirmed, with costs and damages at the rate of six per centum *per annum, including interest on the ***610** amount of the appraised value of the said ship *Neptune*, to be computed from the date of the decree of the said District Court.

Cited—*Deady, 644; 2 Wood. & M. 544.*

THE UNITED STATES

v.

PALMER ET AL.

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A robbery committed on the high seas, although such robbery if committed on land would not by the laws of the United States be punishable with death, is piracy, under the 8th section of the act of 1790, ch. 36 (ix), for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof.

The crime of robbery, as mentioned in the act, is the crime of robbery as recognized and defined at common law.

The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States.

When a civil war rages in a foreign nation, one part of which separates itself from the old-established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed

NOTE.—See note to *U. S. v. Bevans, 3 Wheat. 336*; also *U. S. Rev. Stat. sects. 5370, 5372*, and cases there cited.

Piracy is robbery, or a forcible depredation, on the high seas, without lawful authority, and done *animus furandi*, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy. *Atty.-Gen. v. Kwok-a-Sing, 8 Eng. Rep. 161; Rex v. Dawson, 13 How. St. Tr. 451, 454; 1 Kent's Com. 185; U. S. v. Smith, 5 Wheat. 153, 163, note; 3 Inst. 113; 1 Hawk. P. C. 251; 1 Russ. Crimes, 94.*

The vessels of a nation, whether public or private, traversing the ocean, which is the common highway of nations, are deemed to be floating parts of her territory; and over a crime committed on board, and not within the bounds of any other

by the legislative and executive departments of the government of the United States.

If that government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly-erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

THIS case was certified from the Circuit Court for the Massachusetts District.

611*] *At the Circuit Court of the United States, for the first circuit, begun and holden at Boston, within and for the Massachusetts District, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventeen.

Before the Honorable Joseph Story, associate justice, and John Davis, district judge.

The jurors of the United States of America within and for the district aforesaid, upon their oaths, do present, that John Palmer and Thomas Wilson, both late of Boston, in the district aforesaid, mariners, and Barney Calloghan, late of Newburyport, in the aforesaid district, mariner, with force and arms, upon the high seas, out of the jurisdiction of any particular state, on the fourth day of July now last past, did piratically and feloniously set upon board, break, and enter a certain ship called the *Industria Raffaelli*, then and there being a ship of certain persons (to the jurors aforesaid unknown), and then and there, piratically and feloniously, did make an assault in and upon certain persons, being mariners, subjects of the King of Spain, whose names to the jurors aforesaid are unknown, in the same ship, in the peace of God, and of the said United States of America, then and there being, and then there piratically and feloniously did put the aforesaid persons, mariners of the same ship, in the ship aforesaid then being,

in corporal fear and danger of their lives, then and there, in the ship aforesaid, upon the high seas aforesaid, and out of the jurisdiction of any particular state, as aforesaid, and piratically and feloniously did, then and there, steal, take, and carry away *five hundred and twelve boxes of sugar, of the value of twenty thousand dollars of lawful money of the said United States; sixty pipes of rum, of the value of six thousand dollars; two hundred demijohns of honey, of the value of one thousand dollars; one thousand hides, of the value of three thousand dollars; ten hogheads of coffee, of the value of two thousand dollars; and four bags of silver and gold, of the value of sixty thousand dollars, of the like lawful money of the said United States of America, the goods and chattels of certain persons (to the jurors aforesaid unknown), then and there, upon the high seas aforesaid, and out of the jurisdiction of any particular state, being found in the aforesaid ship, in custody and possession of the said mariners in the said ship, from the said mariners of the same ship, and from their custody and possession, then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, as aforesaid; against the peace and dignity of the said United States, and the form of the statute of the United States, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do farther present, that the aforesaid district of Massachusetts is the district where the offenders aforesaid were first apprehended for the said offense.

To which indictment the prisoners pleaded not guilty, and upon the trial the following questions occurred, upon which the opinions of the said judges of the Circuit Court were opposed:

1st. Whether a robbery committed upon the high seas, although such robbery, if committed upon land, would not, by the laws of the United States, be punishable *with [*613] death, is piracy under the eighth section of the act of Congress, passed the thirtieth of April, A. D., 1790; and whether the Circuit Court of

nation, the courts of the country to which the vessel belongs have a complete territorial jurisdiction. *Wheaton's International Law*, 158, 174; *U. S. v. Pirates*, 5 Wheat. 184; *U. S. v. Imbert*, 4 Wash. C. 702; *U. S. v. Holmes*, 5 Wheat. 412; *U. S. v. Wiltberger*, 5 Wheat. 76; *Reg. v. Serva*, 2 Car. & K. 53; 1 Den. C. C. 104; *Reg. v. Bjornsen, Leigh & Co.* 546; *Reid v. Ship Vere, Bee*, 66; *Rex v. Amarro, Russ & Ry*, 284.

Mariners sailing a vessel or the passengers may commit piracy upon it; as if they shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, tackle, apparel or furniture feloniously. *Rex v. Dawson*, 13 Howell's St. Tr. 451, 464.

Piracy is usually committed under the flag of some known government; but the crew of any vessel committing it casts off thereby its national character; and so, the guilty persons, though the acknowledged subjects of some known government, may be apprehended and punished by the authorities of any nation. *U. S. v. Pirates*, 5 Wheat. 184; *Adams v. The People*, 1 Comst. 173, 177; *The Marianna Flora*, 11 Wheat. 1, 40; *U. S. v. Gilbert*, 2 Sumner, 19, 24, note; 4 Bl. Com. 71; *U. S. v. Demarchi*, 5 Blatchf. 84; *Wheat. Int. Law* 186, 6th ed.; *Dole v. N. E. Ins. Co.*, 2 Cliff. 394, 418; *In re Ternan*, 9 Cox, C. C. 522; *Attorney-Gen'l v. Kwok-a-Sing*, 8 Eng. R. 143, 161.

By the revised statutes of the United States, "Every person who, on the high seas, commits the crime of piracy as defined by the law of nations,

and is afterwards brought into, or found in, the United States, shall suffer death." R. S. of U. S., sec. 5,506.

Pirates may be lawfully captured on the ocean by the public or private ships of every nation, and by becoming a pirate a vessel loses its national character. *The Marianna Flora*, 11 Wheat. 1; *U. S. v. Pirates*, 5 Wheat. 184; *U. S. v. Jones*, 3 Wash. C. C. 203.

To bring a person committing murder, or robbery, within the rule laid down in *United States v. Palmer*, *supra*, the vessel on board which he is, or to which he belongs, must be, at the time, in point of fact as well as right, the property of subjects of a foreign state, who must have, in virtue of this property, the control of the vessel. She must, at the time, be sailing under the flag of a foreign state, whose authority is acknowledged. General piracy, or murder, or robbery committed by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of law, and acknowledging obedience to no government whatever, is within the act, and is punishable in the courts of the United States. *U. S. v. Klintock*, 5 Wheat. 144, 151.

A vessel loses her national character by assuming a piratical character; and a piracy committed by a foreigner from on board such a vessel, upon any other vessel whatever, is punishable under sec. 8 of the act of April 30, 1790. *U. S. v. Pirates*, 5 Wheat. 184; *U. S. v. Gilbert*, 2 Sumn. 19.

Wheat. 3.

the United States hath authority to take cognizance of, try, and punish such offense.

2d. Whether the crime of robbery, mentioned in the said eighth section of the act of Congress aforesaid, is the crime of robbery, as recognized and defined at common law, or is punishable until it is defined and expressly punished by some act of Congress, other than the act of Congress above mentioned.

3d. Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy, within the true intent and meaning of the said eighth section of the act of Congress aforesaid, and of which the Circuit Court of the United States hath cognizance, to hear, try, determine, and punish the same.

4th. Whether the crime of robbery committed on the high seas, by citizens of the United States, on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of a foreign state or sovereignty, or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not, at the time, on board of any **614*** ship or vessel, belonging in whole or part to the United States, or to any citizen thereof, be a robbery or piracy within the said eighth section of the acts of Congress aforesaid, and of which the Circuit Court of the United States hath cognizance to hear, try, and determine, and punish the same.

5th. Whether any revolted colony, district, or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign or independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property and vessels of the subjects of the mother country, who retain their allegiance; and whether the captures made under such commissions are, as to the United States, to be deemed lawful; and whether the forcible seizure, with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance, on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy within the said eighth section of the act of Congress aforesaid.

6th. Whether an act, which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas, when the same act is done under a commission, or the color of a commission from any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, **615*** and *have assumed to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged, or recognized, as an independent or sovereign government, or nation, by the **Wheat. 3.**

United States, or by any other foreign state, prince, or sovereignty.

7th. Whether the existence of a commission to make captures, where it is set up as a defense to an indictment for piracy, must be proved by the production of the original commission, or of a certified copy thereof from the proper department of the foreign state or sovereignty by whom it is granted; or if not, whether the impossibility of producing either the original or such certified copy must not be proved, before any inferior and secondary evidence of the existence of such commission is to be allowed, on the trial of such indictment before any court of the United States.

8th. Whether a seal, purporting to be the seal of a foreign state or sovereignty, and annexed to any such commission, or a certified copy thereof, is to be admitted in a court of the United States as proving itself, without any other proof of its genuineness, so as to establish the legal existence of such commission from such foreign state or sovereignty.

9th. Whether a seal, annexed to any such commission, purporting to be the public seal used by the persons exercising the powers of government in any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and actually exercise the powers of an independent government *or nation, but have never been ac- **[*616]** knowledged as such independent government or nation by the United States, is admissible in a court of the United States as proof of the legal existence of such commission, with or without further proof of the genuineness of such seal.

10th. Whether any colony, district, or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed, in any court of the United States, an independent or sovereign nation, or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States, otherwise than by some act or statute or resolution, of the Congress of the United States, or by some public proclamation, or other public act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving and acknowledging an ambassador, or other public minister, from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States, as to foreign states and sovereignties, their colonies, and dependencies.

11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to neutral *nations, as enemies **[*617]** to each other, entitled to the rights of war; and that captures made of each other's ships and other property on the high seas are to be considered, in respect to neutral nations, as

rightful, so that courts of law of neutral nations are not authorized to deem such acts as piracy.

And the said judges, being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of the District-Attorney for the United States, stated, under the direction of the judges, and ordered by the court to be certified under the seal of the court to the Supreme Court, at their next session to be held thereafter, to be finally decided by said Supreme Court; and the court being further of opinion that further proceedings could not be had in said cause without prejudice to the merits of the same cause, did order, that the jury impaneled as aforesaid to try said cause be discharged from giving any verdict therein.

Mr. Blake, for the United States, argued: 1. That a robbery committed on the high seas is piracy, under the 8th section of the act of 1790, ch. 36, "for the punishment of certain crimes against the United States," although no law of the United States be subsisting for the punishment of the same offense if committed on land; and that such piracy is cognizable in the Circuit Court. The words of the statute are, "That if any person or persons shall commit, upon the high seas," &c., "murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the **618**"] United States, be punishable *with death;" &c., "every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death," &c. The relative pronoun "which" does not relate back to the first specified offenses of "murder or robbery," but refers only to its immediate antecedent, "any other offense." It is this last class of crimes only that must be punishable, by the laws of the United States, with death, if committed within the body of a county, in order to constitute them piracies, when committed on the high seas. It is a mistaken principle commonly applied to penal statutes, that they are to be construed strictly. Sir William Jones has laid down the true rule, that criminal laws are to be construed liberally as to the offense, and strictly as to the offender.¹ A strong illustration of the good sense of this rule is to be found in the construction which has been given in England to the Stabbing Act.² A contrary construction of the statute now under consideration would render it wholly inoperative, until there shall be a law of the United States for the punishment of robbery committed in the body of a county; which will never happen, as the United States have no constitutional authority to punish a robbery committed within the body of a county. Forts, arsenals, dock-yards, &c., "under the sole and exclusive jurisdiction of the United States," cannot be said to be within the body of a county. It may be admitted that there is some degree of looseness **619**"] in the phraseology *of this section, which was evidently copied from the British statute of the 39 Geo. III., ch. 37, relative to the same subject, without regarding the difference between the constitutions of the two countries. On the construction of the British stat-

ute, it would be perfectly immaterial whether the pronoun "which" was carried back to the words "murder and robbery," or whether it was confined to its immediate antecedent; because, in England, murder and robbery are punishable with death, when committed in the body of a county, under the same laws which constitute them piracies when committed on the high seas. But such a construction of our statute would render it wholly inoperative as to the great offenses of murder and robbery, which are not, and cannot be made punishable under the laws of the United States, when committed within the body of a county. Nor can it be objected, that by the construction now contended for, the words "any other offense" would be equally inoperative; because there are various offenses which would still be reached by the statute, such as treason, &c., for the punishment of which Congress may provide, though committed within the body of a county. It follows, as a corollary, that the Circuit Court has cognizance of these offenses; for, by the judiciary act of 1789, ch. 20, s. 11, it has cognizance of "all crimes and offenses cognizable under the authority of the United States." 2. The crime of robbery mentioned in the 8th section of the act of 1790, is the crime of robbery as understood at common law. A piracy or felony on the high seas is sufficiently defined by terming it a robbery committed on the high seas. *The [**620** import of the term "robbery" must be sought in the common law, in the same manner as the import of the terms murder, manslaughter, rescous, benefit of clergy, and many others that are used in the criminal code of the United States. 3. If the robbery in question amount to piracy, by the law of nations, the words "any person or persons," in the 8th section, will embrace the subjects of all nations, who may commit that offense on the high seas, whether on board a foreign vessel or a vessel belonging to citizens of the United States. A felony, which is made a piracy by municipal statutes, and was not such by the law of nations, cannot be tried by the courts of the United States, if committed by a foreigner on board a foreign vessel, on the high seas; because the jurisdiction of the United States, beyond their own territorial limits, only extends to the punishment of crimes which are piracy by the law of nations. But it is the right and the duty of the United States, as a member of the community of nations, to punish offenses committed on the high seas against the law of nations.³ By this statute, Congress have exercised this power, which is also conferred on them by the constitution. The offense of piracy, which is imperfectly defined by the law of nations, is declared to be murder or robbery committed on the high seas, or in any river, &c., out of the jurisdiction of any particular state; and is made punishable with death. Congress cannot be presumed to have neglected so important a duty as that of defining and punishing the offense of general piracy. *Without this statute, there can be [**621** found no definition and punishment of it; because the law of nations merely creates the offense, and the common law and statute, 28

1.—Life of Sir W. Jones, p. 268.

2.—Foster's Crown Law, 297.

3.—4 Bl. Com. 71.

Henry VIII., ch. 15, may perhaps not be considered as in force in the United States. 4. The crime of robbery committed by a citizen of the United States on the high seas, on board a foreign vessel, or on the person of a foreigner, must be considered as a piracy, under the 8th section of the act; because the jurisdiction of a nation extends to its citizens, wherever they may be, except within the territory of a foreign sovereign.¹ The jurisdiction of a nation over its public ships is exclusive everywhere; but it is not exclusive over merchant vessels belonging to its subjects. It is there concurrent with the personal jurisdiction of other nations over their citizens. Consequently the personal jurisdiction of the United States over their citizens extends to offenses committed by them on board of foreign merchant vessels on the high seas. 5. The general principle applied by the writers on the law of nations to the case of a civil war considers the war (as between the conflicting parties) as just on both sides, and that each is to treat the other as a public enemy, according to the established usages of war.²

So, also, it is the duty of other nations to remain neutral, and not to interfere with the exercise of complete belligerent rights by both parties within the territory which is the scene of their hostilities. But this does not imply a **622*** right on their part to push their wars on to the ocean, and to annoy the rest of the world on this common highway of nations. The generality of the expressions used by Vattel on this subject may, indeed, seem to import such a right. But it should be remembered that, with all his merit, he is very deficient in precision, and on this question peculiarly unsatisfactory. The maritime rights of a belligerent power must be perfect, or they cannot exist at all. They must, therefore, include the right of visitation and search, and of detaining for adjudication, and of punishing a resistance to the exercise of these rights by the appropriate penalty of confiscation. So that neutral nations may come to be affected in their most valuable interests by a mere domestic quarrel, which never ought to have been extended beyond the territory of the people where it originated. This renders it indispensable to inquire how far neutral nations are bound to submit to the exercise of these high prerogatives of sovereignty in a civil war, under color of a commission from one of the belligerent parties, whose independence has not been acknowledged by any power.

The right of an insurgent people to be treated by the parent state, against which it revolts, with all the humanity and moderation which are required in any other war, and the duty of neutral nations to abstain from interfering in the contest, are not denied. But the right of the new people to thrust themselves into the family of nations, and to make the ocean the theatre of their predatory hostilities, without the consent of other nations, is denied. Such **623*** a right can only be founded upon a

perfect title to sovereignty, which cannot exist in a case where the very object of the war is to decide whether the claim of the former sovereign or of the revolted people shall prevail. This title cannot be taken notice of by courts of justice until it has been recognized by the government of the country under whose authority they sit.³ 6. If, then, a revolted colony or people, whose independence has not been recognized by the government of the United States have no authority to issue a commission to make captures on the high seas, which can be considered as valid in the courts of the United States, a capture under such a commission is in no respect distinguishable from a capture without any commission. A privateer cruising under two commissions from different sovereigns is a pirate.⁴ In the case of the famous pirate Kydd,⁵ the indictment was for general piracy. He had two commissions, one against the French, the other against certain pirates, which he produced in his justification. But Lord Chief Baron Ward said, "If he had acted pursuant to his commission, he ought to have condemned ship and goods, if they were French; but by his not condemning, he seems to show his aim, mind and intention, and that he did not act in that case by virtue of his commission, but quite contrary to it. Whilst men pursue their commissions, they **624** must be justified; but when they do things not authorized, or never intended by them, it is as if they had no commission." This principle, that where the criminal intention is apparent, the quality of the act will not be changed by its having been committed under color of legal authority, is illustrated by all the analogies of criminal law.⁶ 7. The established rules of evidence ought not to be dispensed with in the proof of an authority to capture, where that authority is set up as a defense to an indictment for piracy. All civilized nations have departments and offices in which the commissions issued to their cruisers are registered; the original is borne about with him by the cruiser as his authority to search, to detain, and to capture; a copy of it may always be readily obtained by application at the proper office. The impossibility of producing the original, or an examined copy of such a commission, is, therefore, an inadmissible supposition. The rule of evidence which requires that it should be produced is inflexible, and is founded upon the reasonable suspicion, excited by a resort to inferior testimony, that there must be some fatal defect in the original documents. 8. There can be no doubt that the seal of a recognized foreign state or sovereignty is to be admitted as proving itself, without other proof of its genuineness. But the seal of a new people, or state, is not sufficiently notorious to prove itself, and to give credit to it would be to recognize the sovereign from whom it emanates, which courts of justice are not **625** competent to do. 9. The ninth question certified from the court below has been already answered. 10. The first branch of the tenth question has

1.—2 Rutherford's Inst. 180, Vattel, L. 2, ch. 6.

2.—Vattel, L. 3, ch. 18, s. 296.

3.—Rose v. Himely, 4 Cranch, 292; Gelston v. Hoyt, ante, p. 324.
Wheat. 3.

4.—2 Sir L. Jenkins's Life, 714; Ord. de la Mar. L. 3, t. 9, art. 3; Martens on Privateers, 44.

5.—5 State Trials, 314.

6.—2 East's Crown Law, 600; Forster, 135, 154, 312.

been before answered by this court in the cases already cited.¹ The second branch of this question presupposes that no distinct acknowledgment of the new state has been made by the United States, since it excludes from consideration any public act of recognition by the legislative and executive departments, and confines itself to the mere private acts and instructions of the executive. On a subject of such importance as a change in the foreign relations of the country, nothing but the most explicit, public, and notorious acts of the government should be noticed by courts of justice. Nothing should be left to inference and conjecture; because, such a course might lead to a usurpation by the courts of the high prerogative of making war and peace, and the whole nation would become responsible to other nations for the error of judgment in a department with which it had not entrusted the care of its foreign affairs. In the infinite variety and complication of these affairs, the language and conduct of the executive may be misunderstood; and therefore, nothing short of an act of the whole legislature, a treaty, a proclamation of the President, or the public reception of an ambassador from the new state, ought to be considered as a recognition of its independence. 11. The 626* eleventh question is involved in the discussion of the preceding.

No counsel appeared to argue the cause for the prisoners.

MARSHALL, *Ch. J.*, delivered the opinion of the court: In this case, a series of questions has been proposed by the Circuit Court of the United States, for the District of Massachusetts, on which the judges of that court were divided in opinion. The questions occurred on the trial of John Palmer, Thomas Wilson and Barney Calloghan, who were indicted for piracy committed on the high seas.

The first four questions relate to the construction of the 8th section of the "act for the punishment of certain crimes against the United States."

The remaining seven questions respect the rights of a colony or other portion of an established empire, which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms.

The 8th section of the act on which these prisoners were indicted is in these words: "And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods 627*] or *merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seamen shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such of-

fender shall be deemed, taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

Robbery committed on land, not being punishable by the laws of the United States, with death, it is doubted whether it is made piracy by this act, when committed on the high seas. The argument is understood to be, that Congress did not intend to make that a capital offense on the high seas which is not a capital offense on land. That only such murder, and such robbery, and such other offense as, if committed within the body of a county, would, by the laws of the United States, be punishable with death, is made piracy. That the word "other" is without use or meaning, if this construction be rejected. That it so connects murder and robbery with the following member of the sentence, as to limit the words murder and robbery to that description of those offenses which might be made punishable with death, if committed on land. That in consequence of this word, the relative "which" has for its antecedent the whole preceding part of the sentence, and not the words "other offenses." That section *consists of three distinct classes [*628 of piracy: The first, of offenses which, if committed within the body of a county, would be punishable with death. The second and third, of particular offenses which are enumerated.

This argument is entitled to great respect on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over-rigid construction ought to be admitted. But the court cannot assent to its correctness.

The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offences shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery to that description of those offenses which is punishable with death, if committed on land, but for the purpose of adding other offenses, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of Congress been to render the crime of piracy dependent on the punishment affixed to the same offense, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offenses, the language of the legislature would have been, that "any offense" committed on the high seas, which, if *committed in the body of a county, [*629 would be punishable with death, should amount to piracy.

The particular crimes enumerated were undoubtedly first in the mind of Congress. No other motive for the enumeration can be assigned. Yet, on the construction contended for, robbery on the high seas would escape unpunished.

Wheat. 3.

1.—Rose v. Himely, 4 Cranch, 232; Gelston v. Hoyt, *ante*, p. 324.

It is not pretended that the words of the legislature ought to be strained beyond their natural meaning, for the purpose of embracing a crime which would otherwise escape with impunity; but when the words of a statute, in their most obvious sense, comprehend an offense, which offense is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.

The correctness of this exposition of the 8th section is confirmed by those which follow.

The 9th punishes those citizens of the United States who commit the offenses described in the 8th, under color of a commission or authority derived from a foreign state. Here robbery is again particularly specified.

The 10th section extends the punishment of death to accessories before the fact. They are described to be those who aid, assist, advise, &c., &c., any person to "commit any murder, robbery, or other piracy aforesaid." If the word "aforesaid" be connected with "murder" and "robbery," as well as with "other piracy," **630*** yet it seems difficult to resist the conviction that the legislature considered murder and robbery as acts of piracy.

The 11th section punishes accessories after the fact. They are those who, "after any murder, felony, robbery, or other piracy whatsoever, aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated. Can it be doubted that the legislature considered murder, felony, and robbery, committed on the high seas, as piracies?

If it be answered, that although this opinion was entertained, yet, if the legislature was mistaken, those whose duty it is to construe the law must not yield to that mistake; we say, that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it.

Of the meaning of the term *robbery*, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.

The question, whether this act extends farther than to American citizens, or to persons on board American vessels, or to offenses committed against citizens of the United States, is not without its difficulties. The constitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offense against the United States. The only **631*** question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the Union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?

The words of the section are in terms of unlimited extent. The words "any person or persons" are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction

of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?

The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, "an act for the punishment of certain crimes against the United States." It would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish.

The act proceeds upon this idea, and uses general terms in this limited sense. In describing those who may commit misprision of treason or felony, the words used are "any person or persons;" yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States.

The 8th section also commences with the words "any person or persons." But these words must be limited in some degree, **[632]** and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law. The succeeding member of the sentence commences with the words, "if any captain or mariner of any ship or other vessel, shall piratically run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate."

The words "any captain, or mariner of any ship or other vessel," comprehend all captains and mariners, as entirely as the words "any person or persons" comprehend the whole human race. Yet it would be difficult to believe that the legislature intended to punish the captain or mariner of a foreign ship, who should run away with such ship, and dispose of her in a foreign port, or who should steal any goods from such ship to the value of fifty dollars, or who should deliver her up to a pirate when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the general words "any seaman." But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offenses against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offense the punishment its own policy may dictate, and no general words of a statute ought to ***be construed to embrace them when [633]** committed by foreigners against a foreign government.

That the general words of the two latter members of this sentence are to be restricted to offenses committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of that sentence.

This construction derives aid from the 10th section of the act. That section declares, that

"any person" who shall "knowingly and willingly aid and assist, procure, command, counsel, or advise any person or persons to do or commit any murder or robbery," &c., shall be an accessory before the fact, and, on conviction, shall suffer death.

It will scarcely be denied that the words "any person," when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery? If the advice is not a crime within the law, neither is the fact advised a crime within the law.

The opinion formed by the court on this subject might be still further illustrated by animadversions on other sections of the act. But it would be tedious, and is thought unnecessary.

The court is of opinion that the crime of robbery, committed by a person on the high seas, **634** on board of "any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.

This opinion will probably decide the case to which it is intended to apply.

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

As it is understood that the construction which has been given to the act of Congress, will render a particular answer to them unnecessary, the court will only observe that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government **635** that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation

to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.

It follows as a consequence, from this view of the subject, that persons or vessels employed in the service of a self-declared government, thus acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed may be proved without proving the seal.

JOHNSON, J. The first of these questions arises on the construction of the first division of the 8th section of the act for the punishment of certain crimes.

*That act comprises two classes of **636** cases, the second of which may again be subdivided into two divisions. In the second class of cases, each crime is specifically described in the ordinary mode of defining crimes, and so far the constitutional power of defining and punishing piracies and felonies on the high seas is strictly complied with. But, with regard to the first class of cases, the legislature refers for a definition to other sources—to information not to be found in that section itself. The words are these: "If any person shall commit, upon the high seas, &c., murder or robbery, or any other offense, which, if committed in the body of a county, would, by the laws of the United States, be punishable with death, &c., such person shall, upon conviction thereof, suffer death." Thus referring to the common law definition of murder and robbery alone, or to the common law definition of murder and robbery with the superadded statutory requisite of being made punishable with death, if committed on land, in order to define the offense which, under that section, is made capitally punishable.

The crime of robbery is the offense charged in this indictment, and the question is, whether it must not be shown that it must have been made punishable with death, if committed on land, in order to subject the offender to that punishment, if committed on the high seas. And singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone. Upon such a **637** question I hereby solemnly declare, that I never will consent to take the life of any man in obedience to any court; and if ever forced to choose between obeying this court, on such a point, or resigning my commission, I would not hesitate adopting the latter alternative.

But to my mind it is obvious that both the intent of the legislature and the construction of the words are in favor of the prisoners. This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as affectual in their favor as the most thorough conviction.

Wheat. 3.

When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was, with regard to crimes which may be committed either on the sea or land, to produce an uniformity in the punishment, so that where death was inflicted in the one case, it should be inflicted in another. And Congress certainly legislated under the idea that the punishment of death had been previously enacted for the crime of robbery on land, as it had in fact been for murder, and some other crimes. And, in my opinion, this intent ought to govern the grammatical construction, and make the relative to refer to all three of the antecedents, murder, robbery, and other crimes, instead of being confined to the last alone. That it may be so applied consistently with grammatical correctness, no one can deny; and if so, *in favorem vite*, we are, in my opinion, legally bound to give it that construction. Again, there is no reason to think that the word *other* is altogether a super-**638*** numerary *member of the sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative; the sentence has the same meaning with or without it. But if we retain it, and substitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results; *other* is commonly defined to mean not the same, or (what is certainly synonymous), not before mentioned. With this expression, the sentence would read thus: "murder, or robbery, or any offense not before mentioned," for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefinite, by expunging all the commas from the sentence the meaning becomes still more obvious. Or, if instead of substituting the words not before mentioned, we introduce the single term *unenumerated*, in the sense of which the term *other* is unquestionably used by the legislature, the conclusion becomes irresistible in favor of the prisoners. There is another view of this subject that leads to the same conclusion, by supplying an obvious elision, the same meaning is given to this section. The word *other* is responded to by *than*, and the repetition of the excluded words is understood. Thus, in the case before us, by supplying the elision, we "make murder, robbery, or any crime other than murder or robbery," made punishable, &c., the signification of which words, had they been used, would have left no doubt.

There are several inconsistencies growing out of a construction unfavorable to the prisoners, **639*** which *merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merit attention. With regard to the mail, this inconsistency actually may occur under existing laws, should the

mail ever again be carried by water, as it has been formerly. This cannot be consistent with the intention of the legislature.

But, it is contended, if Congress had not intended to make murder and robbery punishable with death, independently of the circumstance of those offenses being so made punishable when committed on land, they would have omitted those specified crimes altogether from this section, and have enacted generally, that all crimes made punishable with death on land should be punished with death if committed on the seas, without enumerating murder and robbery. This is fair reasoning; and in any case but one of life and death, it might have some weight. But in no case very great weight; because, in that respect, a legislature is subject to no laws in the selection of the course to be pursued. In this case, the obvious fact is, that they commenced enumerating, and fearing some omission of crime then supposed subject by law to death, these *general descrip- **640** tive words are resorted to. But every other crime that this division of the section comprises was punishable with death, both those which precede robbery in the enumeration and those which come after. Robbery, except in case of the mail, stands alone; and, no doubt, was introduced under the idea that that also had the same punishment attached to it. If it had not, in fact, then it was not the case on which the legislature intended to act; and according to my views of the grammatical or philological construction of the sentence, it is one on which they have not acted. This construction derives considerable force, also, from the consideration that this act is framed on the model of the British statute, which avowedly had this uniformity for its object.

The second question proposed in this case is one on which, I presume, there can be no doubt. For the definition of robbery, under this act, we must look for the definition of the term in the common law, or we will find it nowhere; and, according to my construction, superadd to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offense made punishable under this section.

There are eleven questions certified from the Circuit Court of Massachusetts; but of those eleven, these two only appear to me to arise out of the case. The transcript contains nothing but the indictment and empaneling of the jury. No motion; no evidence; no demurrer *ore tenus*, or case stated, appears upon the transcript, on which the remaining questions could *arise. On the indictment the two first **641** questions might well have been raised by the court themselves, as of counsel for the prisoners; but as far as appears to this court, all the other questions might as well have been raised in any other case. I here enter my protest against having these questions adjourned to this court. We are constituted to decide causes, and not to discuss themes, or digest systems. It is true, the words of the act, respecting division of opinion in the Circuit Court, are general; but independently of the consideration that it was not to be expected that the court could be divided, unless upon questions arising out of some cause depending, the words in the

first proviso, "that the cause may be proceeded in," plainly shows that the questions contemplated in the act are questions arising in a cause depending; and if so, it ought to be shown that they do arise in the cause, and are not merely hypothetical. In the case of *Martin v. Hunter*,¹ this court expressly acted upon this principle, when it went into a consideration of the question, whether any estate existed in the plaintiff in error, before it would consider the question of the constitution of the treaty, as applicable to that estate.

If, however, it becomes necessary to consider the other questions in this case, I will lay down a few general principles, which, I believe, will answer all. 1. Congress can inflict punishment on offenses committed on board the vessels of the United States, or by citizens of the United States, anywhere; but Congress cannot make that piracy which is not piracy by §42*] the law of nations, in order to give jurisdictions to its own courts over such offenses.

2. When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.

3. The proof of a commission is not necessary to exempt an individual serving on board a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons; he must answer that to his own government. It is only necessary to prove two facts: 1st. The existence of open war. 2d. That the vessel is really documented, owned and commanded as a belligerent vessel, and not affectedly so for piratical purposes.

4. For proof of property and documents, it is not to be expected that any better evidence can be produced than the seal of the revolted country, with such reasonable evidence as the case may admit of, to prove it to be known as such; and a seal once proved, or admitted to a court, ought afterwards to be acknowledged by the court officially, at least, as against the party who has once acknowledged it.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the §43*] District of Massachusetts, *and on the

1.—7 Cranch, 308; ante, Vol. I., p. 304.

questions on which the judges of that court were divided; and was argued by counsel on the part of the United States. On consideration whereof, this court is of opinion, that a robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy under the eighth section of the act entitled "an act for the punishment of certain crimes against the United States;" and that the Circuit Court of the United States have jurisdiction thereof. And that the crime of robbery, as mentioned in the said act of Congress, is the crime of robbery as recognized and defined at common law.

This court is further of opinion, that the crime of robbery committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act entitled "an act for the punishment of certain crimes against the United States," and is not punishable in the courts of the United States.

This court is further of opinion, that when a civil war rages in a foreign nation, one part of which separates itself from the old-established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, the courts *of the Union cannot [*644 consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. In general, the same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, must be admitted to prove that a vessel or person is in the service of such newly-erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. And the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

All which is ordered to be certified to the Circuit Court of the United States for the District of Massachusetts.

Cited—4 Wheat. 63, 304, 502; 5 Wheat. 149, 195; 5 Pet. 47, 59; 5 How. 374; 7 How. 57; 2 Black 306; 6 Wall. 12; 11 Wall. 307; 13 Wall. 649; 23 Wall. 330; 2 Sprague, 133; Hempe. 418 (M); Bald. 26-29, 93; 3 Paine, 637; 2 Abb. U. S. 38, 39; 2 Cliff. 418; McAll. 201; 2 Sumn. 88, 485; 5 Blatchf. 87; 1 Wood. & M. 448; 2 Wood. & M. 637.

APPENDIX.

[NOTE I.]

DOCUMENTS ON THE SUBJECT OF BLOCKADES.

Extract of a Letter from Mr. King, Minister Plenipotentiary of the United States at London, to Mr. Hickering, Secretary of State, dated London, July 15th, 1799.

"Seven or eight of our vessels, laden with valuable cargoes, have been lately captured, and are still detained for adjudication; these vessels were met in their voyages to and from the Dutch ports declared to be blockaded. Several notes have passed between Lord Grenville and me upon this subject, with the view, on my part, of establishing a more limited and reasonable interpretation of the law of blockade than is attempted to be enforced by the English government. Nearly one hundred Danish, Russian, and other neutral ships have, within a few months, been in like manner intercepted, going to and returning from the United Provinces. Many of them, as well as some of ours, arriving in the Texel in the course of the last winter, the severity of which obliged the English fleet to return to their ports, leaving a few frigates only to make short cruises off the Texel as the season would allow.

My object has been to prove, that in this situation of the investing fleet, there can be no effective blockade, which, in my opinion, cannot be said to exist without a competent force stationed, and present, at or near the entrance of the blockaded port."

4*) *Extract of a Letter from Mr. King to Lord Grenville, dated Downing street, London, May 23d, 1799.*

"It seems scarcely necessary to observe, that the presence of a competent force is essential to constitute a blockade; and although it is usual for the belligerent to give notice to neutral nations when he institutes a blockade, it is not customary to give any notice of its discontinuance; and that, consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade; in like manner as the actual investment of a besieged place is the only evidence by which we decide whether the siege is continued or raised. A siege may be commenced, raised, recommenced, and raised again, but its existence at any precise time must always depend upon the fact of the presence of an investing army. This interpretation of the law of blockade is of peculiar importance to nations situated at a great distance from each other, and between whom a considerable length of time is necessary to send and receive information."

Wheat. 3.

U. S., Book 4.

Extract of a Letter from Mr. Marshall, Secretary of State, to Mr. King, dated September 20th, 1800.

"2d. The right to confiscate vessels bound to a blockaded port has been unreasonably extended to cases not coming within the rule, as heretofore adopted.

On principle it might well be questioned, whether this rule can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals. But it is not of this departure from principle—a departure which has received some sanction from practice—that we mean to complain. It is, that *ports, not effectually blockaded [*5] by a force capable of completely investing them, have yet been declared in a state of blockade, and vessels attempting to enter therein have been seized, and on that account confiscated.

This is a vexation proceeding directly from the government, and which may be carried, if not resisted, to a very injurious extent. Our merchants have greatly complained of it, with respect to Cadiz and the ports of Holland.

If the effectiveness of the blockade is dispensed with, then every port of all the belligerent powers may, at all times, be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent, and, of consequence, the mischief to neutral commerce cannot be very extensive. It is, therefore, of the last importance to neutrals, that this principle be maintained unimpaired.

I observe that you have pressed this reasoning on the British minister, who replies, that an occasional absence of a fleet from a blockaded port ought not to change the state of the place.

Whatever force this observation may be entitled to, where that occasional absence has been produced by accident, as a storm, which for a moment blows off the fleet, and forces it from its station, which station it immediately resumes, I am persuaded, that where a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle, requiring an effective blockade, which is, that the mischief can then only be co-extensive with the naval force of the belligerent, requires, that during such temporary absence, the commerce of neutrals to the place should be free."

63*] *Extract of a letter from Mr. Madison to Mr. Charles Pinkney, Minister Plenipotentiary of the United States, at Madrid, dated, Department of State, Washington, October 25th, 1801.*

"The pretext for the seizure of our vessels seems at present to be, that Gibraltar has been proclaimed in a state of blockade, and that the vessels are bound to that port. Should the proceeding be avowed by the Spanish government, and defended on that ground, you will be able to reply:

1st. That the proclamation was made as far back as the 15th of February, 1800, and has not since been renewed; that it was immediately protested against by the American and other neutral ministers at Madrid, as not warranted by the real state of Gibraltar, and that no violations of neutral commerce having followed the proclamation, it was reasonably concluded to have been rather a menace against the enemies of Spain than a measure to be carried into execution against her friends.

2d. That the state of Gibraltar is not, and never can be, admitted by the United States to be that of a real blockade. In this doctrine they are supported by the law of nations, as laid down in the most approved commentators, by every treaty which has undertaken to define a blockade, particularly those of latest date among the maritime nations of Europe, and by the sanction of Spain herself, as a party to the armed neutrality in the year 1781. The spirit of articles XV. and XVI., of the treaty between the United States and Spain may also be appealed to as favoring a liberal construction of the rights of the parties in such cases. In fact, this idea of an investment, a siege or a blockade, as collected from the authorities referred to, necessarily results from the force of those terms; and though it has been sometimes grossly violated or evaded by powerful nations in pursuit of favorite objects, it has invariably kept its place in code of public law, and cannot be shown to have been expressly renounced in a single stipulation between particular nations.

7*] 3d. That the situation of the naval force at Algeiras, in relation to Gibraltar has not the shadow of likeness to a blockade, as truly and legally defined. This force can neither be said to invest, besiege, or blockade the garrison, nor to guard the entrance into the port. On the contrary, the gun-boats infesting our commerce have their stations in another harbor, separated from that of Gibraltar by a considerable bay; and are so far from beleaguering their enemy at that place, and rendering the entrance into it dangerous to others, that they are, and ever since the proclamation of the blockade have been, for the most part, kept at a distance by a superior naval force, which makes it dangerous to themselves to approach the spot.

4th. That the principle on which the blockade of Gibraltar is asserted, is the more inadmissible, as it may be extended to every other place, in passing to which vessels must sail within the view and reach of the armed boats belonging to Algeiras. If, because a neutral

vessel bound to Gibraltar can be annoyed and put in danger by waylaying cruisers, which neither occupy the entrance into the harbor nor dare approach it, and by reason of that danger is liable to capture, every part of the Mediterranean coast and islands, to which neutral vessels must pass through the same danger, may with equal reason be proclaimed in a state of blockade, and the neutral vessels bound thereto made equally liable to capture. Or if the armed vessels from Algeiras alone should be insufficient to create this danger in passing into the Mediterranean, other Spanish vessels, co-operating from other stations, might produce the effect, and the ports thereby not only blockade any particular port of any particular nation, but blockade at once a whole sea surrounded by many nations. Like blockades might be proclaimed by any particular nation, enabled by its naval superiority to distribute its ships at the mouth of the same, or any similar sea, or across channels or arms of the sea, so as to make it dangerous for the commerce of other nations to pass to its destination. These monstrous consequences condemn the principle from which they flow, and ought to unite against it every nation, Spain among the rest, which has an interest in the rights of the sea. Of this, Spain herself appears to have been sensible in the year 1780, when she yielded to Russia ample satisfaction *for seizures of her vessels made under the pretext of a general blockade of the Mediterranean, and followed it with her accession to the definition of a blockade contained in the armed neutrality.

5th. That the United States have the stronger ground for remonstrating against the annoyance of their vessels, on their way to Gibraltar, inasmuch as, with very few exceptions, their object is not to trade there for the accommodation of the garrison, but merely to seek advice or convoy, for their own accommodation, in the ulterior objects of their voyage. In disturbing their course to Gibraltar, therefore, no real detriment results to the enemy of Spain, whilst a heavy one is committed on her friends. To this consideration it may be added, that the real object of the blockade is, to subject the enemy to privations, which may co-operate with external force in compelling them to surrender; an object which cannot be alleged in a case, where it is well known that Great Britain can, and does at all times, by her command of the sea, secure to the garrison of Gibraltar every supply which it wants.

6th. It is observable that the blockade of Gibraltar is rested by the proclamation on two considerations: one, that it is necessary to prevent illicit traffic, by means of neutral vessels, between Spanish subjects and the garrison there; the other, that it is a just reprisal on Great Britain for the proceedings of her naval armaments against Cadiz and St. Lucar. The first can surely have no weight with neutrals, but on a supposition, never to be allowed, that the resort to Gibraltar, under actual circumstances, is an indulgence from Spain, not a right of their own; the other consideration, without examining the analogy between the cases referred to and that of Gibraltar, is equally without weight with the United States, against whom no right can accrue to Spain

* 1.—See late treaties between Russia and Sweden, and between Russia and Great Britain.

from its complaints against Great Britain; unless it could be shown that the United States were in an unlawful collusion with the latter; a charge which they well know that Spain is too just and too candid to insinuate. It cannot even be said that the United States have acquiesced in the depredations committed by Great Britain, under whatever pretexts, on their lawful commerce. Had this indeed been [9*] the case, the acquiescence ought to be regarded as a sacrifice made by prudence to a love of peace, of which all nations furnish occasional examples, and as involving a question between the United States and Great Britain, of which no other nation could take advantage against the former. But it may be truly affirmed, that no such acquiescence has taken place. The United States have sought redress for injuries from Great Britain, as well as from other nations. They have sought it by the means which appeared to themselves, the only rightful judges, to be the best suited to their object; and it is equally certain, that redress has in some measure been obtained, and that the pursuit of complete redress is by no means abandoned.

7th. Were it admitted that the circumstances of Gibraltar, in February, 1800, the date of the Spanish proclamation, amounted to a real blockade, and that the proclamation was therefore obligatory on neutrals; and were it also admitted that the present circumstances of that place amount to a real blockade (neither of which can be admitted), still the conduct of the Algerias cruisers is altogether illegal and unwarrantable. It is illegal and unwarrantable, because the force of the proclamation must have expired whenever the blockade was actually raised, as must have been unquestionably the case since the date of the proclamation, particularly and notoriously when the port of Algeiras itself was lately entered and attacked by a British fleet, and because, on a renewal of the blockade, either a new proclamation ought to have issued, or the vessels making for Gibraltar ought to have been premonished of their danger, and permitted to change their course as they might think proper. Among the abuses committed under the pretext of war, none seem to have been carried to a greater extravagance, or to threaten greater mischief to neutral commerce, than the attempts to substitute fictitious blockades by proclamation, for real blockades formed according to the law of nations; and, consequently, none against which it is more necessary for neutral nations to remonstrate effectually, before the innovations acquire maturity and authority from repetitions on one side, and silent acquiescence on the other."

10*] **Mr. Smith, Secretary of the Navy, to Commodore Preble.*

NAVY DEPARTMENT, Feb. 4, 1804.

SIR:

Your letter of the 12th of November, inclosing your circular notification of the blockade of the port of Tripoli, I have received.

Sensible, as you must be, that it is the interest, as well as the disposition of the United States, to maintain the rights of neutral

nations, you will, I trust, cautiously avoid whatever may appear to you to be incompatible with those rights. It is, however, deemed necessary, and I am charged by the President to state to you, what, in his opinion, characterizes a blockade. I have therefore to inform you, that the trade of a neutral in articles not contraband cannot be rightfully obstructed to any port, not actually blockaded by a force so disposed before it as to create an evident danger of entering it. Whenever, therefore, you shall have thus formed a blockade of the port of Tripoli, you will have a right to prevent any vessel from entering it, and to capture, for adjudication, any vessel that shall attempt to enter the same, with a knowledge of the existence of the blockade. You will, however, not take as prize any vessel attempting to enter the port of Tripoli, without such knowledge; but, in every case of an attempt to enter, without a previous knowledge of the existence of the blockade, you will give the commanding officer of such vessel notice of such blockade, and forewarn him from entering. And if, after such a notification, such vessel should again attempt to enter the same port, you will be justifiable in sending her into port for adjudication. You will, sir, hence perceive that you are to consider your circular communication to the neutral powers, not as an evidence that every person attempting to enter has previous knowledge of the blockade, but merely as a friendly notification to them of the blockade, in order that they might make the necessary arrangements for the discontinuance of all commerce with such blockaded port. I am, &c., &c.,

(Signed)

R. SMITH.

Commodore Preble.

[COPY.]

*Mr. Merry to Mr. Madison. [*11

WASHINGTON, April 12, 1804.

SIR: Mr. Thornton not having failed to transmit to His Majesty's government an account of the representation which you were pleased to address to him, under date of the 27th of October, last year, respecting the blockade of the islands of Martinique and Guadeloupe, it is with great satisfaction, sir, that I have just received His Majesty's commands signified to me by his principal Secretary of State for foreign affairs, under date of the 6th of January last, to communicate to you the instructions which have, in consequence of your representation, been sent to Commodore Hood, and to the judges of the vice-admiralty courts in the West Indies.

I have, accordingly, the honor to transmit to you, sir, inclosed, the copy of a letter from Sir Eleanor Nepean, secretary to the board of Admiralty, to Mr. Hammond, His Majesty's Under-Secretary of State for foreign affairs, specifying the nature of the instructions which have been given.

His Majesty's government doubt not that the promptitude which has been manifested in redressing the grievance complained of by the government of the United States, will be considered by the latter as an additional evidence

of His Majesty's constant and sincere desire to remove any ground of misunderstanding that could have a tendency to interrupt the harmony which so happily subsists between his government and that of the United States.

I have the honor to be,
With high respect and consideration,
Your most obedient humble servant,
(Signed) ANTH. MERRY.

12*]

*[COPY.]

ADMIRALTY OFFICE, 5th January, 1804.

SIR: Having communicated to the Lords of the Admiralty Lord Hawkesbury's letter of the 23d ultimo, inclosing the copy of a despatch which His Lordship had received from Mr. Thornton, His Majesty's charge d'affaires in America, on the subject of the blockade of the islands of Martinique and Guadaloupe, together with the report of the advocate-general.

Thereupon, I have their lordship's commands to acquaint you, for His Lordship's information, that they have sent orders to Commodore Hood not to consider any blockade of those islands as existing, unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them, and that they have also sent the necessary directions on the subject to the judges

of the vice-admiralty courts in the West Indies and America. I am, &c.,

(Signed) EYREAN NEPEAN.
George Hammond, Esq.

Mr. Merry to Mr. Madison.

WASHINGTON, April 12, 1804.

Sir: I have the honor to acquaint you that I have just received a letter from Rear-Admiral Sir John Duckworth, commander-in-chief of His Majesty's squadron at Jamaica, dated the second of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for His Majesty's service to convert the siege, which he lately attempted, of Curraçoa, into a blockade of that island.

I cannot doubt, sir, that this blockade will be conducted conformably to the instructions which, as I have had the honor to *ac- [*13] quaint you in another letter of this date, have been recently sent on this subject to the commander-in-chief of His Majesty's forces, and to the judges of the vice-admiralty courts in the West Indies, should the smallness of the island of Curraçoa still render necessary any distinction of the investment being confined to particular ports.

I have the honor to be, &c.,
(Signed) ANT. MERRY.

[NOTE II.]

ON THE PATENT LAWS.

The patent acts of the United States are, in a great degree, founded on the principles and usages which have grown out of the English statute on the same subject. It may be useful, therefore, to collect together the cases which have been adjudged in England, with a view to illustrate the corresponding provisions of our own laws; and then bring in review the adjudications in the courts of the United States.

By the statute of 21 Jac. 1, ch. 8, commonly called the statute of monopolies, it is enacted, (sec. 1) "that all monopolies, and all commissions, grants, licenses, charters, and letters patent, heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm, or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty to dispense with any others, or to give license or toleration to do, use, or exercise anything against the tenor or purport of any law or statute, or to give or make any warrant for any such dispen-

sation, license, or toleration, to be had or made, or to agree or compound with any others for any penalty or forfeiture, limited by any statute, or of any grant or promise of the benefit, profit, *or commodity of any forfeiture, [*14] penalty, or sum of money that is or shall be due by any statute, before judgment thereupon had; and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing the same, or any of them, are altogether contrary to the laws of the realm, and so are and shall be utterly void and of none effect, and in nowise to be put in use or execution." The 6th section, however, provides, "that any declaration before mentioned, shall not extend to any letters patent, and grants of privilege, for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such

Wheat. 3.

letters patent and grants, shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent, or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be if this act had never been made, and none other."

It is under this last section, that patents for new and useful inventions are now granted in England; and by a proviso, or condition, always inserted in every patent, the patentee is bound particularly to describe and ascertain the nature of his invention, and in what manner the same is to be constructed or made, by an instrument in writing, under his hand and seal, and to cause the same to be enrolled in the Court of Chancery within a specified time. (*Harmer v. Playne*, 11 East, 101; *Boulton v. Bull*, 2 H. Bl., 463; *Hornblower v. Boulton*, 8 T. R., 95, 2 Bl. Com., 407, note by Christian, 7.) This instrument is usually termed the specification of the invention; and all such instruments are preserved in an office for public inspection.

Upon the construction of the British patent act, taken in connection with the condition inserted in the letters patent, a great variety of decisions have been made. 1. As the statute contains no restriction confining the grants to **15*** British subjects, "it is every day's practice to grant patents to foreigners, and no such patent has ever been brought into judicial doubt. 2. A patent can be granted only for a thing new; but it may be granted to the first inventor, if the invention be new in England, though the thing was practiced beyond sea before; for the statute speaks of new manufactures within this realm; so that if it be new here, it is within the statute, and whether learned by travel or study, is the same thing. (*Edgeberry v. Stevens*, 2 Salk., 447; *Hawk. P. C.* b. 1, ch. 79; and see *Noy*, 182, 183.) 3. The language of the statute is new manufacture; but the terms are used in an enlarged sense, as equivalent to new device, or contrivance, and apply not only to things made but to the practice of making. Under things made we may class, in the first place, new compositions of things, such as manufactures in the ordinary sense of the word; second, all mechanical inventions, whether made to produce old or new effects; for a new piece of mechanism is certainly a thing made. Under the practice of making, we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art, producing effects useful to the public. When the effect produced is some new substance, or composition, it would seem that the privilege of the sole working, or making, ought to be for such new substance, or composition, without regard to the mechanism or process, by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance. When the effect produced is no new substance, or composition of things, the patent can only be for the mechanism, if new mechanism is used; or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced. **Wheat. 3.**

duced. (Per *Eyre, Ch. J.*, in *Boulton v. Bull*, 2 H. Bl., 463, 492; and *Lawrence, J.*, in *Hornblower v. Boulton*, 8 T. R., 95, 106.) A patent, therefore, under certain circumstances, may be good for a method, as well as for an engine or machine. (*Ibid.*, and 8 T. R., 95, 106; *Rez v. Cutler* 1 Starkie's N. P. R., 354.) 4. A patent cannot be for a mere principle, properly so called; that is, for an elementary truth. But the word principle is often used in a more lax sense, to signify constituent parts, peculiar structure, or process; and in specifications it is generally used in this latter sense; and *in this view, it may well be the ***16** subject of a patent. (*Ibid.*) 5. It was formerly considered that a patent could not be for an improvement (3 Inst., 184), but that opinion has been long since exploded; and it is now held, that a patent may well be for a new improvement. (*Harmer v. Playne*, 14 Ves., 186; *Ex-parte For*, 1 Ves. & Beame, 67; *Boulton v. Bull*, 2 H. Bl., 463, 488; 8 T. R., 95 Bull. N. P., 77.) 6. A patent must be of such manufacture or process as no other did, at the time of making the letters patent, use; for, though it were newly invented, yet, if any other did use it at the time of making the letters patent, or grant of the privilege, it is declared void by the act. (3 Inst., 184.) And in a very recent case of a patent for a new mode of making verdigris, one of the objections was, that the invention was in public sale by the patentee, before the grant of the patent; and *Gibbs, Ch. J.*, on that occasion said, "with respect to this objection, the question is somewhat new. Some things are obvious as soon as they are made public; of others, the scientific world may possess itself by analysis; some inventions almost baffle discovery. But to entitle a man to a patent, the invention must be new to the world. The public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void. It is in evidence, that a great quantity was sold in the course of four months, before the patent was obtained." And if the jury were satisfied of that fact, His Lordship added, "that he thought the patent void." (*Wood v. Zimmer*, 1 Holt's N. P. Rep., 58.) 7. The invention must not only be new, but useful; for if it be contrary to law, or mischievous, or hurtful to trade, or generally inconvenient, it is, by the terms of the statute, void. (3 Inst., 184.) 8. A patent can legally be granted only to the first and true inventor; for such are the descriptive terms of the statute. (3 Inst., 184.) But if the original inventor has confined the invention to his closet, and the public be not acquainted with it, a second inventor, who makes it public, is entitled to a patent. (*Boulton v. Bull*, 2 H. Bl., 463; and *Dolland's patent*, cited 2 H. Bl., 470, 487.) 9. The patent must not be more extensive than the invention; therefore, if the invention consist in an addition, or improvement only, and the patent is for the whole machine, or manufacture, it is void. (*Buller's N. P.*, 76; *Boulton v. Bull*, 2 H. Bl., *463, and cases there cited; *The King* [*17 v. *Else*, 11 East, 109, note; *Harmer v. Playne*, 11 East, 101, S. C., 14 Ves., 180.) Therefore, where a patent was for the exclusive liberty of making lace composed of silk and cotton thread mixed, not of any particular mode of

making it; and it was proved that silk and cotton thread were before mixed on the same frame for lace, in some mode or other, though not like the plaintiff's, the patent was held void, as being more extensive than the invention. (*The King v. Elae*, 11 East, 109, note.) A person may obtain a patent for a machine, consisting of an entirely new combination of parts, although all the parts may have been separately used in former machines; and the patent may correctly set out the whole as the invention of the patentee. But if a combination of a certain number of those parts have previously existed, up to a certain point, in former machines, the patentee merely adding other combinations, the patent should comprehend such improvements only. (*Berill v. Moore*, 2 Marshall's R., 211.) 10. If a person has invented an improvement upon an existing patented machine, he is entitled to a patent for his improvement; but he cannot use the original machine, until the patent for it has expired. (*Ex-parte Fox*, 1 Ves. & Beame's R., 67.) 11. Although the specification is not annexed to a patent in England, and the patent contains a concise description only of the invention, yet, as there is a proviso in the patent, requiring the enrollment of a specification in chancery, within a specified time, and in default making the patent void, the patent is always construed in connection with the specification, and the latter is deemed a part of the patent, at least for the purpose of ascertaining the nature and extent of the invention claimed by the patentee. (*Boulton v. Bull*, 2 H. Bl., 463; *Hornblower v. Boulton*, 8 T. R., 95.) 12. Care should be taken that the specification comports with the patent; for otherwise it will not sustain the grant. For where a patent was obtained for an improved mode of lighting cities, it was held by LeBlanc, J., that it was not supported by a specification, describing an improved lamp. The patent ought to have been for an improved street lamp. (*Lord Cochrane v. Smethurst*, 1 Starkie's N. P. R., 205.) No technical words, however, are necessary to [18*] explain the subject "of a patent; but the court will construe the terms of the patent and of the specification in a liberal manner, and give them such a meaning as best comports with the apparent intention of the patentee. (*Hornblower v. Boulton*, 8 T. R., 95; *Boulton v. Bull*, 2 H. Bl., 463.) Therefore, when the patent was "for a method of lessening the consumption of steam and fuel in fire-engines," one objection was, that the patent was for a philosophical principle only, neither organized, nor capable of being organized, whereas it ought to have been for a formed machine; a second objection was, that if it was a patent for a formed machine, it was for the whole machine, when the invention was only an improvement, or addition to an existing machine: But the Court of King's Bench, on examining the specification, were of opinion, that both of the objections were unfounded, although the terms of the specification were so doubtful and obscure as to have produced a division of opinion in the Court of Common Pleas. (*Hornblower v. Boulton*, 8 T. R., 95; *Boulton v. Bull*, 5 H. Bl., 463.) Both of these cases were very elaborately discussed, and contain more learning on the subject of patents than can be found

in any other adjudications, and are, therefore, deserving of the most accurate attention of every lawyer. In both of them all the judges agreed, that a mere mistake in terms, or in the correct sense of words, would not vitiate a patent, if the court could give a reasonable construction to the whole specification.

Mr. Justice Heath said, "when a mode of doing a thing is referred to something permanent, it is properly termed an engine; when to something fugitive, a method." "If method and machinery had been used by the patentee as convertible terms, and the same consequences would result from both, it might be too strong to say that the inventor should lose the benefit of his patent by the misapplication of this term." "Method is a principle reduced to practice; it is, in the present instance, the general application of a principle to an old machine." "A patent for an improvement of a machine, and a patent for an improved machine, are, in substance, the same. The same specification would serve for both patents; the new organization of parts is the same in both." Mr. Justice Rooke said, "a new invented method *conveys to my understanding [*19 the idea of a new mode of construction. I think those words are tantamount to fire-engines of a newly-invented construction; at least, I think they will bear this meaning, if they do not necessarily exclude every other. The specification shows that this was the meaning of the words, as used by the patentee, for he has specified a new and particular mode of constructing fire-engines. It seems, therefore, but reasonable, that if he sets forth his improvement intelligibly, his specification should be supported, though he professes only to set forth the principle." Mr. Justice Buller said, "the method and mode of doing a thing are the same; and I think it impossible to support a patent for a method only, without having carried it into effect, and produced some new substance. When the thing is done, or produced, then it becomes the manufacture which is the proper subject of a patent." The remarks of Lord Chief Justice Eyre have been already stated. He, however, considered the patent not to be for a fire-engine, but in effect for a manner of working a fire-engine, so as to lessen the consumption of steam; and, he added, "the specification calls a method of lessening the consumption of steam in fire-engines a principle, which it is not; the act (of parliament) calls it an engine, which, perhaps, also, it is not; but both the specification and statute are referable to the same thing, and when they are taken with their correlative, are perfectly intelligible. A narrower ground was taken in the argument, which was to expound the word engine, in the body of this act (meaning the special act of parliament for this patent), in opposition to the title of it, to mean a method; and I am ready to say I would resort to that ground, if necessary, in order to support the patent, *ut res magis valeat quam pereat*." In the king's bench. Mr. Justice Lawrence observed, "engine and method mean the same thing, and may be the subject of a patent. Method, properly speaking, is only placing several things, and performing several operations, in the most convenient order; but it may signify contrivance, or device; so may an engine; and, therefore, I think

it may answer the word method. So principle may mean an elementary truth; but it may also mean constituent parts." 13. The patent being 20*) granted upon "condition that the invention is new (at least in England), and useful, and also that the patentee shall deliver and enrol in chancery a specification of his invention, it is necessary for the patentee to establish, by proof, when his invention is called in question in a suit, that he has complied with these conditions. If, therefore, the novelty or effect of the invention be disputed, the patentee must show in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this, on his part, is sufficient; and it is then incumbent on the defendant to falsify the specification. (*Turner v. Winter*, 1 T. R., 602.) 14. In respect to specifications (objections to which form the most common, and, indeed, usually the most fatal defense to suits for infringements of patents), several rules have been laid down. In the first place, a man, to entitle himself to the benefit of a patent of monopoly, must disclose his secret, and specify his invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new invention, or addition of their own. (*Re v. Arkwright*, Bull. N. P., 77.) In the second place, he must so describe it that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and, therefore, if the specification describe many parts of an instrument, or machine, and the patentee uses only a few of them, or does not state how they are to be put together or used, the patent is void. (*Re v. Arkwright*, Bull. N. P., 77; *Harmar v. Playne*, 11 East, 101.) So, if the patentee could only make the article with two or three of the ingredients specified, and he has inserted others which will not answer the purpose, that will avoid the patent. So, if he makes the article with cheaper materials than those which he has enumerated, although the latter will answer the purpose, the patent is void. (*Turner v. Winter*, 1 T. R., 602.) In the third place, if the specification be, in any part of it, materially false, or defective, or obscure and ambiguous, or give directions which tend to mislead the public, the patent is void. (*Re v. Arkwright*, Bull. N. P., 77; *Turner 21*) v. Winter*, 1 T. R., 602.) Therefore, where, in a patent for trusses for ruptures, the patentee omitted what was very material for tempering the steel, which was rubbing it with tallow, Lord Mansfield held the patent, for want of it, void. (*Liardet v. Johnson*, Bull. N. P., 76; S. C., cited 1 T. R., 602, 608, Per Buller, J.) So, where a patent was for a new mode of making verdigris, and the specification omitted an ingredient (*aqua fortis*), which, though not necessary to the composition for which the patent was claimed, was a more expeditious and beneficial mode of producing the same effects, and was, as such, used by the patentee, Lord Ch. J. Gibbs held the patent void. (*Wood v. Zimmer*, 1 Holt's N. P. R., 58.) So, if the specification direct an ingredient to be used which will not answer the purpose, or is never used by the patentee, the patent is void.

Wheat. 3.

(*Turner v. Winter*, 1 T. R., 602.) So, if the patentee says, in his specification, he can produce three things by one process, and he fails in any one, the patent is void. (*Turner v. Winter*, 1 T. R., 602.) So, if the specification direct the same thing to be produced several ways, or by several different ingredients, and any of them fail, the patent is void. (*Turner v. Winter*, 1 T. R., 602.) In the fourth place, if the invention be of an improvement only, it is indispensable that the patent should not be more broad than the invention, and the specification should be drawn up in terms which do not include anything but the improvement. (*Boulton v. Bull*, 2 H. Bl., 468; Bull. N. P., 76; *Borvill v. Moore*, 2 Marsh. R., 211.) And in the specification for such improvement it is essential to point out precisely what is new and what is old; and it is not sufficient to give a general description of the construction of the instrument, without such distinction, although a plate be annexed containing detached and separate representations of the parts in which the improvement consists. Therefore, where a patent was "for certain improvements in the making of umbrellas and parasols," and the specification contained a minute description of the construction of them, partly including the usual mode of stitching the silk, and also certain improvements in the insertion of the stretches, &c., and throughout the whole specification no distinction was made between what was new and what was old, Lord Ellenborough *said, [*22 "the patentee ought, in his specification, to inform the person who consults it what is new and what is old. He should say, my improvement consists in this: describing it by words if he can, or, if not, by reference to figures. But here the improvement is neither described in words nor figures, and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. A person ought to be warned by the specification against the use of a particular invention." (*M'Farlane v. Price*, 1 Starkie's N. P. R., 199.) And it may be added, also, that the public have a right to purchase the improvement by itself, and not to be encumbered with other things, where the improvement is of an old machine. But where the patentee obtained a patent for a new machine, and afterwards another patent for improvements in the said machine, in which the grant of the former was recited, it was held, that a specification, containing a full description of the whole machine so improved, but not distinguishing the new improved parts, or referring to the former specification, otherwise than as the second recited the first, was sufficient. Lord Ellenborough, on that occasion, said, "it may not be necessary, indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement; but on many occasions it may be sufficient to refer generally to them. As in the instance of a common watch, it may be sufficient for the patentee to say, 'take a common watch, and add or alter such and such parts,' describing them." (*Harmar v. Playne*, 11 East, 101; S. C., 14 Ves., 130.) The case, also, of *Borvill v. Moore*, already cited (2 Marsh. R., 211), affords very important instruction on this point.

487

In the fifth place, if a patentee in his specification sum up the principle in which his invention consists, if this principle be not new, the patent cannot be supported, although it appear that the application of the principle, as described in the specification, be new; for the patentee, by such summing up, confines himself to the benefit only of the principle so stated. (*Ree v. Cutler*, 1 Starkie's N. P. R., 354.) 15. If a patent is void, the patentee cannot enforce [23*] force performance of a *covenant for the observance of the exclusive right, entered into by the covenantor, in contemplation of the patent being good. (*Hayne v. Maltby*, 3 T. R., 488.) 16. The right of a patentee is assignable at law; and upon such an assignment the assignee has the exclusive right to maintain an action for any infringement of the patent, (See *Boulton v. Bull*, 2 H. Bl., 463.) 17. Where the patentee has assigned his patent, in an action by the assignee against the patentee, for an infringement of the patent, the latter will not be permitted to aver against his deed that the invention is not new. (*Oldham v. Langmead*, cited 3 T. R., 489.) 18. Where the patent is void, from any of the causes before stated, the party sued for an infringement may, under the general issue, avail himself of any such matter in his defense. 19. Or the patent itself may be repealed by a *scire facias* by the king, upon the ground of fraud, or false suggestion. The mode of proceeding on *scire facias* may be seen in 2 Saunders's Rep., 72; Williams's note, 4, s. 4.

These are the principal doctrines established in the English courts, upon the subject of patents for new inventions. In respect to the adjudications under the patent laws of the United States, it is matter of regret that so few of them have been published; but the following are the leading provisions of the act, and the principles which have been recognized as applicable to it. It may be convenient to follow the order of the patent act itself, and to arrange the decisions under the corresponding heads, to which they properly belong.

The first patent act of the United States was passed in the year 1790 (Act of the 10th of April, 1790, ch. 34), and was repealed by another act, passed in the year 1793 (Act of the 21st of February, 1793, ch. 11), and this last act, as amended by the act of 1800 (Act of the 17th of April, 1800, ch. 25), constitutes the present general patent law of the United States.

1. By the first section of the act of 1793, any citizen who has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements therein, not known or used before the application, may, on application and petition to the Secretary of State, obtain a patent for the exclusive right and liberty of making, constructing, [24*] using, and *vending to others to be used, the said invention or discovery, upon complying with the regulations of the act; and the patent is required to recite the allegations and suggestions of the petition, and give a short description of the invention or discovery. The letters patent, previous to their being issued, are to be examined by the Attorney-General, and are by him to be certified to be conformable to law, and are then to be recorded in the office of the Secretary of State. The act of 1800, ch. 25, s. 1 and 2, extends this provision

to aliens who have resided two years in the United States; and also to the legal representatives and devisees of a person entitled to a patent, who dies before it is obtained. The original inventor of a machine, who has reduced his invention first into practice, is entitled to a priority of the patent-right; and a subsequent inventor, although an original inventor, cannot sustain his claim, although he has obtained the first patent; for *qui prior est in tempore, potior est in jure*. (*Woodcock v. Parker*, 1 Gallis. R., 438; *Odiome v. Winkley*, 2 Gallis. R., 51.) And, therefore, every subsequent patentee, although an original inventor, may be defeated of his patent-right, upon proof of such prior invention put into actual use. (*Bedford v. Hunt*, 1 Mason's R.; for then the invention cannot be considered as new. If an inventor make a gift of his invention to the public, and suffer it to go into general use, he cannot afterwards resume the invention, and claim an exclusive right under a patent. (*Whitemore v. Cutler*, 1 Gallis. R., 478.) By useful invention, in the patent act, is meant an invention which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health, or good order of society, or frivolous and insignificant. (*Bedford v. Hunt*, 1 Mason's R.; *Lorrell v. Lennis*, 1 Mason's R.) It is not necessary to establish that it is in all cases superior to the modes now in use for the same purpose. (*Ibid.*) 2. By the second section, any person who shall have invented an improvement, shall not be at liberty to use the original discovery, nor shall the original inventor be at liberty to use the improvement. And the simply changing the form or the proportions of any machine, or composition of matter, in any degree, shall not be *deemed a discovery. (See *Odiome v. Winkley*, 2 Gallis. R., 51.) If the inventor of an improvement obtain a patent for the whole machine, the patent, being more extensive than the invention, is void. (*Woodcock v. Parker*, 1 Gallis. R., 439; *Whitemore v. Cutler*, 1 Gallis. R., 478; *Odiome v. Winkley*, 2 Gallis. R., 51.) 3. By the third section, every inventor, before he can obtain a patent, is required to swear that he is the true inventor or discoverer of the art, machine, or improvement, for which he solicits a patent, and to deliver a written description of his invention, and of the manner of using, or process of compounding it, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same. And in the case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions; and he is to accompany the whole with drawings and written references, where the nature of the case admits of drawings; or with specimens of the ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention is a composition of matter; which description, signed by himself, and attested by two witnesses, is to be filed in the office of state; and the inventor is moreover to deliver a model of his machine, if the Secretary shall deem it necessary. The

Wheat. 3.

patentee must describe, in his specification, with reasonable certainty, in what his invention consists; otherwise it will be void for ambiguity. If it be for an improvement in an existing machine, he must, in his specification, distinguish the new from the old, and confine his patent to such parts only as are new; for if both are mixed up together, and a patent is taken for the whole, it is void. (*Lowell v. Lewis*, 1 Mason's R.) The taking of the oath is directory to the party, but if, by mistake, the oath is not taken before the issuing of the patent, the patent is not thereby rendered void. (*Whittemore v. Cutter*, 1 Gallis. R., 429.) 4. By the fourth section, patentees may assign their rights, and, upon the assignment being recorded in the office [26*] of *state, the assignee shall stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assignees in any degree. Where the patentee has assigned an undivided moiety of his patent-right, the action for an infringement of the right should be in the joint names of the patentee and the assignee. (*Whittemore v. Cutter*, 1 Gallis. R., 429.) But an assignee of the patent-right, by an assignment excepting certain places, is not an assignee entitled to sue within the act. (*Tyler v. Tuel*, 6 Cranch, 324.) 5. The third section of the act of 1800 (which is a substitute for the fifth section of the act of 1793) declares, that any person who, without the written consent of the patentee, &c., shall "make, devise, use, or sell" (the words of the fifth section of the act of 1793 were, "make, devise, and use, or sell") the thing patented, shall forfeit three times the actual damages sustained by the patentee, &c., to be recovered by an action on the case, in the Circuit Court of the United States, having jurisdiction thereof. Upon this section it has been held that the making of a patented machine, fit for use, and with a design to use it for profit, in violation of the patent-right, is, of itself, a breach of this section, for which an action lies; but where the making only, without a user, is proved, nominal damages only are to be given for the plaintiff. (*Whittemore v. Cutter*, 1 Gallis. R., 429, 478.) If a user is proved, the measure of damages is the value of the use during the time of the user. (*Ibid.*) But the act gives the plaintiff a right to his actual damages only, and not to a vindictive recompense, as in other cases of tort. (*Ibid.*) And neither the price of, nor the expense of making, a patented machine, is a proper measure of damages in such case. (*Ibid.*) The sale of the materials of a patented machine by a sheriff, upon an execution against the owners, is not a sale which subjects the sheriff to an action under the third section of the act of 1800. (*Sawin v. Guild*, 1 Gallis. R., 485.) In an action on this section, the jury are to find the single damages, and the court are to treble them. (*Whittemore v. Cutter*, 1 Gallis. R., 479.) 6. The sixth section authorizes the defendant to plead the general issue, and give this act, and any special matter, in evidence, of which notice in writing [27*] may have been given to the plaintiff *thirty days before trial, tending to prove, (1) that the specification does not contain the whole truth relative to the discovery, or that it contains more than is necessary to produce the described effect, which concealment, or addition, shall fully appear to have been made for the purpose of deceiving the public; (2) or that the patented thing was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee; (3) or that he had surreptitiously obtained a patent for the discovery of another person; in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void. Besides the points decided in the principal case in the text (*Evans v. Eaton*), the following are deserving of notice. It is clear that this section does not include all the matters of defense which the defendant may be legally entitled to make; as for instance, it does not include the case of the non-existence of the fact of infringement in any shape; the case of an assignment from the plaintiff, or a written license, or purchase from the plaintiff; or that the patentee is an alien not entitled to a patent; which are clearly bars to the action, upon the very terms of the act, as well as the general principles of law. (*Whittemore v. Cutter*, 1 Gallis. R., 429, 435.) So, if the specification do not describe the invention in clear and exact terms, so as to distinguish it from other inventions, but be so ambiguous and obscure that it cannot be with reasonable certainty ascertained for what the patent is taken, or what it includes, the patent is void for ambiguity; and the fact may be shown in his defense by the defendant. (*Lowell v. Lewis*, 1 Mason's R.) But if the invention is definitely described in the patent and specification, so as to distinguish it from other inventions before known, the patent is good, although it does not describe the invention in such full, clear, and exact terms, that a person skilled in the art, or science, of which it is a branch, could construct or make the thing; unless such defective description or concealment was with intent to deceive the public. (*Whittemore v. Cutter*, 1 Gallis. R., 429; *Lowell v. Lewis*, 1 Mason's R.) In order to defeat a patent, it is not necessary to prove that the invention has previously been in general use, *and gen- [28*] erally known to the public. It is sufficient, if it has been previously known to, and put in use by, other persons, however limited in extent the use or the knowledge of the invention may have been. (*Bedford v. Hunt*, 1 Mason's R.) 7. The seventh section applies only to the cases of patents, under state authority, before the constitution of the United States. 8. The eighth section applied only to applications then pending for patents, under the patent act of 1790. 9. The ninth section directs that, in case of interfering applications for a patent for the same invention, the same may be referred to arbitrators, chosen by the applicants and the Secretary of State, whose award shall be final, "as far as respects the granting of the patent;" and if either of the applicants refuse to choose an arbitrator, the patent shall issue to the opposite party. It has been held, that such an award is not conclusive in any other respect than as to the mere issuing of the patent; and that it decides nothing as to the right of invention, or other claims of either party, but that either party may contest, in a suit at law, the validity of the patent. (*Stearns v. Barrett*, 1 Mason's R.) 10. The tenth section provides that, upon oath or affirmation being made before the district judge of the district

Wheat. 3.

489

where the patentee, his executors, &c., reside, that any patent was obtained "surreptitiously, or upon false suggestion" (the words of the act of 1790 are "surreptitiously by or upon false suggestion"), the district judge may, if the matter appear sufficient, at any time within three years after the issuing of the patent, grant a rule that the patentee show cause why process should not issue against him, to repeal the patent; and if sufficient cause be not shown, the rule shall be made absolute, and the judge shall order process to be issued against such patentee, &c., with costs of suit. And if no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by the court for the repeal of the patent; and if the plaintiff fails in his complaint, the defendant shall recover costs. It has been held, that the proceedings under the rule to show cause are summary; and that when it is made absolute, it is not, that the patent be repealed, but only that process issue to try the

validity of the patent, on *the suggestions [*29 stated in the complaint. That this process is in the nature of a *scire facias* at the common law, to repeal patents, and the issues of fact, if any, are to be tried, not by the court, but by a jury; that the judgment upon this process is in the nature of a judgment on a *scire facias* at common law, upon which a writ of error lies, as in other cases, to the Circuit Court, where there is matter of error apparent on the record, by bill of exceptions, or otherwise. That the patent itself is slight, but *prima facie* evidence, in favor of the patentee, that it is his invention; that if it appear that he is but a joint inventor, and he takes out the patent as his sole invention, it is an obtaining of the patent upon false suggestion within the act. (*Stearns v. Barrett*, 1 Mason's R.) 11. The remaining sections of the act (11 and 12) contain no matter of any general importance; the eleventh being directory only as to the fees of office, and the twelfth being a repealing clause of the act of 1790.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

FEBRUARY TERM, 1819.

BY HENRY WHEATON,

Counselor at Law.

VOLUME IV.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

THE HON. JOHN MARSHALL, *Chief Justice.*
THE HON. BUSHROD WASHINGTON, *Associate Justice.*
THE HON. WILLIAM JOHNSON, *Associate Justice.*
THE HON. BROCKHOLST LIVINGSTON, *Associate Justice.*
THE HON. THOMAS TODD, *Associate Justice.**
THE HON. GABRIEL DUVALL, *Associate Justice.*
THE HON. JOSEPH STORY, *Associate Justice.*
WILLIAM WIRT, Esq., *Attorney-General.*

* Mr. Justice TODD was absent during the whole of this term on account of indisposition.

REPORTS OF THE DECISIONS OF THE Supreme Court of the United States.

FEBRUARY TERM, 1819.

[CHANCERY.]

THE TRUSTEES OF THE PHILADELPHIA BAPTIST ASSOCIATION ET AL.

v.

HART'S EXECUTORS.

In the year 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item, what shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association, that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792 the legislature of Virginia passed an act repealing all English statutes. In 1795 the testator died. The Baptist Association in question had existed as a regularly organized body for many years before the date of his will; and in 1797 was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia Baptist Association."

Held, that the Association, not being incorporated at the testator's decease, could not take this trust as a society.

21] That the bequest could not be taken by the individuals who composed the association at the death of the testator.

That there were no persons to whom this legacy, were it not a charity, could be decreed.

And that it could not be sustained in this court, as a charity.

Charitable bequests, where no legal interest is

vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43 Eliz.

If, in England, the prerogative of the king, as *parens patriæ*, would, independent of the statute of Elizabeth, extend to charitable bequests of this description. *Quære*, How far this principle would govern in the courts of the United States.

Held, that it was unnecessary to enter into this inquiry, because it could only arise where the Attorney-General is made a party.

IN the year 1790, Silas Hart, a citizen and resident of Virginia, made his last will in writing, which contains the following bequest: "Item, what shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family. In 1792 the legislature of Virginia passed an act, repealing all English statutes, including that of the 43 Eliz., c. 4. In the year 1795 the testator died. The Baptist Association, which met annually at Philadelphia, had existed as a regularly organized body for many

NOTE.—Marshall, Ch. J., who delivered the opinion of the court in the above case, and Justice Story, who wrote out his own opinion and afterwards published it in the appendix to 3 Pet. Rep., p. 497, were both, at that time, of the opinion that it (the power of the Chancery Court of England in relation to charities) was derived from the statutes 43d Elizabeth. But in *Vidal v. Girard's executors* (2 How. 127), Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records. *Fountain v. Ravonol*, 17 How. 394. It was intimated in the above case (Phil. Bapt. Ass'n v. Hart), by Chief Justice Marshall, that charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, enforcing the prerogative of the king, as *parens patriæ*, independently of the statute of 43 Elizabeth. But this doctrine was denied by Chancellor Walworth (*Potter v. Chapin*, 6 Falge, 648), and was shown by the Supreme Court of the United States to be wrong in a subsequent case. (*Vidal v. Girard's executors*, 2 How. 196.) It has been conclusively proved that the Court of Chancery exercised jurisdiction over charities anterior to the statute of Elizabeth, and upon the common law.

Willard's Eq. Jur. 570, 571, citing *Vidal v. Girard's Ex'rs*, 2 How. 196; *Williams v. Williams*, MS., N. Y.

Wheat. 4.

Court of Appeals, per Denio; *Porter's case*, 1 Co. 28; *McCartee v. The Orphan Asylum*, 9 Cow. 437, 476, per Jones, Ch.; *Executors of Burr v. Smith*, 7 Vt. 241; *Story's Eq. sec. 1138 et. seq.*; *Kinskern v. The Lutheran Churches*, 1 Saund. Ch. R. (N. Y.) 562, where most of the cases are collected. See also 2 Kent's Com. 286-288, marg. p.

Subsequent incorporation will confer on the association the capacity of taking and managing the fund. *Inglis v. Sailors' Sun Harbor*, 3 Pet. 9, 113.

In New York it is provided by statute that "no devise to a corporation shall be valid, unless such corporation be expressly authorized, by its charter, or by statute, to take by devise." 2 R. S. (N. Y.) 57, s. 3.

See also *Wright v. Meth. Epis. Ch.*, 1 Hoff. Ch. R. 225; *Jackson v. Hammond*, 2 Caines's Cas. 387.

An act enabling a corporation to take by devise, cannot have a retroactive effect, to make valid a devise by a testator who died before the act was in force. *Bonard's will*, 16 Abb. Pr. N. S. 129.

The common law right of taking personal property by bequest was, it seems, always enjoyed by corporations as well as individuals. 2 Atk. 37; *Phillips Academy v. King*, 12 Mass. 548. *In re Howe*, 1 Falge, 214; *Angell & Ames, Corp.* (3d ed.) 187; *Burr v. Smith*, 7 Vermont, 241; *Burbank v. Whitney*, 24 Pick. 151; *Gibson v. McCall*, 1 Richardson, 174; *Washburn v. Sewall*, 9 Met. 280; *Griffin v. Graham*, 1 Hawks, 96; *Gass v. Wilhite*, 2 Dana, 170.

years before the date of this will, and was composed of the clergy of several Baptist churches of different states, and of an annual deputation 3*] of laymen from *the same churches. It was not incorporated until the year 1797, when it received a charter from the legislature of Pennsylvania, incorporating it by the name of "The Trustees of the Philadelphia Baptist Association." The executors having refused to pay the legacy, this suit was instituted in the Circuit Court for the District of Virginia, by the corporation, and by those individuals who were members of the association at the death of the testator. On the trial of the cause, the judges of that court were divided in opinion on the question, whether the plaintiffs were capable of taking under this will. Which point was, therefore, certified to this court.

The *Attorney-General*, for the plaintiffs, argued, that the peculiar law of charitable bequests did not originate in the statute of the 43d Eliz., which was repealed in Virginia before the death of the testator. If lands had been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise would have been held good at law; and, consequently, the Court of Chancery would have enforced the trust, in virtue of its general equity powers, independent of that statute. The statute does not profess to give any validity to devises, or legacies, of any description, not before valid; but only furnishes a new and more convenient mode for discovering and enforcing them; but the case before the court is such as requires the interposition only of the ordinary powers of a court of equity. Devises equally vague and indefinite, have been sustained in courts of common law, before the 4*] statute of Elizabeth, *and would, *a fortiori*, have been supported in courts of equity.¹ And the Court of Chancery, exercising the prerogative of the king as *parens patrie*, has been constantly in the habit of establishing charitable bequests of this nature. "In like manner," says Lord Chancellor Macclesfield, "in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Eliz., relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the Attorney-General's name, for the establishment of charities."² So also, Lord Keeper Henly says, "and I take the uniform rule of this court, before, at and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under statute Hen. VIII., yet they were always considered as good in equity, if given to charitable uses."³ The powers of the Court of Chancery over these

subjects, are derived from, and exercised according to the civil law.⁴ Lord Thurlow says, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses, not ascertained, shall be applied to some *proper object."⁵ By that law, be [*5] quests for charitable purposes, *ad pios usos*, are not void for uncertainty.⁶ But, even supposing all the powers of the English Court of Chancery over charities to have been originally derived from the statute of Elizabeth, still it does not follow that the courts of the United States have not all the powers which the English courts of equity possessed, when this country was separated from the British empire. The chancery system originated in various sources; in the peculiar jurisprudence of the court, which may be denominated its common law; in statutes; and in the authority of the Chancellor, as keeper of the king's conscience. It is difficult to find any chancery decisions wholly purified from the influence of statutory provisions. The grant of equity powers in the constitution, to the national judiciary, extends "to all cases in equity." It is not limited to those cases which arise under the ordinary jurisdiction of the Court of Chancery.⁷ This is not a question of local law, nor can the equity jurisdiction of the United States courts depend upon the enactment or repeal of local statutes. This court has already determined that the remedies in the court of the United States, in equity, are to be, not according to the practice of state courts, but according to the principles of equity as known and practiced in that country from which we derive a knowledge of those principles. In England, this bequest would, unquestionably, be sustained. The association, which was *the object of the testator's [*6] bounty, though unincorporated at the time, was certainly as definite a body as the "sixty pious ejected ministers," in one case,⁸ or "the charitable collections for poor dissenting ministers living in any county in England," in another.⁹ Nor was it necessary that they should be incorporated in order to take. A devise by an impropriator, directly "to one who served the cure, and all who should serve it after him," &c., has been carried into effect.¹⁰ So, if the devise be to a charitable use, though the object be not *in esse*, and though it depend on the will of the crown, whether it shall ever be called into existence, equity will establish it.¹¹

Mr. Leigh, contra, contended, that the association could not take the bequest, neither in their individual nor in their collective capacity. Not as individuals; because the persons composing the association continually fluctuating and were not designated, were not indeed known, at the time of the bequest. No personal benefit was intended to them. The testator's intent was to constitute the association, in its col-

1.—Porter's case, 1 Co. Rep. 22, b; Plowd. 522.

2.—Eyre v. The Countess of Shaftsbury, 2 P. Wms. 118.

3.—Case of Christ's College, Cambridge, 1 Str W. Bl. 91.

4.—3 Bl. Com. 478; White v. White, 1 Bro. Ch. Cas. 15; Moggridge v. Thackwell, 7 Ves. 36.

5.—White v. White, 1 Bro. Ch. Cas. 15.

6.—Swinb. part 1, sec. 16; part 7, sec. 8.

7.—Campbell v. Robinson, 3 Wheat. 212.

8.—The Attorney-General v. Baxter, 1 Vern. 248; Attorney-General v. Hughes, 2 Vern. 105.

9.—Walker v. Childs, Amb. 524.

10.—Anon, 2 Vent. 349.

11.—Lady Downing's Case, Amb. 562. Ayliff v. Dodd, 2 Atk. 328; The Attorney-General v. Oglander, 3 Bro. Ch. Cas. 166; The Attorney-General v. Bowyer, 3 Ves., Jun., 725.

lective capacity, trustee of the fund for this charitable purpose; and whether the trust can be carried into effect or not, they cannot take 7*] individually *to their own use.¹ Nor can they so take in their collective capacity, because not incorporated at the time; and the subsequent incorporation does not help their case.² Therefore, this is to be regarded as a bequest to charitable uses, without the intervention of trustees to take the legal estate and fulfill the uses. According to the law of Virginia, which must govern in this case, such a trust cannot be carried into effect by any court in any mode. Had such a case occurred in England, it is admitted that the Court of Chancery would carry the trust into effect by supplying legal and capable trustees to take and hold the fund of the objects of the testator's charity; or, if those objects were not designated in the testator's will with sufficient certainty, would execute it, upon the doctrine of *cy pres*, for objects *ejusdem generis*, according to a scheme digested by the master. But the Court of Chancery in England exercises such powers solely in virtue of the statute of the 43d Eliz. All ancient precedents of the exercise of such powers, to effect such charitable uses, are expressly stated to be founded on that statute.³ As all the early decisions are founded on the statute, so the more modern cases are founded on the authority of the ancient; with this only extension of their principle, and although the statute merely pro- 8*] vides that *charitable donations shall be applied to such of the charitable uses therein expressed, for which they were appointed by the donors or founders, the Court of Chancery has gone a step farther, and held upon the equity of the statute, that where objects of charity are in any way pointed out, however vaguely and indefinitely, the court will apply the fund to charitable uses of the same kind with those intended by the donor, according to a scheme digested by the master.⁴ All the elementary writers and compilers concur in deducing the jurisdiction of the English Court of Chancery over charitable bequests from the statute of Eliz.; tracing all the powers of the court, as a court of equity, over this subject, to that source; its liberality and favor toward charitable donations; its practice of supplying all the defects of conveyances to charitable uses; of substituting trustees where those named by the donor fail before the vesting of the legal estate; and of taking on itself the execution of the trust, where incapable, or no trustees are appointed by the donors.⁵ Indeed, no donation is considered in England as a donation to charitable uses, unless for such uses as are enumerated in the statute of Eliz.; or such as are analogous.⁶ The very signification of *the words *charity* and *charitable use* are derived from

that statute. In the case last cited, Sir W. Grant said: "In this court, the signification of charity is derived principally from the statute of Elizabeth. Those purposes are considered charitable which that statute enumerates, or which by analogies are deemed within its spirit and intendment."⁷ Lord Eldon, in rehearing the same case, confirms the doctrine. "I say, with the master of the rolls, a case has not yet been decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general."⁸ In a previous case, Lord Loughborough had said: "It does not appear that the court, before that period (the 43d of Eliz.), had cognizance of informations for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations, but they made out the case as well as they could at law."⁹ The repeal of the English statute of charitable uses by the legislature of Virginia, must be considered as almost, if not entirely, repealing that whole head of equity. The effect of this repeal may be estimated by recurring to the history of the system of equitable jurisprudence. Every part of that system has been built up since the 43d year of Elizabeth, and there is not a single chancery case, touching charitable bequests, prior to the *statute of that year. The [*10 court is then driven to ascertain either the common law method of effecting charitable uses, or the jurisdiction of the English Chancery, independent of the statute. Lord Loughborough says, that it had no jurisdiction whatever, of the matter before the statute, and that they made out the case as well as they could at law; and he instances certain cases.¹⁰ The jurisdiction of the Court of Chancery in England, abstracted from, and independent of, the statute of the 43d Eliz., may be inferred from the course of the court in cases where the donors of charities, failing to point out any object of charity, or designating improper, impolitic, or illegal objects, the statute gives the court no authority to direct the charity to any definite purpose. In all such cases, the disposition of the funds belongs to the king, as *parens patrie*, and is made by him under his sign manual. In *Moggridge v. Thackwell*,¹¹ Lord Eldon, after reviewing all the cases (acknowledging that they conflicted with each other, and that his own mind was perplexed with doubts), came to this general conclusion, which he deemed the most reconcilable to authorities; that when the execution of the trust for a charity is to be by a trustee in general, or some objects pointed out, there the court will take upon itself the execution of the trust; but where there is a general indefinite

1.—*Morris v. The Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522.

2.—8 Vin. Abr. tit. Devise, H. pl. 1; *Woodmore v. Woodroffe*, Amb. 696.

3.—*The Attorney-General v. Rye*, 2 Vern. 453; *Rivett's case*, Moor, 890; *Pigott v. Penrice*, 2 Eq. Cas. Abr. 191, pl. 6; *The Attorney-General v. Hickman*, Ib. 193, pl. 14.

4.—*Barlia v. The Attorney-General*, 2 Atk. 239; *White v. White*, 1 Bro. Ch. Cas. 12; *Moggridge v. Thackwell*, 3 Bro. Ch. Cas. 517; S. C. 1 Ves., Jun., 464; S. C. 7 Ves. 36.

5.—2 Bl. Com. 376; 2 Fonbl. Eq. 213; *Roberts on Wheat*. 4.

Wills, 213, 214; 1 Bac., Abr. tit. Ch. Uses; 5 Vin. Abr. same tit; 1 Burn's Eccl. Law, same tit.

6.—*The Attorney-General v. Hewer*, 2 Vern. 387; *Brown v. Yeale*, 7 Ves. 50, note c; *Morrice v. The Bishop of Durham*, 9 Ves. 399, S. C. 10 Ves. 540.

7.—*Morris v. The Bishop of Durham*, 9 Ves. 399.

8.—S. C. 10 Ves. 540.

9.—*The Attorney-General v. Bowyer*, 3 Ves., Jun., 726.

10.—*Porter's Case*, 1 Co. Rep. 23; *Sutton's Hospital Case*, 10 Co. Rep. 1.

11.—7 Ves. 36.

purpose, not fixing itself on any object, the disposition is to be made by the king's sign [1*] manual. A due attention to *the cases there collected by Lord Eldon, will show that the first class of cases are those over which the statute of the 43d Eliz. gives the court a jurisdiction, and which it will consequently exercise; and that the second class consists of those which belong to its jurisdiction, abstracted and independent of the statute, and in which the disposition belongs to the king.¹ So, if the donation be to a charitable use, but one which is deemed unlawful or impolitic, the disposition belongs to the king.² And were it not for the statute, all charitable donations whatever would be subject to the disposition of the king, as *parens patriæ*. It is true, there are some *dicta*, which at first sight seemed to support a different doctrine. Such is that of Lord Keeper Henly, in the case of *Christ's College*.³ But this *dictum* is directly contradicted by Lord Loughborough, in the *Attorney-General v. Bowyer*.⁴ Lord Keeper Henly cites no authority for this *dictum*; but Lord Chief Justice Wilmot having, in the case of *Downing College*,⁵ said something of the same kind, cites the authority which, doubtless, Lord Keeper Henly had in his mind; which is what fell from Lord Macclesfield in *Eyre v. The Countess of Shaftsbury*. "And in like manner, in case of charity, [12*] the king, *pro bono publico*, has an *original right to superintend the care thereof; so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file an information in chancery in the name of the Attorney-General for the establishment of charities."⁶ Whence, it appears, that the information which might be filed in the Attorney-General's name, for the establishment of charities, abstracted from, and independent of, the statute, related to such as depended on the disposition of the king as *parens patriæ*. This explanation is corroborated by what is said by Lord Somers, in the case of *Lord Falkland v. Bertie*,⁷ Lord Thurlow's *dictum*, in *White v. White*,⁸ that "the cases had proceeded on motions derived from the Roman and civil law," cannot be construed to extend to the entire adoption of the civil law on charities. By the civil law, if a man makes a will containing a charitable bequest and afterwards cancel the will, the bequest to charity is not thereby revoked. It is otherwise by the law of England. So, in case of a deficiency of assets, the civil law gave a preference to charitable legacies; but in the English Court of Chancery they abate in proportion.⁹

The conclusion, then, is, that in every case of charity, wherein the English Court of Chancery has not jurisdiction to direct the application of the *charity, either by the words or the equity of the statute 43 Eliz., the dispo-

sition belongs to the King, as *parens patriæ*, and the Court of Chancery is only resorted to in order to enforce his disposition. That statute being repealed in Virginia, and no similar one enacted in that state, the disposition of all charitable donations is in the *parens patriæ*, of Virginia. The courts of the United States cannot direct this charity, or carry it into effect. It is the government of Virginia which is the *parens patriæ* of that state. At the revolution, all the rights of the crown devolved on the commonwealth; and still remain in the commonwealth, except such as are delegated to the United States by the national constitution. But none of the rights that appertain to the state government, as *parens patriæ*, are delegated to the United States. Can this, or any other court of the United States, pretend to the care or guardianship of infants, lunatics, and idiots? If not, neither can they undertake the direction of a charity, which stands on the same footing as belonging to that government which is *parens patriæ*. Even, therefore, if it were admitted that the Court of Chancery of Virginia could carry this bequest to charitable uses into effect, the courts of the United States cannot. Another objection to the jurisdiction of those courts is, that the Attorney-General (that is, of Virginia) representing the *parens patriæ*, must be made a party.¹⁰ But *to make the Attorney-General of [*14 Virginia, that is, the state of Virginia, a party defendant, would be contrary to the constitution of the United States. There is a further, and an insurmountable objection to the jurisdiction of the United States courts in cases of charity, where there is no trustee appointed, or (which is the same thing) unascertainable and incapable trustees are appointed. If not the whole jurisdiction of the English Court of Chancery, at least so much of it as is abstracted from, and independent of, the statute 43 Eliz., belongs neither to its ordinary nor extraordinary jurisdiction, but to the Lord Chancellor personally, as delegate to the King. But by the constitution and laws of the United States, the only branch of the English chancery jurisdiction which is vested in the courts of the United States, is the ordinary or equity jurisdiction of the Court of Chancery in England. Finally, it is impossible to give effect to this charity in any mode. Not only are the trustees uncertain and unascertainable, but the objects of the charity are also uncertain, and not ascertainable by this court. The very idea of the court attempting to execute the trust, *cy pres*, and referring it to the master to digest a scheme for that purpose, is absurd and impracticable.

The Attorney-General, in reply, insisted, that if it were necessary to show the capacity of the plaintiffs as trustees, it could be done. *Id certum est quod certum reddi potest*; and the court might direct the money to be paid to those who constituted the association at *the time of [*15

1.—The Attorney-General v. Siderfin, 1 Vern. 224; Fiser v. Peacock, there cited; The Attorney-General v. Herrick, Amb. 712.

2.—The Attorney-General v. Baxter, 1 Vern. 248; De Costa v. De Pas, Amb. 228; Cary v. Abbott, 7 Ves. 480.

3.—W. Bl. 91.

4.—3 Ves., Jun., 726.

5.—Wilm. Rep. 1.

6.—2 P. Wms. 118, 119.

7.—2 Vern. 342.

8.—1 Bro. Ch. Cas. 15.

9.—The Attorney-General v. Hudson, 1 Cox's P. Wms. 675, and note.

10.—Mitf. Plead. 7, 98; Cooper's Plead. 219; Anon. 8 Atk. 277; 2 Atk. 67; Monell v. Lawson, 5 Vin. Abr. tit. Char. Uses, lb., pl. 11; The Attorney-General v. Hewett, 9 Ves. 482.

the bequest. But this association was incorporated shortly after the death of the testator; and it is sufficient to support the charity, that its objects may be *in esse*. The first of the two cases, cited to show that the devise must take effect at the time, or not at all, was a devise of lands to the priests of a chantry or college in the church of A; and there were none such, neither chantry, college, nor priests.¹ But suppose there had been, as in the case now before the court, would their want of a corporate character have defeated the devise? But this case is entirely inapplicable. The objects designated did not exist even under the description which the testator used. Nor did they exist at the time of the decision, so as to present the question as to the efficacy of the devise in that respect; and all that the court said upon this subject must be regarded as extrajudicial. The whole question was on a devise of lands on the rigid rules of the common law. The case of *Widmors v. Woodroffe*,² was a bequest of money to the corporation of Queen Anne's County to augment poor vicarages, which was held to be void by the statute of Mortmain, as the corporation were bound by their rules to lay out their donations in lands. It does not touch the question, whether a devise of a charity must take effect at the death of the testator, or not at all. But if the court should think that the Baptist Association were incapable of taking, as trustees, at the death of the testator, and that there must be some person then *in esse*, to hold [16*] the legal estate, the *executors will be considered, by a court of equity, as trustees, whether so named or not.³ So, also, the court will regard the heir as a trustee for the same purpose.⁴ The case of the *Attorney-General v. Bouyer* was decided on this very principle. The law had thrown the legal title on the heir, but he was held responsible for the intermediate profits in the imputed character of a trustee.⁵ The position, that the English Court of Chancery derives the jurisdiction now in question from the statute of Eliz., is denied. The title of the act is, "commissioners, authorized to inquire of misemployment of lands or goods, given to hospitals, &c., which, by their orders, shall be reformed." The preamble recites, that whereas lands, &c., had been theretofore given, limited, appointed, and assigned, to various objects which are specified, which lands, &c., had not been employed "according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same." It is clear, from this preamble, that no new validity was intended to be given to these donations. Their previous validity is admitted; and the mischief was, that they had been defeated by the frauds, breaches of trust, and negligence of those who should have paid them. Frauds and breaches of trust were, at this time, known heads of the equitable jurisdiction of the Court of Chancery; but the statute proceeds to provide a new remedy for [17*] the mischief announced in the preamble. This is the appointment of commissioners, with

powers to institute an inquisition to detect the frauds which had been practiced; authorizing the commissioners, conformably to the title of the act, to make orders to carry the intention of the donor into effect; and allowing the party injured by such orders to complain to the chancellor for an alteration or reversal of such orders. Even supposing the statute did profess to confer on the Court of Chancery a new jurisdiction, it is merely an appellate jurisdiction from the decrees of the commissioners; and this appeal is given to one party only—he who is charged with the fraud. So that it is neither an original jurisdiction, nor is it a jurisdiction to enforce a charitable trust.

The eighth and ninth sections of the act direct the commissioners to certify their decrees into the High Court of Chancery of England, and the Chancery of the Palatinate of Lancaster, and direct the chancellors to take such order for the due execution of the decrees (of the commissioners) as to them shall seem fit and convenient. This is not a power to make a decree, but to execute the decrees made by the commissioners. The 10th section reiterates the appellate power of the chancellor, recognized by the 1st section. The only principles the 10th section prescribes for the regulation of the chancellor on these appeals, are so far from being new to the court, that they have existed ever since its equitable jurisdiction commenced. If, then, the jurisdiction of the Court of Chancery over charitable bequests cannot be derived from the letter of the statute of Eliz., can it be supported *from ancient ad- [18*] judged cases, interpretative of that statute? Even if it could, this would be but a frail support; because the Court of Chancery was then in the infancy of its existence, and grasping at everything to enlarge that jurisdiction which time and usage have since consecrated; and because if its jurisdiction to enforce a charity by original bill, is to depend upon the statute, it has been shown from the statute itself that it cannot be sustained. But the adjudged cases do not support the position that the jurisdiction of the court over charities is derived from the statute. It is necessary, however, to distinguish between the two questions, whether a particular charity is within the statute; and, whether the original jurisdiction of the Court of Chancery is derived from the statute. The first question properly arises, where the commissioners have acted, and the court is reviewing their decree in its appellate character. As the commissioners derive their whole authority from the statute, and are therefore confined to the cases enumerated in it, the first question upon the threshold of the appeal is, whether the case on which they have acted be within the statute. Of this description are the cases cited on the other side, as being the ancient cases, upon the authority of which the modern cases have been decided. The cases of *The Attorney-General v. Rye*⁶ and *Rivett's case*,⁷ are expressly stated by the reporters to have come before the chancellor on exceptions to the orders of the *commissioners. *Piggot* [*19

1.—8 Vin. Abr. Tit. Devise, H. pl.

2.—Amb. 636.

3.—1 Bridg. Index, 761.

4.—2 Bridg. Index, 607.

Wheat. 4.

5.—3 Ves., Jun., 726.

6.—2 Vern. 453.

7.—Moor, 890.

v. *Penrice*,¹ is given by the editor on the authority of another reporter.² On looking into the original report, it will be seen that the question of the statute was not involved in the case as it stood before the chancellor. The only questions before him were: 1st. Whether any estate in lands passed to an executor by the words, "I make my niece, Gore, since married to Sir Henry Penrice, executrix of all my goods, lands, and chattels"? and, 2d. What writing would amount to a revocation of a will? At the end of the report there is a note in these words: "Note, the testatrix, by her second will, gave part of these lands to charitable uses, and they were decreed at the rolls to be good, as an appointment upon the act of parliament, notwithstanding there was no revocation; but that point was not now in question."³ How this question came before the master of the rolls does not appear; but all that is decided is, that the charity was within the statute, which leaves the question of the original jurisdiction of the court over charities untouched. The last ancient case cited, is that of the *Attorney-General v. Hickman*.⁴ A testator gave his estate to B and his heirs, &c., by a will duly executed; and by a codicil not attested by three witnesses, declared the use in these words: "I would have the same employed for the encouraging such non-conformist ministers as preach God's word, and in places where the people are not able to allow them a sufficient maintenance; and for encouraging the bringing 20*] up some to the work of the ministry who are designed to labor in God's vineyard among the dissenters. The particular method how to dispose of it, I prescribe not, but leave to their discretion, designing you (B) to take advice of C and D." This bequest, analogous to that now before the court, though much more vague and general, was confirmed; and the money decreed to be distributed immediately, and not made a perpetual charity. But nothing is said of the statute of Elizabeth, either in the argument or in the opinion of the court. The question was, whether B, and his testamentary advisers, C and D, having all died before the testator, the court could supply trustees. The counsel who contended for this power in the court, supported it, not by the statute, but by the general authority of the court; instancing a legacy bequeathed in trust, and the death of the trustee, which, in equity, would not defeat the bequest. The court sustained its authority without assigning any particular ground; and it may, therefore, be fairly inferred, that the court adopted the ground assumed in the argument. The case is cited from a manuscript report, and another note of the case, in the margin, goes no further than to say, that it was considered as being within the description of the statute of Elizabeth, but does not profess to found the power of the court over the case upon that statute. Nor do the cases cited to show that the power of the court to give effect to a vague devise by the rule of *cy pres* is founded upon the statute,

support that position. In the case of *Baylis v. The Attorney-General*,⁵ £200 were given [*21 under the will of Mr. Church, "to the ward of Bread street, according to Mr. —, his will." Lord Hardwicke, after rejecting testimony to fill the blank, proceeds thus: "Though the alderman and inhabitants of a ward are not, in point of law, a corporation, yet, as they have made the Attorney-General a party, in order to support and sustain the charity, I can make a decree that the money may, from time to time, be disposed of in such charities as the alderman, for the time being, and the principal inhabitants, shall think the most beneficial to the ward." Nothing is said of the statute; and the circumstance of making the Attorney-General a party points rather to the exercise of the king's prerogative, as *parens patriæ*, which is independent of the statute. In *White v. White*,⁶ the testator bequeathed one moiety of the residue of his personal estate to the Foundling, and the other to the Lying-in Hospital, and if there should be more than one of the latter, then to such of them as his executors should appoint. The testator struck out the name of his executor, and never appointed another. Lord Thurlow held that this was no revocation of the legacy, and referred it to a master to which of the lying-in hospitals it should be paid; but he does not countenance the idea of the power thus exercised by him being derived from the statute of Eliz. On the contrary, he refers it to notions derived from the Roman and civil law. *Moggridge v. Thackwell*⁷ was a gift of a residue to I. *Vaston, to such [*22 charitable uses as he should appoint; but recommending poor clergymen with large families and good characters. I. V. died in the testator's life-time. The charity was sustained and executed by the court; but there is no allusion to the statute in the opinion of Lord Eldon. He says: "Vaston, if alive, could not claim this property for his own use. All the rules, both of the civil and common law, would repel him from taking the property in that way. This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy." The second report of the same case does not vary the ground taken by the court.⁸ In the report of the case on the rehearing, all the cases are collated, yet nothing is delivered at the bar or from the bench referring the power of the court to the statute of Eliz.⁹ Lord Eldon, speaking of former decisions, says: "In what the doctrine (of *cy pres*) originated, whether as supposed by Lord Thurlow, in *White v. White*, in the principles of the civil law as applied to charities, or in the religious notions entertained in this country. I know not."¹⁰ A strange doubt, if the doctrine originated in the statute! Nor are the elementary writers and compilers understood as deducing the jurisdiction from the statute. Blackstone, who is cited for this purpose, is treating of a different subject in the passage of his commentaries referred to.¹¹ Having stated in a preceding page that corporations were excepted

1.—2 Eq. Cas. Abr. 191.

2.—Gilb. Eq. Rep. 137.

3.—Ib.

4.—2 Eq. Cas. Abr. 193.

5.—2 Atk. 239.

6.—1 Bro. Ch. Cas. 12.

7.—3 Bro. Ch. Cas. 517.

8.—1 Ves., Jun., 464.

9.—7 Ves. 36.

10.—Ib. 69.

11.—2 Bl. Com. 376.

from the statutes of wills of 32 Hen. VIII., c. 1, and 34 Hen. VIII., c. 5, he says in the page 23*] cited, that the statute *of 43 Eliz., c. 4, is considered as having repealed that of Hen. VIII. so far as to admit a devise to a corporation for a charitable use; he then speaks of the liberal construction which had been given to devises under this statute by force of the word *appointment*; but does not even insinuate that it was the origin of the chancery jurisdiction. All the other elementary writers and compilers cited are equally remote from proving the position assumed. Their remarks are directed to the liberal construction put upon the word *appoint* under the statute of Eliz.; but the principles to be extracted from all the cases cited by them are the principles of the civil law, by which the court had been guided antecedent to, and independent of, the statute. *The Attorney-General v. Herer*,¹ which is cited to prove that no donation is considered in England as a charitable donation, unless for the uses enumerated in the statute, or for analogous uses, was a devise to a school; and the Lord Keeper decided that not being a free school, the charity was not within the statute, and, consequently, the inhabitants had not a right to sue in the name of the Attorney-General. This is a very different position from that which the case was cited to prove; and it is an unfounded position; for the statute authorizes no proceeding in the name of the Attorney-General; and it is admitted that the Attorney-General might, and had, informed in the name of the king as *parens patrie*, previous to, and independent of, the statute. *Brown v. Yeale* is merely stated in a note, and settles nothing.² It is true, the statute 24*] ute *of Eliz., having enumerated charities, gave a new technical name to a portion of the uses and trusts recognized by the civil law. It is this idea which the master of the rolls pursues in *Morris v. The Bishop of Durham*.³ The trust before the court was for such objects of benevolence and liberality as her executor in his own discretion should most approve of. Sir W. Grant determined that this was not within the description of charitable trusts under the statute; that purposes of liberality and benevolence do not necessarily mean the same as objects of charity. With regard to charities, he says that it had been settled upon authorities which it was too late to controvert, that they should not fail on account of their generality, but that in some cases their particular application should be directed by the king, and in others by the court. But he does not say that the king or the court derived this power of direction from the statute. The statute is looked at, to see if the bequest be a charity within it; but the powers of control and direction in the king and the court are derived from the original respective authority of the one as *parens patrie*, and of the other as a court of equity. It is admitted, by the clearest implication, that although the bequest was not a charity within the statute, yet if any defi-

nite object had been indicated by the will for which the money could have been decreed, it would have been so decreed. On the rehearing of the same case, Lord Eldon merely confirms the same principles.⁴ But Lord Loughborough is supposed to have *attributed the jurisdiction to the statute, in express terms, in the case of the *Attorney-General v. Bonyer*.⁵ But to understand his words correctly, it is necessary to observe, that the 43d of Elizabeth's reign, was the year 1601, and that Lord Ellesmere received the seals of 1603, the epoch of her decease, and of the accession of James I. The point under Lord Loughborough's consideration was the title to intermediate rents and profits, in the case of a trust to take effect in *future*. He first considers the question as to the legal right, and introduces *Porter's case*,⁶ and that of the *Sutton Hospital*.⁷ The case of *Porter*, he says, was upon a devise before the statute of wills (32 Hen. VIII., c. 1), and before the statute of uses (27 Hen. VIII., c. 10), and, consequently, before the statute of Eliz. "It does not appear that the court before that period had cognizance of informations for the establishment of charities." At what period? Not the 43d Eliz., as has been contended; but either the period of the devise, which was in the 32d of Hen. VIII., or of the decision, which was in the 34th of Elizabeth. The chancellor proceeds: "Prior to the time of Lord Ellesmere, as far as the tradition in times immediately following goes, there was no such information as to that upon which I am now sitting, but they made out the case as well as they could at law." The phrase, "prior to the time of Lord Ellesmere," cannot be considered as equivalent to prior to the 43d of Eliz.; for there is no coincidence in point of time. The idea is singularly expressed, if he meant to deduce the practice and authority *of [26 informations from the statute of the 43d of Elizabeth. All that he really meant was to affirm, that the practice of proceeding on informations by the Attorney-General grew up in the time of Lord Ellesmere. But this position is contradicted by Lord Keeper Henly,⁸ by Lord Macclesfield,⁹ by Lord Sommers,¹⁰ by Lord Thurlow;¹¹ and, finally, by the admission on the opposite side, that the proceeding of the Attorney-General, was as representing the king in his character of *parens patrie*. The chancellor next proceeds to establish the validity of these devises at common law, and consequently independent of the statute; and coming to the exercise of the equitable jurisdiction, he expressly founds it on the general power of the court over trusts. It results, then, that by the civil law, devises to pious and public uses were liberally expounded, and not suffered to fail by their uncertainty; that the ecclesiastical courts, and courts of equity, acting on ecclesiastical subjects, when called upon to take cognizance of a devise to pious or public uses, exercised all the powers before the statute which have been since exercised; that the statute of Eliz.

1.—2 Vern. 387.

2.—7 Ves. 50, note, c.

3.—9 Ves. 309.

4.—10 Ves. 522.

5.—3 Ves. 728.

6.—1 Co. Rep. 22, b.

Wheat. 4.

7.—10 Co. Rep. 1.

8.—1 W. Bl. 91.

9.—2 P. Wms. 119.

10.—2 Vern. 342.

11.—1 Bro. Ch. Cas. 15.

came, and following up the principle of the civil law, made an enumeration of those gifts to pious and public uses, under the new name of charitable uses; not to give them new validity, but to discover them by inquisition, and to effectuate them upon civil law principles. After the statute, the new name of *charitable uses*, became the fashion of the court; and the 27*] word *appointment* *was extended to produce the same effect which Swinburne had ascribed to the civil law before. It became unnecessary to look back beyond the statute for the exercise of power over a charitable use; the case was brought within the statutory description, and if found within it, the constructive power of the word *appointment* was brought to bear upon it. Whatever be the origin of the powers of the Court of Chancery in England, whether derived from the peculiar law of the court itself, from statutes, or from the extraordinary jurisdiction of the chancellor, they are all vested in the courts of the United States, by the constitution giving to them jurisdiction of all suits in equity between citizens of different states. There is no necessity that the Attorney-General of Virginia should be made a party, because that is only required where the objects of the charity contravene the policy of the law; nor is it necessary that the court should superintend the execution of the trust, since the trustees are appointed by the testator; nor that the court should refer it to a master to digest a scheme for its application, as the objects are clearly designated in the will.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

It was obviously the intention of the testator, that the association should take in its character as an association; and should in that character perform the trust created by the will. The members composing it must be perpetually changing; but, however they might change, it 28*] is "The Baptist Association that *for ordinary meets at Philadelphia annually" which is to take and manage the "perpetual fund" intended to be created by this will. This association is described with sufficient accuracy to be clearly understood; but not being incorporated, is incapable of taking this trust as a society. Can the bequest be taken by the individuals who composed the association at the death of the testator?

The court is decidedly of opinion that it cannot. No private advantage is intended for them. Nothing was intended to pass to them but the trust; and that they are not authorized to execute as individuals. It is the association forever, not the individuals, who, at the time of his death, might compose the association, and their representatives, who are to manage this "perpetual fund."

At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the association give it this capacity?

The rules of law compel the court to answer this question in the negative. The bequest was intended for a society which was not at the time, and might never be, capable of taking it. According to law, it is gone forever. The

legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation.

There being no persons who can claim the right to execute this trust, are there any who, upon the *general principles of equity, [*29 can entitle themselves to its benefits? Are there any to whom this legacy, were it not a charity, could be decreed?

This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended, are to be designated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination who were designed for the ministry, nor for those who were the descendants of his father, unless, in the opinion of the trustees, they should appear promising. These trustees being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the person designated who might take beneficially.

Though this question be answered in the negative, we must still inquire whether the character of this legacy, as a charity, will entitle it to the protection of this court.

That such a legacy would be sustained in England is admitted. But, it is contended for the executors, that it would be sustained in virtue of the statute of the 43d of Elizabeth, or of the prerogative of the crown, or of both; and not in virtue of those rules by which a court of equity, exercising its ordinary powers, is governed. Should these propositions be true, it is farther contended, that the statute of Elizabeth does not extend to the case, and that the equitable jurisdiction of the courts of the Union does not extend to cases not within the ordinary powers of a court of equity.

*On the part of the plaintiffs, it is con- [*30 tended that the peculiar law of charities does not originate in the statute of Elizabeth. Had lands been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise, it is said would have been good at law; and, of consequence, a court of chancery would have enforced the trust in virtue of its general powers. In support of this proposition, it has been said that the statute of Elizabeth does not even profess to give any validity to devises or legacies, of any description, not before good, but only furnishes a new and more convenient mode for discovering and enforcing them; and that the royal prerogative applies to those cases only where the objects of the trust are entirely indefinite; as a bequest generally to charity, or to the poor.

It is certainly true that the statute does not, in terms, profess to give validity to bequests acknowledged not before to have been valid. It is also true, that it seems to proceed on the idea that the trusts it is intended to enforce ought, in conscience, independent of the statute, to be carried into execution. It is, however, not to be denied, that if, at the time, no remedy existed in any of the cases described, the statute gives one. A brief analysis of the act will support this proposition.

It authorizes the chancellor to appoint commissioners to inquire of all gifts, &c., recited in

Wheat. 4.

the act, of the abuses, &c., of such gifts, &c.; and upon such inquiry to make such order as that the articles given, &c., may be duly and faithfully employed, to and for the charitable **31*** uses and intents, before rehearsed *respectively, for which they were given, &c. The statute then proceeds, "which orders, judgments, and decrees, not being contrary or repugnant to the orders, statutes, or decrees, of the donors, or founders, shall, by the authority of this present parliament, stand firm and good according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the Lord Chancellor of England," &c.

Subsequent sections of the act direct these decrees, &c., to be certified to the chancellor, who is to take such order for their execution as to him shall seem proper; and, also, give to any person aggrieved the right to apply to chancery for redress.

It is not to be denied, that if any gifts are enumerated in this statute, which were not previously valid, or for which no previous remedy existed, the statute makes them valid, and furnishes a remedy.

That there were such gifts, and that the statute has given them validity, has been repeatedly determined. The books are full of cases, where conveyances to charitable uses, which were void by the statute of mortmain, or were, in other respects, so defective, that, on general principles, nothing passed, have been sustained under this statute. If this statute restores to its original capacity a conveyance rendered void by an act of the legislature, it will, of course, operate with equal effect on any legal objection to the gift which originates in any other manner, and which a statute can remove.

The authorities to this point are numerous. In the case of the *Attorney-General*, on behalf **32*** of *St. John's College in Cambridge v. Platt*,¹ the name of the corporate body was not fully expressed. This case was referred by the chancellor to the judges, who certified, that though, according to the general principles of law, the devise was void, yet it was good under the statute of Elizabeth. This case is also reported in cases in chancery (267), where it is said, the judges certified the devise to be void at law, but the chancellor decreed it good under the statute.

So, in chancery cases (184), it was decided, that a bequest to the parish of Great Creation was good under the statute. Though this case was not fully nor clearly reported, enough appears to show that this bequest was sustained only under the statute of Elizabeth. The objections to it were, that it was void on general principles, the parish not being incorporated; and that it would not be decreed under the statute, the proceedings not being before commissioners, but by original bill. The master of the rolls ordered precedents to be produced; and, on finding one in which four judges had certified that a party might, under the statute, proceed in chancery by original bill, he directed the legacy to be paid. Could this bequest have been sustained on doctrines applicable to charities independent of the statute, no question

could have arisen concerning the rights to proceed by original bill.

In Collison's case,² the will made John Bruet and others "feoffees of a home, to keep it in reparation, and to bestow the rest of the profits on reparation of *certain highways." On **[33]** a reference by the chancellor, the judges declared that "this case was within the relief of the 43d of Elizabeth; for, though the devise were utterly void, yet it was within the words limited and appointed for charitable uses."

In these cases, it is expressly decided that the bequests are void, independent of the statute, and good under it. It furnishes no inconsiderable additional argument, that many of the gifts recited in the 43 Eliz. would not, in themselves, be considered as charitable; yet they are all governed by the same rule. No *dictum* has been found indicating an opinion that the statute has no other effect than to enable the chancellor to inquire, by commission, into cases before cognizable in his court by original bill. It may, then, with confidence be stated, that whatever doubts may exist in other points which have been made in the cause, there is none in this. The statute of the 43d of Eliz. certainly gave validity to some devises to charitable uses, which were not valid, independent of that statute. Whether this legacy be of that description, is a question of more difficulty.

The objection is, that the trust is void and the description of the *cestui que trust* so vague that no person can be found whose interest can be sustained.

The counsel for the plaintiff insists that cases equally vague have been sustained in courts of common law, before the statute; and would, *a fortiori*, have been sustained in courts of equity. He relies on Porter's case,³ and on Plowden, 522.

Porter's case is this: Nicholas Gibson, in the 32d *Hen. VIII., devised a wharf and **[34]** house to his wife, upon condition that she should, on advice of learned counsel, in all convenient speed after his decease, assure, give, and grant the said lands and tenements, for the maintenance, forever, of a free school the testator had erected, and of alms-men and alms-women attached to it. The wife entered into the property, and, instead of performing the condition, conveyed it, in the 3d of Edw. VI., by a lease for forty years. Afterwards, in the 34th of Eliz., the heir at law entered for a condition broken, and conveyed to the queen. On the validity of this entry and conveyance the cause depended.

On the part of Porter, who claimed under the lease, it was contended, that the use was against the act of the 22d of Hen. VIII., ch. 10, and therefore void, on which the estate of the wife became absolute.

On the part of the queen, it was argued: 1st. That the statute of Hen. VIII. avoided superstitious, and not charitable uses. But if it extended to this, still, that it made the use, and not the conveyance, void. The devisee, there being no consideration, would stand seized to the use of the heir. 2d. That in case the devise is to the wife, on condition that she would, by the advice of learned counsel, assure his

1.—Finch, 221.
Wheat. 4.

2.—Hob. 136.

3.—1 Co. Rep. 22 b.

lands for the maintenance of the said free school, and alms-men and alms-women; this might be done lawfully, by procuring the king's letters patent incorporating them, and, afterwards, a letter of license to assure the lands to them.

Upon these reasons the court was of opinion **35*** that "the condition was broken, and that the entry of the heir was lawful.

In this case no question arose concerning the possibility of enforcing the execution of the trust. It was not forbidden by law; and, therefore, the trustee might execute it. On failing so to do, the condition on which the estate was given was broken, and the heir might enter; but it is not suggested that the *cestui que trust* had any remedy. An estate may be granted on any condition which is not against law, as that the grantee shall go to Rome; and for breach of that condition, the heir may enter, but there are no means of compelling the journey to Rome. In the argument of Porter's case, the only mode suggested for assuring to the school the benefit intended, is by an act of incorporation, and a letter of license.

In considering this case, it seems impossible to resist the conviction that chancery could then afford no remedy to the *cestui que trust*. It is not probable that those claiming the beneficial interest would have waited, without an effort, from the 32d of Hen. VIII., when the testator died, or, at any rate, from the 8d of Edw. VI., when the condition was conclusively broken by the execution of the lease, until the 34th of Eliz., and then have resorted to the circuitous mode of making an arrangement with the heir at law, and procuring a conveyance from him to the queen, on whose will the charity would still depend, if a plain and certain remedy had existed, by a direct application to the chancellor.

If, as there is much reason to believe from this, and from many other cases of the same **36*** character *which were decided at law anterior to the statute of Eliz., the remedy in chancery was not then afforded, it would go far in deciding the present question; it would give much countenance to the opinion that the original interference of chancery in charities, where the *cestui que trust* had not a vested equitable interest which might be asserted in a court of equity, was founded on that statute, and still depends on it.

These cases, and the idea they suggest, that at the time chancery afforded no remedy for the aggrieved, account for the passage of the statute of 43d of Elizabeth, and for its language, more satisfactorily than any other cause which can be assigned.

If, as has been contended, charitable trusts, however vague, could then, as now, have been enforced in chancery, why pass an act to enable the chancellor to appoint commissioners to inquire concerning them, and to make orders for their due execution, which orders were to be revised, established, altered, or set aside by him? If the chancellor could accomplish this, and was in the practice of accomplishing it in virtue of the acknowledged powers and duties of his office, to what purpose pass the act? Those who might suppose themselves interested in these donations would be the persons to bring the case before the commissioners; and

the same persons would have brought it before the chancellor, had the law afforded them the means of doing so. The idea, that the commissioners were substituted for the court as the means of obtaining intelligence not otherwise attainable, or of removing inconveniences in prosecuting claims by original bill which had been found so *great as to obstruct the [***37** course of justice, is not warranted by the language of the act, and is disproved by the efforts which were soon made, and which soon prevailed, to proceed by way of original.

The statute recites, that whereas lands, money, &c., has been heretofore given, &c., some for the relief of aged, impotent, and poor people, &c., which lands, &c., "nevertheless, have not been employed according to the charitable intent of the givers and founders thereof, by reason of"—what? of the difficulty of discovering that such trusts had been created? or of the expensiveness and inconvenience of the existing remedy? No. "By reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same." That is by reason of fraud, breach of trust, and negligence of the trustees. The statute then proceeds to give a remedy for these frauds, breaches of trust, and negligences. Their existence was known when the act passed, and was the motive for passing it. No negligence or fraud is charged on the court, its officers, or the objects of the charity; only on the trustees. Had there been an existing remedy for their frauds and negligences, they could not, when known, have escaped that remedy.

There seems to have been two motives, and they were adequate motives, for enacting this statute: The first, and greatest, was to give a direct remedy to the party aggrieved, who, where the trust was vague, had no certain and safe remedy for the injury sustained; who might have been completely defeated by any compromise between the heir of the feoffor and *the trustee; and who had no means of [***38** compelling the heir to perform the trust, should he enter for the condition broken. The second, to remove the doubts which existed, whether these charitable donations were included within the previous prohibitory statutes.

We have no trace, in any book, of an attempt in the Court of Chancery, at any time anterior to the statute, to enforce one of these vague bequests to charitable uses. If we have no reports of the decisions in chancery at that early period, we have reports of decisions at common law, which notice points referred by the chancellor to the judges. Immediately after the passage of the statute, we find that questions on the validity of wills containing charitable bequests, were propounded to, and decided by the law judges. Collison's case was decided in the 15th of James I., only seventeen years after the passage of the act, and the devise was declared to be void at law, but good under the statute. Two years prior to this, Griffith Flood's case, reported in Hobart, was propounded by the Court of Wards to the judges; and, in that case, too, it was decided that the will was void at law, but good under the statute. Had the Court of Chancery taken cognizance before the statute, of devises and bequests to charitable uses, which were void at law, similar questions must have arisen, and would have been referred to the

courts of law, whose decisions on them would be found in the old reporters. Had it been settled before the statute, that such devises were good, because the use was charitable, these questions could not have arisen "afterwards; or, had they arisen, would have been differently treated.

Although the earliest decisions we have, trace the peculiar law of charities to the statute of Elizabeth, and although nothing is to be found in our books to justify the opinion that courts of chancery, in the exercise of their ordinary jurisdiction, sustained, anterior to that statute, bequests for charitable uses, which would have been void on principles applicable to other trusts, there are some modern *dicta* in cases respecting prerogative, and where the proceedings are on the part of the king, acting as *pater patrie*, which have been much relied on at the bar, and ought not to be overlooked by the court.

In 2 Peere Will., 119, the chancellor says: "In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof; so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the Attorney-General's name, for the establishment of charities."

"This original right" of the crown, "to superintend the care" of charities, is no more than that right of visitation, which is an acknowledged branch of the prerogative, and is certainly not given by statute. The practice of filing an information in the name of the Attorney-General, if, indeed, such a practice existed in those early times, might very well grow out of this prerogative, and would by no means prove that, prior to the statute, the law respecting charities was what it has been since. These words were uttered for the purpose of illustrating the original power of the crown over the persons and estates of infants, not with a view to any legal distinction between a legacy to charitable and other objects.

Lord Keeper Henly, in 1 Sir Wm. Blackstone's Reports, 91, says: "I take the uniform rule of this court before, at, and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, the devises to corporations were void under the statute of Hen. VIII.; yet they were always considered as good in equity, if given to charitable uses."

We think we cannot be mistaken when we say, that no case was decided between the statute of mortmain, passed in the reign of Hen. VIII., and the statute of Elizabeth, in which a devise to a corporation was held good. Such a decision would have overturned principles uniformly acknowledged in that court. The cases of devises, in mortmain, which have been held good, were decided since the statute of Elizabeth, on the principle that the latter statute repeals the former so far as relates to charities. The statute of Geo. II. has been uniformly construed to repeal, in part, the statute of Elizabeth, and charitable devises comprehended in that act have, ever since its passage, been declared void. On the same reason, similar devises must, subsequent to the statute of Wheat. 4.

Henry VIII., and anterior to that of Elizabeth, have been also declared void. It is remarkable that, in this very case, the Lord Keeper [*41] declares one of the charities to be void, because it is contrary to the statute of mortmain, passed in the reign of Geo. II. All the respect we entertain for the reporter of this case, cannot prevent the opinion that the words of the Lord Keeper have been inaccurately reported. If not, they were inconsiderately uttered.

The principles decided in this case are worthy of attention: "Two questions," says the report, "arose: 1st. Whether this was a conveyance to charitable uses under the statute of Elizabeth, and therefore, to be aided by this court. 2d. Whether it fell within the purview of the statute of mortmain, 9th of Geo. II., and was therefore a void disposition."

It is not even suggested that the defect of the conveyance could be remedied otherwise than by the statute of Elizabeth. The Lord Keeper says, "the conveyance of the 22d of June, 1721, is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and therefore there is a want of persons to take in perpetual succession." (The very defect in the conveyance under the consideration of this court.) "The only doubt," continues the Lord Keeper, "is, whether the court should supply this defect, for the benefit of the charity, under the statute of Elizabeth."

It is impossible, we think, to understand this declaration otherwise than as an express admission, that a conveyance to officers, who compose the corporate body, instead of the corporate body itself, or, in other words, a conveyance to any persons not incorporated *to [*42] take in succession, although for charitable purposes, would be void if not supported by the statute of Elizabeth.

After declaring the conveyance to be good, the Lord Keeper proceeds: "The conveyance, therefore, being established under the statute of Elizabeth, we are next to consider how it is affected under the statute of the 9th of Geo. II."

The whole opinion of the judge, in this case, turns upon the statute of Elizabeth. He expressly declares the conveyance to be sustained by that statute, and in terms admits it to be defective without its aid. The *dictum*, therefore, that before that statute, courts were in the habit of aiding defective conveyances to charitable uses, either contradicts his whole opinion on the point before him, or is misreported. The probability is that the judge applied this *dictum* to cases which occurred, not to cases which were decided before the statute. This application of it would be supported by the authorities, and would accord with his whole opinion in the case.

In the case of the *Attorney-General v. Bowyer*, the chancellor, speaking of a case which occurred before the passage of the statute of wills, says: "It does not appear that this court, at that period, had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I

am now sitting, but they made out the case as well as they could by law."

43* "Without attempting to reconcile these seemingly contradictory *dicta*, the court will proceed to inquire whether charities, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, could be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patrie*, before the 43d of Elizabeth.

The general principle, that a vague legacy, the object of which is indefinite, cannot be established in a court of equity, is admitted. It follows, that he who contends that charities formed originally an exception to the rule, must prove the proposition. There being no reported cases on the point anterior to the statute; recourse is had to elementary writers, or to the opinions given by judges of modern times.

No elementary writers sustain this exception as a part of the law of England. It may be considered as a part of the civil code, on which our proceedings in chancery are said to be founded; but that code is not otherwise a part of the law of England than as it has been adopted and incorporated by a long course of decisions. The whole doctrine of the civil law, respecting charities, has certainly not been adopted. For example, by the civil law, a legacy to a charity, if there be a deficiency of assets, does not abate; by the English law, it does abate. It is not, therefore, enough to show that, by the civil law, this legacy would be valid. It is necessary to go farther, and to show that this principle of the civil law has **44*** been engrafted "into the jurisprudence of England, and been transplanted into the United States.

In *White v. White*,¹ the testator had given a legacy to the Lying-in Hospital which his executor should appoint, and afterwards struck out the name of the executor. The legacy was established, and it was referred to a master to say to which lying-in hospital it should be paid. In giving this opinion, Lord Thurlow said, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object."

These expressions apply, perhaps exclusively, to that class of cases in which legacies given to one charity have, since the statute of Elizabeth, been applied to another; or, in which legacies given so vaguely as that the object cannot be precisely defined, have been applied by the crown, or by the court, acting in behalf of the crown, to some charitable object of the same kind. *White v. White* was itself a case of that description; and the words "legacies given to public uses not ascertained," "applied to some proper object," seem to justify this construction. If this be correct, the sentiment advanced by Lord Thurlow would amount to nothing more than that the cases in which this extended construction was given to the statute of Elizabeth proceed upon notions adopted from the Roman and civil law.

But if Lord Thurlow used this language

under the *impression that the whole [**45** doctrine of the English Chancery, relative to charities, was derived from the civil law, it will not be denied that his opinions, even when not on the very point decided, are entitled to great respect. Something like the same idea escaped Lord Eldon in the case of *Moggridge v. Thackwell*.² Yet, upon other occasions, different opinions have been advanced, with an explicitness which supports the idea that the Court of Chancery in England does not understand these *dicta* as they have been understood by the counsel for the plaintiff. In the case of *Morrice v. The Bishop of Durham*,³ where the devise was to the Bishop, in trust, to dispose of the residue "to such objects of benevolence and liberality as he, in his own discretion, should most approve," the bequest was determined to be void, and the legacy decreed to the next of kin. The Master of the Rolls said: "In this court, the signification of charity is derived principally from the statute of Elizabeth. Those purposes are considered charitable, which that statute enumerates, or which, by analogies, are deemed within its spirit and intendment." This case afterwards came before the chancellor, who affirmed the decree, and said: "I say with the Master of the Rolls, a case has not yet been decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general."⁴

The reference made by the chancellor to the words of the Master of the Rolls, whose language he adopts, "proves that he uses the [**46** term "law" as synonymous with "the statute of Elizabeth."

Afterward, in the same case, speaking of a devise to charity generally, the chancellor says: "It is the duty of the trustees, or of the crown, to apply the money to charity, in the sense which the determinations have affixed to the word in this court, viz., either such charitable purposes as are expressed in the statute, or to purposes analogous to those."

He adds, "charitable purposes, as used in this court, have been ascribed to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is, by the statute, given to all the purposes described."

It has been also said that a devise to a charity generally is good, because the statute of Elizabeth uses that term.

These quotations show that Lord Eldon, whatever may have been the inclination of his mind when he determined the case of *Moggridge v. Thackwell*, was, on more mature consideration, decidedly of opinion that the doctrines of the Court of Chancery, peculiar to charities, originated not in the civil law, but in the statute of Elizabeth. This opinion is entitled to the more respect because it was given after an idea, which might be supposed to conflict with it, had been insinuated by Lord Thurlow, and in some degree followed by himself; it was given in a case which required an investigation of the question; it was given, too,

2.—7 Ves. 36.

3.—9 Ves. 399.

4.—10 Ves. 540.

1.—1 Bro. Ch. Cas. 15.

without any allusion to the *dicta* uttered by Lord Thurlow and himself; a circumstance [47*] which would *scarcely have occurred had he understood those *dicta* as advancing opinions he was then denying. It is the more to be respected because it is sustained by all the decisions which took place, and all the opinions expressed by the judges soon after the passing of the statute of Elizabeth. In 1 Ch. Cas., 134, a devise to the Parish of Great Creation, the Parish not being a corporation, was held to be void independent of a statute, but good under it. So, in the same book, p. 267, on a devise to a corporation which was misnamed, the Lord Keeper decreed the charity under the statute, though before the statute no such devise could have been sustained. The same point is decreed in the same book, p. 195, and in many other of the early cases. These decisions are totally incompatible with the idea that the principles on which they turned were derived from the civil law.

There can be no doubt that the power of the crown to superintend and enforce charities existed in very early times; and there is much difficulty in marking the extent of this branch of the royal prerogative before the statute. That it is a branch of the prerogative, and not a part of the ordinary power of the chancellor, is sufficiently certain. Blackstone, in Vol. III., p. 47, closes a long enumeration of the extraordinary powers of the chancellor, with saying: "He is the general guardian of all infants, idiots, lunatics; and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery." In the same volume, p. 487, he says, "the king as *parens* [48*] *patrie*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and therefore, whenever it is necessary, the Attorney-General, at the relation of some informant, files, *ex officio*, an information in the Court of Chancery, to have the charity properly established."

The author of "A Treatise of Equity" says, "so, anciently in this realm, there were several things that belonged to the king as *parens patrie*, and fell under the care and direction of this court: as, charities, infants, idiots, lunatics, &c." Cooper, in his chapter on the jurisdiction of the court, says, "the jurisdiction, however, in the three cases of infants, idiots or lunatics, and charities, does not belong to the Court of Chancery as a court of equity, but as administering the prerogative and duties of the crown."

It would be waste of time to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject without perceiving and admitting it. Its extent may be less obvious.

We now find this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses; in applying them to different objects than those designated by the donor; and in supplying all defects in the instrument by which the dona-

tion is conveyed, or in that by which it is administered.

It is not to be admitted that legacies not valid in themselves can be made so by force of prerogative, *in violation of private [*49] rights. This superintending power of the crown, therefore, over charities, must be confined to those which are valid in law. If, before the statute of Elizabeth, legacies like that under consideration would have been established, on information filed in the name of the Attorney-General, it would furnish a strong argument for the opinion that some principle was recognized prior to that statute, which gave validity to such legacies.

But although we find *dicta* of judges, asserting, that it was usual, before the statute of Elizabeth, to establish charities, by means of an information filed by the Attorney-General; we find no *dictum* that charities could be established on such information, where the conveyance was defective, or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking; and the thing given would vest in the heir or next of kin. All the cases which have been cited, where charities have been established, under the statute, that were deemed invalid independent of it, contradict this position.

In construing that statute, in a preceding part of this opinion, it was shown that its enactments are sufficient to establish charities not previously valid. It affords, then, a broad foundation for the superstructure which has been erected on it. And, although many of the cases go, perhaps, too far; yet, on a review of the authorities, we think they are to be considered as constructions of the statute not entirely to be justified, rather than as proving the existence of some other principle concealed in a dark and remote antiquity, and [*50] giving a rule in cases of charity which forms an exception to the general principles of our law.

But even if in England the power of the king as *parens patrie* would, independent of the statute, extend to a case of this description, the inquiry would still remain how far this principle would govern in the courts of the United States. Into this inquiry, however, it is unnecessary to enter, because it can arise only where the Attorney-General is made a party.

The court has taken, perhaps, a more extensive view of this subject than the particular case, and the question propounded on it, might be thought to require. Those who are to take this legacy beneficially, are not before the court, unless they are represented by the surviving members of the Baptist Association, or by the present corporation. It was, perhaps, sufficient to show that they are not represented by either. This being the case, it may be impossible that a party plaintiff can be made to sue the executor, otherwise than on the information of the Attorney-General. No person exists who can assert any interest in himself. The *cestui que trust* can be brought into being only by the selection of those who are named in the will to take the legacy in trust, and those who are so named are incapable of taking it. It is, perhaps, decisive of the question propounded to this court to say that the plaintiffs

cannot take. But the rights of those who claim the beneficial interest have been argued at great length, and with great ability; and 51*) there would have *been some difficulty in explaining satisfactorily the reasons why the plaintiffs cannot take without discussing also the rights of those for whom they claim. The court has, therefore, indicated its opinion on the whole case, as argued and understood at the bar.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Court of the United States, for the fifth circuit, and the District of Virginia, and on the question therein stated, on which the judges of that court were divided in opinion, and which was adjourned to this court, and was argued by counsel. On consideration whereof, this court is of opinion, that the plaintiffs are incapable of taking the legacy for which this suit was instituted; which opinion is ordered to be certified to the said Circuit Court.¹

Cited—3 Pet. 114, 149; 2 How. 192, 194, 196; 3 How. 401; 9 How. 79; 17 How. 384, 392, 393, 395; 24 How. 501; 11 Otto, 396; 2 Cranch, C. C. 700; 3 Cranch, C. C. 275; Taney, 359, 362; 2 Cliff. 482.

52*)

*[PRIZE.]

THE DIVINA PASTORA.

THE SPANISH CONSUL, *Claimant*.

The government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy.

Unless the neutral rights of the United States (as ascertained by the law of nations, the acts of Congress, and treaties) are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country.

Where the pleadings in a prize, or other admiralty cause, are too informal and defective to pronounce a final decree upon the merits, the cause will be remanded to the Circuit Court, with directions to permit the pleadings to be amended and for further proceedings.

APPEAL from the Circuit Court of Massachusetts.

The petition or libel, in this cause, by the Consul of His Catholic Majesty at Boston, alleges and propounds: 1. That there lately arrived at the port of New Bedford, in this district, and is now lying in the said port of N. B., a Spanish vessel, called the *Esperanza*, otherwise called the *Divina Pastora*, having on board a cargo, consisting of cocoa, cotton, indigo, hides, and horns, of great value, to wit, of the value of \$10,000; that the said vessel is navigated by seven persons, who are all American citizens, as he is informed, and be- 53*) lieves; and that there are no *other persons on board of said vessel, and none other were on board when the said vessel arrived at

said port. That the aforesaid persons say that the said vessel was bound on a voyage from Laguaira to Cadiz, in Spain, and that she was captured by a privateer, or armed vessel, sailing under a flag, which they denominate the flag of La Plata; and that they did intend to carry said vessel to some port in the West Indies, but, afterwards, came into the port of New Bedford. 2. That the said vessel and cargo purport to have been consigned to Antonio Seris, a merchant at Cadiz. 3. That the said consul verily believes that the said vessel has been captured and brought into the aforesaid port, contrary to the law of nations, and in violation of the rights of the said Antonio Seris, and that the said Antonio is justly and lawfully entitled to the possession of the said vessel and her cargo; concluding with a prayer, that the process of the court may issue, directed to the marshal of this district, or his deputy, requiring of them, respectively, to take the said vessel and cargo into custody, to the end that due inquiry may be made into the facts pertaining to this case, and that the property may be adjudged, decreed, and restored, according to the just rights of whomsoever may be therein interested, and according to law and the comity which the United States have always manifested towards foreign nations.

The plea and answer of "Don Daniel Utley, a citizen of the free and independent United Provinces of Rio de la Plata, &c., in behalf of himself and all concerned, in the capture of the Spanish polacre brig **Divina Pastora* and [*54 her cargo, to the libel and petition exhibited by Don Juan Stoughton, Consul of His Catholic Majesty, &c.," sets forth, that the said Utley, by protestation, and not confessing or acknowledging any of the matters and things in the libellant's petition and libel contained, to be true, in such manner and form as the same are therein and thereby alleged, for plea to the said libel and petition, says, that the United Provinces of Rio de la Plata, in South America, are free and independent states, and, as such, have the power to levy war and make peace, raise armies and navies, &c. And that the Supreme Provisional Director of said Provinces, at the fort of Buenos Ayres, on the 25th day of October, 1815, commissioned a certain schooner, called the *Mangoree*, to cruise against the vessels and effects of the kingdom of Spain, and the subjects thereof, excepting only the Spanish Americans who defend their liberty, and authorized one James Barnes to act as commander of said schooner, and to seize and capture the vessels and effects of European Spaniards, and bring them within the government of the United Provinces, for adjudication, according to the law of nations, Ferdinand VII., King of Spain, then being at war with said provinces, and general reprisals having been granted by the said provisional government against the European subjects of the said king. That said schooner *Mangoree*, bearing the flag of the said independent provinces, sailed on a cruise from the harbor of Buenos Ayres, within the said provinces, on or about the first day of January, 1816, by virtue of said commission. And having touched *at Port-au-Prince, in the Island of His- [*55 paniola, sailed again on said cruise, and on the 31st of October, 1816, on the high seas, &c.,

Wheat. 4.

1.—Vide Appendix, Note I., on Charitable Bequests.

captured the polacre brig *Divina Pastora*, belonging to the said king, or to his European subjects, on board of which brig said Utley was put as prize-master. And the original crew of said prize was taken out by the said Barnes, &c., and put on board of said schooner *Mangoree*, and a prize crew sent on board the *Pastora*. And the said Barnes, &c., then appointed said Utley to the command of the said prize, and delivered to him a copy of his commission, &c., which the said Utley now brings with him, and respectfully submits to the inspection of this honorable court. And thereupon, the said Utley proceeded to navigate the said prize from the place where she was captured to Port-au-Prince, in the Island of Hispaniola, for the purpose of there procuring supplies and provisions, and thence proceeding to the port of Buenos Ayres. The plea then proceeds to state, that in the prosecution of the voyage, the prize vessel was compelled, by stress of weather, and want of provisions and water, to put into the port of New Bedford; and concludes with alleging that by the law of nations, and the comity and respect due from one independent nation to another, it doth not pertain to this court, nor is it within its cognizance, at all to interfere, or hold plea respecting said brig or goods on board, so taken as prize of war, and a prayer for restitution, with costs and damages.

The replication of the Spanish Consul states, that inasmuch as the said Utley, in his plea, **[56*]** admits that *the said vessel, and the cargo laden on board, were, on the 31st day of October, 1816, the property of a subject or subjects of His Majesty Ferdinand VII., the said consul claims the same, as the property of such subject or subjects, the names of whom are to him, at present, unknown; excepting that he verily believes the same to be the lawful property of Antonio Seris, as he, in his petition, hath set forth. And avers that the same ought to be restored and delivered up for the use of the Spanish owner or owners. The replication then proceeds to aver, that as the said vessel is stated in the plea to have been captured on the high seas by a certain armed vessel called the *Mangoree*, commanded by one James Barnes, which armed vessel is stated to have been commissioned under a certain authority called the United Provinces of Rio de la Plata, in South America, the said capture and seizure, &c., were piratical, or tortious, and contrary to the lawful and well-known rights of the faithful subjects of His said Majesty, to whom the same belonged at the time of such capture, &c., and that no right of property thereby vested in the said Barnes or Utley, or any other person or persons who were navigating and sailing in the said armed vessel called the *Mangoree*; 1st. Because, at the time when the said pretended capture as prize of war was made, &c., the several provinces situate in South America, and near to the river called Rio de la Plata, were provinces and colonies of His said Majesty Ferdinand VII., and now are provinces and colonies of His said Majesty; and that the same had been, for a long course of years, provinces **[57*]** and colonies of the successive *kings of Spain; and that all the people, persons, and inhabitants dwelling therein, were, on the 21st day of October, 1815, and for a long time before had been, and now are Spanish subjects, and did at the aforesaid times, and now do owe

Wheat. 4.

U. S., Book 4.

allegiance and fidelity to His said Majesty. 2d. Because the said subjects and persons, dwelling in the said provinces and colonies in South America, had not, on the 25th day of October, 1815, nor had any, or either of the said subjects and persons, then, or at any other time, any lawful right, power, or authority, to commission any vessel or vessels, or any person or persons whomsoever, to wage war against him, the said Ferdinand VII., nor against his subjects, or their persons, or property, by sea, or elsewhere; and that no person or persons whomsoever, could lawfully receive, and take from any person or persons in any of the said colonies or provinces, any commission, power, or authority, or right, to wage war, and make captures of any property on the high seas. 3d. Because all captures made on the high seas, under the pretense of power or authority derived from, or in virtue of any such commission as set forth in said plea, is unlawful and piratical; and that all pretended captures and seizures, as prize of war, of property belonging to the subjects of His said Majesty when made under such commissions as aforesaid, are cognizable by the courts of nations at peace and in amity with His said Majesty, which hold pleas of admiralty and maritime jurisdiction, and take cognizance of cases arising under the law of nations, whenever the property so captured is found within *their respective jurisdic- **[58** tions. And as a further ground for the claim of restitution to the original Spanish owners, the replication recites the 6th, 9th, and 14th articles of the treaty of 1795, between the United States and Spain. And as a further ground for the claim, it alleges that the papers exhibited with the plea, and by which the capture is pretended to be justified, are false and colorable; that the prize crew did not speak the Spanish language, and were shipped at Port-au-Prince; that one of the crew stated in his affidavit that the flag of the privateer was obtained at that place; and that all of them stated that the *Divina Pastora*, from the time of her capture, was ordered for, and bound to the same place, all the captured persons having been previously taken out of her, and put on board the privateer. And concludes with renewing the averments of the piratical and tortious capture, and praying that restitution of the property may be decreed to him, the Spanish Consul, to be held for the right owners or owner thereof, who are subjects, or a subject of the King of Spain.

Upon these pleadings, further proceedings were had in the District Court, under which a decree was pronounced of restitution of the vessel and cargo to the libellant, for the benefit of the original Spanish owners. This decree was affirmed, *pro forma*, in the Circuit Court, and the cause was brought by appeal to this court.

Mr. *Winder*, for the appellants, argued, that there was nothing stated in the allegation of the Spanish *Consul, or in the other plead- **[59** ings in the cause, by which a prize court of this country could take jurisdiction of this capture. Nothing was alleged to show that it was made within our neutral territory, or in violation of our neutral rights by an armament fitted out, or augmented in our ports; the only two cases in which the tribunals of a neutral country can assume jurisdiction of captures made *jure belli*. The present capture was made

jure belli, because made under a commission from the United Provinces of the Rio de la Plata. The government of the United States, recognizing the existence of a civil war between Spain and the United Provinces, but remaining neutral, the courts of the United States must consider as legal those acts of hostility which war authorizes, and which the new government may direct against the parent country.¹ Possession under the capture is *prima facie* evidence sufficient to maintain that possession, unless it is shown that the libelants have a better right. But that possession is admitted, and nothing is shown by the pleadings to authorize the courts of this country to divest it from the captors. There is no infraction of the treaty with Spain pleaded which can give our courts jurisdiction to restore to the former Spanish owners. The 6th and 9th articles of the treaty of 1795 are the only articles which can have any bearing upon the case, and these only provide for restitution where the capture is made within our territorial limits, or, where it is made by pirates. But it is not pretended 60*) that the present capture *was made within our territorial jurisdiction; and the court has already determined, that a capture under a commission from the revolted provinces is not a piratical capture.

Mr. Webster and Mr. D. B. Ogden, contra, contended that the district courts of the United States are courts of the law of nations, and that a general allegation of a marine tort, in violation of the law of nations, is sufficient, *prima facie*, to give them jurisdiction, where the captured property is brought within our territory. As a general allegation of prize is sufficient,² so is a general allegation of an unlawful capture. It then becomes incumbent upon the captors to

show that the capture was made under a commission from a sovereign power in amity with the United States. A neutral tribunal has a right to inquire whether the commission was regularly issued by a competent authority, in order to see whether the capture was piratical, or in the exercise of the lawful rights of war.³ The general rule, unquestionably, is, that the courts of the captors' country have the exclusive cognizance of all seizures as prize; but to this rule there are exceptions, as ancient and as firmly established as the rule itself. Among these is the case of a capture made by an armament fitted out or augmented within neutral territory. A capture thus made in violation of the neutral sovereignty *deprives the [*61 courts of the belligerent country of their exclusive jurisdiction, and confers it on the courts of the neutral state, who will exercise it by making restitution to the injured party.⁴ The acts of Congress, and the Spanish treaty, prohibiting the equipment of armed vessels in our ports, and imposing the obligation to restore captures made by them, are merely accumulated upon the pre-existent law of nations, which equally prohibited the one, as an injury to friendly powers, and enjoined the other, as a correspondent duty.⁵ But even if this were not the law *of nations, the treaty with [*62 Spain and the acts of Congress make it the law of this court. "Every treaty," says Sir W. Scott, "is a part of the private *law of [*63 that state which enters into it."⁶ This principle of public law is expressly recognized by our municipal constitution, in which treaties entered into by the United States are declared to be a part of the supreme law of the land. The Spanish treaty and the acts of Congress pronouncing the illegality of captures in viola-

1.—The United States v. Palmer, 3 Wheat. 610, 684.

2.—The Fortuna, 1 Dodson; The Adeline, 9 Cranch, 244, 284.

3.—Talbot v. Janson, 3 Dall. 159; The Invincible, 1 Wheat. 258; 2 Sir L. Jenkins, 727.

4.—Talbot v. Janson, 3 Dall. 133, 164; The Alerta, 9 Cranch, 359, 364.

5.—Vattel, L. 3, c. 7, s. 104, 105; 2 Rutherford, c. 9, s. 19, p. 553; Martens on Privateers, s. 13, p. 42; Burlamaqui, p. 4, c. 8, s. 20, 21, 23; 2 Sir L. Jenkins, 727, 728.

"So that upon this whole matter of fact, there do arise two questions: The one, whether the commission whereby this Ostender was taken is a good commission. The other, whether this capture was not a violence to that protection and safeguard which Your Majesty's authority affords unto strangers, coming upon their lawful occasions towards any of Your Majesty's harbors or ports.

"As to the commission, 'tis true, His Majesty of Portugal is not obliged, in granting out commissions, to take his measures from the English, or any other foreign style; yet the general law determines all commissions (most especially such as this is) to be *stricti juris*, and not to be farther extended, either by inferences or deductions, than the express words do naturally import. So that, whatever the meaning of that clause be, viz., that *de Bills* may set out a man-of-war, and what other vessels shall be necessary for him (as if he might have several vessels at sea, at one and the same time, and yet, himself and his commission can be but in one of them), it cannot be said that he hath liberty to substitute or depute another to act in his place, since there is no such power of deputation given him by his commission. Much less can a copy or translation be authentick when there is no clause providing to that effect in the original; especially in this case, which is as little favorable as can be in the eye of the law.

"The second question is, as I humbly conceive, best resolved out of a declaration, which Your Majesty's grandfather, of blessed memory, published in the year 1604, in reference to these hostilities, in these words:

"Our pleasure is that within our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens as may be reasonably construed to be within that title, limits, or precinct, there shall be no force, violence, or surprise, or offense, suffered to be done, either from man-of-war to man-of-war, or from man-of-war to merchant, &c., but that all of what nation soever, so long as they shall be within those our ports and places of jurisdiction, or where our officers may prohibit violence, shall be understood to be under our protection, and to be ordered by course of justice, &c. And that our officers and subjects shall prohibit, as much as in them lies, all hovering of men-of-war, &c., so near the entry of any of our havens or coasts; and that they shall receive and succor all merchants and others, that shall fall within the danger of any such as shall await our coasts, in so near places, to the hindrance of trade to and from our kingdoms."

"So that, considering this shallow set out of Your Majesty's port, where it hovered for prey; since it was manned for the most part with Your Majesty's subjects, contrary to the meaning of the 4th and 6th articles of the treaty with Spain, made in the year 1630; since the surprisal was made in the night, not by force of arms, but by abusing Your Majesty's name and authority; since the true commission was neither pretended, showed, nor, indeed, on board at the time of the capture; I am of opinion, that the capture was unduly made, and that the Ostender ought to have his ship and goods restored to him, and that the commander in the shallow, and the English on board, deserve to be punished. All which I do with all humility submit to Your Majesty's royal wisdom.

"L. JENKINS."

6.—The Eenroom, 2 Rob. 8.

tion of our neutrality, the duty to restore the captured property to the original owner follows as a corollary. Supposing the allegations to be sufficiently pleaded, the proofs will fully authorize the court in decreeing restitution to the original Spanish owners in this case. But if the court should be of opinion that the pleadings are defective, it will not dismiss the injured party, but will permit him to assert his rights in a new allegation.¹

MARSHALL, *C. J.*, delivered the opinion of the court. The decision at the last term, in the case of the *United States v. Palmer*,² establishes the principle that the government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which [64*] war authorizes, and which *the new governments in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of Congress, and treaties with foreign powers, are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country. If, therefore, it appeared in this case that the capture was made under a regular commission from the govern-

ment established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the captured property must be restored to the possession of the captors. But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners. But the pleadings in this case are too informal and defective to pronounce a final decree upon the merits. The proceedings in the admiralty must always contain at least a general allegation of such a nature as will apply to the case, as of prize, &c. The court has always endeavored to keep these proceedings within some kind of rule, though not requiring the same technical strictness as at common law. Here the pleadings present a case which may be consistent with the demand of the former owners for restitution, but which is tied up to such a state of facts as, if proved, will not authorize it; and will not admit the introduction of evidence varying from the facts alleged. The decree of the Circuit Court must, therefore, *be reversed, and the cause remanded to [*65 that court, with directions to permit the pleadings to be amended, and for further proceedings.

*Cause remanded.**

Cited—4 Wheat. 502; 5 Pet. 47, 59; 4 How. 148, 154; 5 How. 374; 6 How. 434; 7 How. 57; 2 Black, 606; 3 Abb. U. S. 39; 1 Curt. 89; Blatchf. & H. 168.

1.—The *Adeline*, 9 Cranch, 284; The *Edward*, 1 Wheat. 261, 269; The *Samuel*, *ib.* 13, note 1.

2.—3 Wheat. 610.

3.—It is a principle which has been frequently laid down by this court, that it is the exclusive right of governments to acknowledge new states arising in the revolutions of the world, and until such recognition by our government, or by the government of the empire to which such new state previously belonged, courts of justice are bound to consider the ancient state of things as remaining unchanged. *Rose v. Hinely*, 4 Cranch, 292; *Gelston v. Hoyt*, *ante*, Vol. III., p. 324. The distinction between the recognition of the independence of a newly-constituted government which separates itself from an old-established empire, and the recognition of the existence of a civil war between such new government and the parent country, is obvious. In the latter case the very object of the contest is what the former supposes to be decided. But in the meantime, all the belligerent rights which belong to anciently-established governments, except so far as they may be restrained by treaty stipulations, belong to both parties. The obligations which neutrality imposes, are also to be fulfilled towards each party. What are those obligations, and how they may be affected by the misconduct of the belligerents, has been frequently made a subject of decision in this court.

Thus, where the commander of a French privateer, called the *Citizen Genet*, having captured, as prize on the high seas, the sloop *Betsey*, sent the vessel into the port of Baltimore; and upon her arrival there, the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of Sweden, a neutral power, and the cargo was owned jointly by Swedes, and by citizens of the United States, also neutral; it was held, that the District Court of Maryland had jurisdiction competent to inquire, and to decide whether, in [66*] such a case, restitution ought to be *made to the claimants, or either of them, in whole or in part; that is, whether such restitution could be made consistently with the law of nations, and the treaties and laws of the United States. *Glass v. The Betsey*, 3 Dall. 6, 16. This case has been sometimes criticised as involving a denial of the unquestionable principle of public law, that the judicial cognizance of prizes belongs exclusively to the tribunals of the captor's country, with the

admitted exceptions of a violation of neutral sovereignty either in making the capture or fitting out the armament with which it is made, within the neutral territory. But, as is very justly observed by the court in the case of *The Invincible*, the only point settled by the case of *Glass v. The Betsey* was, that the courts of the neutral country have jurisdiction of captures made in violation of its neutrality, and the case was sent back with a view that the District Court should exercise jurisdiction, subject, however, to the law of nations on this matter, as the rule to govern its decision. *Ante*, Vol. I., p. 257.

So, also, it was held, in the same case, that no foreign power can, of right, institute or erect any court of judicature, of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties; and that the admiralty jurisdiction which had been exercised in the United States by the consuls of France in the beginning of the war of 1793, not being so warranted, was illegal. *Glass v. The Betsey*, 3 Dall. 6, 16.

The district courts of the United States have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the captured vessel is alleged to belong to citizens of the United States, and although the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court; the captured vessel having been captured and carried *infra præsidia* of the captors. *The United States v. Peters*, 3 Dall. 121.

The capture of a vessel from a belligerent power, by a citizen of the United States, under a commission from another belligerent power (though the captor sets up an act of expatriation, not carried into effect by a departure from the United States, with an intention to settle permanently in another country), is an unlawful capture, and the courts of the United States will decree restitution to the original owner. *Talbot v. Janson*, 8 Dall. 133, 164. A capture by a citizen of a neutral state, who sets up an act of expatriation to justify it, is unlawful, where the removal from his own country was by sailing, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. *ib.* 153. *Quære*, Whether a citizen of the United States, expatriating himself according to the law of a particular state of the Union, of which he is also a citizen, can be considered as having lost the character

[PRACTICE.]

EVANS v. PHILLIPS.

A writ of error will not lie on a judgment of nonsuit.

ERROR to the Circuit Court of New York.

Mr. D. B. Ogden moved to dismiss the writ of error in this case, upon the ground that the plaintiff had submitted to a nonsuit in the court below, upon which no writ of error will lie.

The court directed the writ of error to be dismissed.

74*] *JUDGMENT.—This cause came on to

of a citizen of the United States, so as to be authorized to capture under a foreign commission the property of powers in amity with the United States. *Ib.* 153. A capture by a vessel, built, owned, and fitted out as a vessel of war, in a neutral country, is unlawful, and restitution of the property captured by such vessel will be decreed by the courts of the neutral country, if brought within its jurisdiction. *Ib.* 155, 157. Every illegal act committed on the high seas does not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution. *Ib.* 154, 160. A capture made by a lawfully-commissioned cruiser through the medium and instrumentality of a neutral, who had no right to cruise, is unlawful; and the property captured will be restored by the neutral state, if brought within its jurisdiction. *Ib.* 155, 157. The exemption of belligerent captures on the high seas, from inquiry by neutral courts, belongs only to a belligerent vessel of war, lawfully commissioned; and if a vessel claims that exemption, it is the duty of the court, upon application, to make inquiry, whether she is the vessel she pretends to be. *Ib.* 159. If, upon such inquiry, it appears that the vessel pretending to be a lawful cruiser is really not such, but uses a colorable commission for the purposes of plunder, she is to be considered by the law of nations, so far, at least, as the title of property or right of possession is concerned, in the same light as having no commission at all. *Ib.* *Prima facie*, all piracies and trespasses committed against 68*) the general law of nations, *are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained either by the general law of nations or by some treaty which forbids or restrains it. *Ib.* 160.

Where a vessel belonging to one belligerent was captured by another belligerent, and being abandoned on the high seas by the captors, to avoid the necessity of weakening their force by manning the prize, was found and taken possession of by citizens of the United States, and brought into a port of this country, and libeled in the District Court for salvage, it was held, that the District Court had jurisdiction upon the subject of salvage, and, consequently, a power of determining to whom the residue of the property, after payment of salvage, ought to be delivered. *M'Donough et al. v. The Mary Ford*, 3 Dall. 188, 198. In this case the captors acquired, immediately on the capture, such a right as no neutral nation could justly impugn or destroy; and it could not be said by the court that the abandonment of the captured vessel revived the interest of the original proprietors. One-third of the value of the property was, therefore, decreed to the neutral salvors, and the residue restored to the captors. *Ib.* This case has been sometimes supposed to involve the inconsistency of a neutral tribunal assuming jurisdiction of the question of prize, or no prize, as an incident to that of salvage. But an attentive examination of the case will show that this is a mistaken supposition. The court do not enter into the question of prize between the belligerents, but decree the residue to the late possessor; thus making the fact of possession as between the belligerent parties the criterion of right. Those points which could be disposed of without any reference to the legal exercise of the rights of war, the court proceed to decide; but those which necessarily involve the question of prize, or no prize, they remit to another tribunal. *L'Invincible*, ante, Vol. I., p. 259.

be heard on the transcript of the record: on consideration whereof, it is adjudged and ordered, that the writ of error be, and the same is hereby dismissed, with costs, the plaintiff having submitted to a nonsuit in the Circuit Court.¹

[COMMON LAW.]

VAN NESS v. BUEL.

A collector of the customs, who makes a seizure

1.—*Vide Box v. Bennett*, 1 H. Bl. 432; *Kempland v. Macaulay*, 4 T. R. 436.

Where the vessel which captured the prize in question had been built in the United States, with the express view of being employed as a privateer, in case the then existing differences between Great Britain and the United States should terminate *in war; some of her equipments [*69] were calculated for war, though frequently used by merchant ships; she was subsequently sold to a subject of one of the belligerent powers, and by him carried to a port of his own country, where she was completely armed, equipped, and furnished with a commission, and afterwards sailed on a cruise, and captured the prize. It was held, that this was not an illegal outfit in the United States, so as to invalidate the capture, and give their courts jurisdiction to restore to the original owner the captured property. *Moodie v. The Alfred*, 3 Dall. 307. A mere replacement of the force of a privateer in a neutral port is not such an outfit and equipment as will invalidate the captures made by her, and give the courts of the neutral country jurisdiction to restore the captured property to the original owner. *Moodie v. The Phoebe Anne*, 3 Dall. 319.

A vessel and cargo belonging to citizens of the United States was captured as a prize by a cruiser belonging to one of the belligerent powers on the high seas, and run on shore within the territory of the United States, by the prize-master, to avoid recapture by the other belligerent, and abandoned by the prize crew; the vessel and cargo were then attached by the original owner, and an agreement was entered into by the parties, that they should be sold, and the proceeds paid into the District Court, to abide the issue of a suit commenced by the owner against the captors for damages. Held, that they were responsible for the full value of the property injured or destroyed, and that whatever might originally have been the irregularity in attaching the captured vessel and cargo, it was obviated by the consent of the captors that the prize should be sold, and that the proceeds of the sale should abide the issue of the suit. *Del Col v. Arnold*, 3 Dall. 231. The consistency of the court in this case cannot be vindicated with the same facility as in that of *The Mary Ford*. "We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which a case is reported, which we are informed, had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer *to the case of *The Cassius* [*70] (*The United States v. Peters*), decided but the term preceding, and observe the correctness with which the law applicable to this case, in principle, is laid down in the recitals to the prohibition, we are confirmed in that opinion. But the case itself (that of *Del Col v. Arnold*) furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears that when pursued by the torpedo, the *Grand Sachem* was wholly abandoned by the prize crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore when the prize crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total derelict (an opinion which, if incorrect, was only so on a point of fact, and one in support of which much might have been said, as the prize crew had no proprietary interest, but only a right founded

of goods for an asserted forfeiture, and before the proceedings *in rem* are consummated by a sentence of condemnation, is removed from office, acquires an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested right to his share of the forfeiture, under the collection act of the 2d of March, 1790.

ERROR to the Circuit Court of Vermont.

This was an action of *assumpsit*, in which the defendant in error, Buel, declared against the plaintiff in error, Van Ness, in the money counts, and gave evidence that the sums of money, for the recovery of which this suit was brought, were the proceeds of a moiety of a certain seizure of goods as forfeited, which seizure

was made in the district of Vermont, on the 6th of July, 1812, while the plaintiff below was collector of the *customs for said district, &c., [*75 which goods were libeled in September, 1812, in the District Court, and condemned at the October term of the Circuit Court, 1813. That the plaintiff below was appointed collector on the 16th of March, 1811, and remained in office until the 15th of February, 1813, when he was removed from office by the President, and the defendant below appointed to the same office; and received the proceeds of the goods condemned. That various other parcels of goods were seized, and libeled while the plaintiff below was collector, but were condemned after his removal from office, and the proceeds received by

on the fact of possession), it would follow that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the industry, to satisfy those damages, the court give no opinion, but place the application of the proceed of the sale of this vessel, on the ground of consent; a principle, on the correctness of the application of which to that case, the report affords no ground to decide.* The *Invincible*, ante, Vol. I., p. 259, 260.

A public vessel of war belonging to a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the courts of the country. The *Exchange*, 7 Cranch, 116. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all other nations with whom it is at peace, and they enter such ports, and remain in them under the protection of the government of the place. Ib. 141. Whether the public ships of war enter the ports of another friendly nation, under the license implied by the absence of any prohibition, or under an express stipulation by treaty, they are equally exempt from the local jurisdiction. Ib. 141. 71*] Where the private vessels of one nation enter the ports of another, under a general implied permission only, they are not exempt from the local jurisdiction. Ib. 143. The sovereign of the place is capable of destroying the implication, under which national ships of war, entering the ports of a friendly power, open for their reception, are considered as exempted by the consent of that power from its jurisdiction. He may claim and exercise jurisdiction over them, either by employing force or by subjecting such vessels to the ordinary tribunals. Ib. 146. But until such power be expressly exerted, those general provisions which are descriptive of the ordinary jurisdiction of the judicial tribunals, and give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country where it is found, ought not to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction. Ib. 146. Upon these grounds it was determined, in this case, that a public vessel of war, belonging to the Emperor Napoleon, which had before been the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself peaceably, could not be reclaimed by the former owner in the tribunals of this country. Ib.

The general rule as to the prize jurisdiction is, that the trial of captures made on the high seas, *jure belli*, by a duly-commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. The *Alerta*, 9 Cranch, 359, 364. But to this rule there are exceptions as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. Ib. 364; Talbot v. Janson, 3 Dall. 133; Ib. 288, note. A neutral nation may, if so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory. But without such

permission, the subjects of the belligerent powers have no right to equip vessels, or to augment their force, either *with arms or with men, within [*73 the territory of the neutral nation. The *Alerta*, 9 Cranch, 365. All captures made by means of such equipments of vessels, or augmentation of their force within the neutral territory, are illegal in respect to the neutral nation, and it is competent for its courts to punish the offenders, and in case the prizes taken by them are brought *infra prædialia*, to order them to be restored. Ib. Even if there were any doubt as to the rule of the law of nations on the subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the act of June 5th, 1794, c. 226, (1) and the power and duty of the proper court of the United States, to restore the prizes made in violation of that act, is clearly recognized. Ib. To constitute an illegal equipment or augmentation of the force of a vessel within the territory of the United States, it is immaterial whether the persons enlisted are native citizens or foreigners domiciled within the United States. Neither the law of nations nor the act of Congress recognizes any distinction in this respect, except as to subjects of the foreign state in whose service they are so enlisted, being transiently within the United States. Ib. 366.

During the late war between the United States and Great Britain, a French privateer, called the *Invincible*, and duly commissioned, was captured by a British cruiser, afterwards recaptured by a private armed vessel of the United States; again captured by a squadron of British frigates; again recaptured by another United States privateer, and brought into a port of the United States for adjudication. Restitution on payment of salvage was claimed by the French Consul on behalf of the owners of the *Invincible*. A claim was also interposed by citizens of the United States, who alleged that their property had been unlawfully taken by the *Invincible*, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed by the Circuit Court, which decree was affirmed in this court; and it was determined that the tribunals of this country have no jurisdiction to redress any supposed torts committed on the high *seas upon the property of our citi-[*73 zens, by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality. L'*Invincible*, ante, Vol. I., p. 238; S. C. 2 Gallis. 20.

Vide infra, the cases of *The Estrella*, and *The Neustra Señora de la Caradid*, in which the same principles which are collected in this note were applied to captures of Spanish property by Venezuelan and Carthaginian privateers, and the property was restored to the original owners, or to the captors, according as the capture had, or had not been made in violation of our neutrality.

For the different public acts by which the government of the United States has recognized the existence of a civil war between Spain and her American colonies, see the Appendix, Note II.

(1).—This act was made perpetual by that of April 24th, 1800, c. 189, which was repealed, and all laws respecting our neutral relations were incorporated into one, by the act of the 20th of April, 1818, c. 93.

the defendant below. The court below charged the jury that the defendant in error was entitled to recover a moiety of the seizures so made by him during his continuance in office, and condemned after his removal. The jury found a verdict, and judgment was rendered for the plaintiff below; and a bill of exceptions having been taken to the charge of the court below, the cause was brought by writ of error to this court.

The cause was submitted without argument.

STORY, J., delivered the opinion of the court: The case differs from that of *Jones v. Shore's Executors*,¹ in two circumstances; first, that this is the case of a seizure of goods for an asserted forfeiture; and, secondly, that before the proceedings *in rem* were consummated by a sentence, the collector who made the seizure [76*] was removed from office. In our judgment, neither of these facts affords any ground to except this case from the principles which were established in *Jones v. Shore's Executors*. It was there expressly held, that the collector acquired an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture.² Without overturning the doctrine of that case, the present is not susceptible of argument; and we therefore unanimously affirm the decision of the Circuit Court.

Judgment affirmed.

Cited—10 Wheat. 289; 10 How. 138; 11 How. 32; 7 Wall. 461; 4 Wash. 68; 1 Abb. U. S. 118.

[COMMON LAW.]

WILLIAMS ET AL. v. PEYTON'S LESSEE.

In the case of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it. The party who sets up a title must furnish the

evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend.

In the case of lands sold for the non-payment of taxes, the marshal's deed is not even *prima facie* evidence that the pre-requisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with.

THIS cause was argued by *Mr. Jones* and *Mr. Talbot* for the plaintiffs in error, and by *Mr. Taylor* for the defendant in error.

The opinion of the court was delivered by MARSHALL, Ch. J.:

This is an ejectment brought in the Circuit Court for the District of Kentucky, by the original patentee, against a purchaser at a sale made for non-payment of the direct tax, imposed by the act of Congress of the 14th of July, [*78 1798, c. 92. After the plaintiff in the Circuit Court had exhibited his title, the defendants gave in evidence the books of the supervisor of the district, showing that the tax on the lands in controversy had been charged to the plaintiffs, and that they had been sold for the non-payment thereof. They also gave in evidence a deed executed by the marshal of the district, in pursuance of the act of March 3d, 1804, and proved by Christopher Greenup, the agent of the plaintiff, that there were tenants on the land, and that he did not pay the tax nor redeem the land.

Upon this evidence, the court, on the motion of the plaintiff, instructed the jury "that the purchaser under the sale of lands for the non-payment of the direct tax, to make out title, must show that the collector had advertised the land, and performed the other requisites of the law of Congress, in that case provided, otherwise he made out no title." The defendants then moved the court to instruct the jury "that the deed and other evidence produced by them, and herein mentioned, was *prima facie* evidence that the said land had been advertised, and the

recovered by virtue of the act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed as follows: "One moiety shall be for the use of the United States, &c., paid into the treasury thereof by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions, to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be within the same district; and in districts where only one of the said officers shall have been established, the said moiety shall be given to such [*77 officer." Then follow provisions concerning the distribution, where the recovery has been had in pursuance of information given by an informer, or by any officer of a revenue cutter.

1.—1 Wheat. 482.

2.—Under the collection act of the 2d of March, 1799, c. 128, and other laws adopting the provisions of that act, the 89th section of which enjoins the collector, within whose district a seizure shall be made or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect; and authorizes him to receive from the court, in which a trial is had, or from the proper officer thereof, the sums so received, after deducting the proper charges, and on receipt thereof, requires him to pay, and distribute the same without delay, according to law, and to transmit, quarterly or yearly, to the treasury, an account of all the moneys received by him for fines, penalties, and forfeitures during such quarter. The 91st section declares that all fines, penalties and forfeitures,

NOTE.—It is said in *Cocke v. Halsey*, 16 Pet. 86, that "all that was ruled in that case (*Williams v. Peyton*, *supra*), was this, that when a title depends upon the acts of a ministerial officer to be performed *in pais*, proof of the performance of those acts is necessary to sustain such a title."

In the execution of a power to sell lands for taxes, a strict compliance with all the material requirements of the statute, is required. *Ritter v. Worth*, 58 N. Y. 627; *Cruger v. Dougherty*, 1 Lans. (N. Y.) 464; *Nat. Life Ins. Co. v. McKay*, 5 Abb. N. S. 445; *Stead v. Course*, 4 Cranch. 403; *McClung v. Ross*, 5 Wheat. 118; *Finley v. Cook*, 54 Barb. 9; *Thatcher v.*

Powell, 6 Wheat. 119; *Rowkendroff v. Taylor*, 4 Pet. 349; *Clarke v. Strickland*, 2 Curt. C. C. 439; *Miner v. McLean*, 4 McLean, 138; 3 West. Law, J. 4; *Moore v. Brown*, 4 McLean, 211; 11 How. 414; *Mayhew v. Davis*, 4 McLean, 213; 8 C. 5 West. Law, J. 304; *Arrowsmith v. Burlington*, 5 West. Law, J. 431; *Parker v. Overman*, 18 How. 157; (reversing *S. C. Hempst. 682*); *Ogden v. Harrington*, 6 McLean, 418; *Stansbury v. Taggart*, 3 McLean, 457; *Bush v. Williams*, 1 Cooke, 360; *Corp. of Washington*, 8 Wheat. 681; *Mason v. Fearson*, 9 How. 248; *Holmbyrd v. Pumphrey*, 18 How. 69; *Thompson v. Carroll*, 22 How. 422; *Bradley v. Connor*, 5 Cranch, C. C. 615; Wheat. 4.

other requisites of the law of Congress, as to the duty of the collector in that respect, had been complied with;" but the court refused to give the instruction; and, on the contrary, instructed the jury "that said deed, and other evidence, was not *prima facie* evidence that the said land had been advertised according to law, nor that the requisites of the law had been complied with."

The defendants excepted to this opinion. The jury found a verdict for the plaintiff, and 79*] the judgment *rendered on that verdict is now before this court on writ of error.

As the collector has no general authority to sell the lands at his discretion for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every prerequisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it.

This general proposition has not been controverted; but the plaintiffs in error contend that a deed executed by a public officer is *prima facie* evidence that every act which ought to precede that deed had preceded it. That this conveyance is good, unless the party contesting it can show that the officer failed to perform his duty.

1.—Which provides (sec. 9): "That each of the said collectors shall, immediately after receiving his collection list, advertise, by notifications, to be posted up in at least four public places in each collection district, that the said tax has become due and payable, and the times and places at which he will attend to receive the same; and, in respect to persons who shall not attend according to such notifications, it shall be the duty of each collector to apply once at their respective dwellings, within such district, and there demand the taxes payable by such persons; and if the taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for such collector to proceed to collect the said taxes by distress and sale of the goods, chattels or effects, of the persons delinquent, as aforesaid, with a commission of eight per cent. upon the said taxes, to and for the use of such collector. Provided, That it shall not be lawful to make distress of the tools or implements of a trade or profession, beasts of the plough necessary for the cultivation of improved lands, arms, or the household utensils, or apparel, necessary for a family." And sec. 13, "That when any tax assessed on lands or houses shall have remained unpaid for the term of one year, the collector of the collection district, within which such land or houses may be situated, having

It is a general principle that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. If this be true in the general, is there *anything [*80 which will render the principle inapplicable to the case of lands sold for the non-payment of taxes? In the act of Congress, there is no declaration that these conveyances shall be deemed *prima facie* evidence of the validity of the sale. Is the nature of the transaction such that a court ought to presume in its favor anything which does not appear, or ought to relieve the party claiming under it from the burden of proving its correctness?

The duties of the public officer are prescribed in the 9th, 10th and 13th sections of the act of the 14th of July, 1798, c. 92.¹ If these duties be examined, *they will be found to be [*81 susceptible of complete proof on the part of the officer, and consequently on the part of the

first advertised the same for two months, in six different public places within the said district, and in the two gazettes in the state, if there be so many, one of which shall be the gazette in which the laws of such state shall be published by authority, if any such there be, shall proceed to sell, at public sale, and under the direction of the inspector of the survey, either the dwelling house or so much of the tract of land (as the case may be) as may be necessary to satisfy the taxes due thereon, together with costs and charges, not exceeding at the rate of one per centum for each and every month the said tax shall have remained due and unpaid. Provided, that in all cases where any lands or tenements shall be sold, as aforesaid, the owner of the said lands or tenements, his heirs, executors, or administrators, shall have liberty to redeem the same, at any time within two years from the time of sale, upon payment, or tender of payment, to the collector for the time being, for the use of the purchaser, his heirs, or assignees, of the amount of the said taxes, costs, and charges, with interest for the same, at the rate of twelve per centum per annum; and upon the payment, or tender of payment, as aforesaid, such sale shall be void. And no deed shall be given in pursuance of any such sale, until the time of redemption shall have expired."

Rodbird v. Rodbird, 5 Cranch, 125; Harvey v. Tyler, 2 Wall. 329; McGunnagle v. Rutherford, Hempst. 45; Ransom v. Williams, 2 Wall. 313; Denike v. Bourke, 3 Biss. 29; Walker v. Moore, 2 Dill. 256; Harkness v. Board of Public Works, 1 McArthur, 121; Coombs v. O'Neal, 1 McArthur, 406; LeRoy v. Reeves, 5 Sawy. 102; Gould v. Day, 4 Otto, 405.

Treasurer's deed for land sold for taxes in Iowa is evidence of the sale and that it was made at the proper time and in proper manner. Callanan v. Hurley, 3 Otto, 287.

Strict execution, when necessary. Waldron v. Chastaney, 2 Blatchf. 62; Rule v. Parker, 1 Cooke, 365; Warner v. Howell, 3 Wash. C. C. 12; Legee v. Thomas, 3 Blatchf. 11; Platt v. McCullough, 1 McLean, 69, 82; Bright v. Boyd, 1 Story, C. C. 457.

To the due execution of a power, there must be a substantial compliance with every condition required to precede or accompany its exercise. Allen v. DeWitt, 3 N. Y. 276; Cleveland v. Boorum, 27 Barb. 232; 23 Barb. 201.

When the consent of third persons is required to the execution of a power, that consent must be Wheat. 4.

strictly complied with. If the person whose consent is necessary dies before the execution of the power without having assented, the power is gone; so the death of one, where the consent of several is required. Barber v. Cary, 11 N. Y. 397.

Where a judicial authority, not a mere private confidence, is conferred upon a number, though it be not expressly provided that a majority may decide, if all meet and confer, the decision of a majority is binding, and this though the minority expressly dissent. Green v. Miller, 8 John. 30; Spicer v. Slade, 9 John. 359; McIntroy v. Benedict, 11 John. 402; Babcock v. Lamb, 1 Cow. 238; Ex-parte Rogers, 1 Cow. 525; McCoy v. Curtice, 9 Wend. 17; People v. Supervisors, 1 Hill. 185; Perry v. Tinen, 22 Barb. 137; Downing v. Ruger, 21 Wend. 178; Wolsey v. Tompkins, 23 Wend. 324; 2 N. Y. Rev. Stat. 555, sec. 27; People v. Supervisors, 10 Abb. Fr. (N. Y.) 233; 18 How. Fr. (N. Y.) 152; Williams v. Lunenburg, 21 Pick. 75; Sprague v. Bailey, 19 Pick. 436; Jones v. Andover, 9 Pick. 146; Commonwealth v. Ipswich, 2 Pick. 70; Maffit v. Jaquins, 2 Pick. 351; Philpott v. Stickney, 3 Met. 384; Damon v. Granby, 2 Pick. 345.

purchaser, who ought to preserve the evidence of them, at least for a reasonable time. Their chief object is to give full notice to the proprietor, and furnish him with every facility for the voluntary payment of the tax, before resort should be had to coercive means. In some instances the proprietor would find it extremely difficult, if not impracticable, to prove that the officer had neglected to give him the notice required by law. It is easy, for example, to show **82*** that the collector ^{has} posted up the necessary notifications in four public places in his collection district, as is required by the 9th section, but very difficult to show that he has not. He may readily prove that he has made a personal demand on the person liable for the tax, but the negative, in many cases, would not admit of proof.

The 13th section permits the collector, when the tax shall have remained unpaid for the term of one year, having first advertised the same for two months in six different public places within the said district, and in two gazettes in the state, if there be so many, one of which shall be the gazette in which the laws of such state shall be published by authority, if any such there be, to proceed to sell, &c.

The purchaser ought to preserve these gazettes, and the proof that these publications were made. It is imposing no greater hardship on him to require it than it is to require him to prove that a power of attorney, in a case in which his deed has been executed by an attorney, was really given by the principal. But to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task always difficult, and sometimes impossible to be performed.

Although this question may not have been expressly, and in terms decided in this court, yet decisions have been made which seem to recognize it. In the case of *Stead's Executors v. Course*,¹ in which was drawn into question the validity of a sale made under the tax laws of the state of Georgia, this court said, "it is incumbent on the vendee to prove the authority **83*** to sell." And in *Parker v. Rule's Lessee*,² where a sale was declared to be invalid, because it did not appear in evidence that the publications required by the 9th section of the act had been made, the court inferred that they had not been made, and considered the case as if proof of the negative had been given by the plaintiff in ejectment. The question, whether the deed was *prima facie* evidence, it is true, was not made in that case, but its existence was too obvious to have escaped either the court or the bar. It was not made at the bar, because counsel did not rely on it, nor noticed by the judges, because it was not supposed to create any real difficulty.

It has been said in argument, that in cases of sales under the tax laws of Kentucky, a deed is considered by the courts of that state as *prima facie* evidence that the sale was legal. Not having seen the case or the law, the court can form no opinion on it. In construing a statute of Kentucky, the decisions of the courts of Kentucky would unquestionably give the

rule by which this court would be guided; but it is the peculiar province of this court to expound the acts of Congress, and to give the rule by which they are to be construed.

Judgment affirmed with costs.

Cited—16 Pet. 86; 5 How. 272; 9 How. 260; 16 How. 618; 2 Wall. 319; 1 Otto, 245; 4 McLean, 222, 499; 3 Cranch, C. C. 130, 134; 4 Biss. 122; 3 Wash. 552.

*[PRACTICE.]

[*84

THE EXPERIMENT.

Depositions taken on further proof, in one prize cause, cannot be invoked into another.

APPEAL from the Circuit Court of Massachusetts.

This was a question of collusive capture.

The *Attorney-General* moved to invoke into this cause depositions taken, on further proof, in the case of *The George*, reported *ante*, Vol. I., p. 408.

MARSHALL, Ch. J. Original evidence and depositions taken on the standing interrogatories, may be invoked from one prize cause into another. But depositions taken as farther proof in one cause, cannot be used in another.

*Motion refused.*¹

[COMMON LAW.]

WEIGHTMAN v. CALDWELL.

E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship *Aristides*, W. P. Z., supercargo, say at \$2,522.33 at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration under the statute of frauds being set up as a defense, on the ground of the defect of mutuality in the written contract; the court below left it to the jury to infer from the evidence an actual performance of the agreement; the jury found a verdict for the plaintiff, and the court below rendered judgment thereon. The judgment was affirmed by this court.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by *Mr. Jones* and *Mr.*

1.—But in other respects, cases of collusive and joint captures form an exception to the general rules of evidence in prize causes. In cases of this nature, the usual simplicity of the prize proceedings is departed from, because the standing interrogatories are more peculiarly directed to the question of prize or no prize, as between the captor and captured, and are not adapted to the determination of questions of joint or collusive capture. It is, therefore, almost a matter of course to permit the introduction of further proof in these cases. *The George*, *ante*, Vol. I., p. 408. But this further proof must be of such a nature as is admissible by the general rules of prize ^{evi-} [*85] dence. Under what circumstances these rules permit the invocation of papers and depositions, may be seen, *ante*, Vol. II., Appendix, note I., p. 23.

Wheat. 4.

1.—4 Cranch, 403.

2.—9 Cranch, 64.

Key for the plaintiff in error,¹ and by *Mr. Caldwell* and *Mr. Swann* for the defendant in error.²

86*] *JOHNSON, J., delivered the opinion of the court: The suit below was instituted on a promissory note by the defendant in error. Although it is, in fact, an indorsed note, and so declared on, yet it is admitted to have originated in a negotiation between the maker and indorser, and whatever defense would be good as against the promisee, is admitted to be maintainable against this indorser, the indorser standing only on the ground of a security or ordinary collateral undertaker to the maker. The defense set up is the statute of frauds, not under the supposition that a promissory note is a contract within the statute, but on the ground that this note was given for a consideration which was void under the statute. The case was this: Caldwell having an interest in a cargo afloat, agrees with Weightman for the sale of it, and Weightman signs the following memorandum, expressive of the terms of their agreement: "John Weightman agrees to purchase the share or interest of Elias B. Caldwell, in the cargo of the ship *Aristides*, W. P. Zant-zinger, say, \$2,522.83, at fifteen per cent. advanced, on said amount, payable at five months from this date, and to give a note or notes for the same with an approved indorser.

JOHN WEIGHTMAN.

"WASHINGTON, May 20, 1816."

87*] *In compliance with that agreement, Weightman gives his note for the sum agreed upon, which is afterwards renewed, and this note taken, on which this action is instituted. At the trial below, Weightman's counsel moved the court to instruct the jury that, "If no bargain or agreement for the sale of the plaintiff's share of the said ship *Aristides*, nor any note or memorandum in writing, of the same, was ever signed by the plaintiff, binding him in writing to sell his said share to defendant, and if defendant did never actually receive or accept any part of said cargo, and gave nothing in earnest to bind said bargain, or in part payment, and if plaintiff has never made or tendered any written transfer or bargain of his said share to the defendant; but if the entire obligation, reciprocally binding plaintiff to sell said share, was verbal, and formed the sole consideration for the said note, then there is

no adequate consideration for the said note, and plaintiff is not entitled to recover upon said note. This instruction the court refused to give, but instructed the jury, that if they should be of opinion, from the evidence, that the defendant executed and delivered to the plaintiff the note upon which this action is brought, and that the said note was given in consideration of the purchase of the plaintiff's share or interest in the said cargo of the said ship *Aristides*, as stated in the aforesaid writing, &c., and that the said cargo was then on the high seas on its passage from France to the United States, and that the same has since arrived, and has never come to the possession of the plaintiff; that the *plaintiff had an [*88 interest in the said cargo, and that the defendant never demanded of the plaintiff any written assignment of his share of the said cargo, then the statute of frauds is no bar to the plaintiff's recovery, and that the said note is not, by reason of the said statute, void, as being given without consideration.

Taking the charge prayed for, and the charge given, together, they appear to make out the following case: The defendant moved the court to instruct the jury that the note which was the cause of action was void for want of consideration, inasmuch as it was given in compliance with an agreement signed by one party, and not the other, and which, being unattended with any actual delivery of the article sold, was, as he contended, void under the statute of frauds. The court, without denying the principles laid down by the defendant, submit the whole case to the jury, and instruct them, that upon that evidence they were at liberty to infer an actual execution of the agreement by both parties, and thus take the case entirely out of the operation of the statute of frauds. Under this construction of the bill of exceptions—for it must, like all other instruments, be the subject of construction—we are decidedly of opinion that the judgment below must be affirmed. Whether right or wrong, the defendant had all the benefit of the law that his case admitted of, and, therefore, this court is not called upon to express a judgment on its correctness. The court below were clearly right in submitting the question of execution to the jury. If there had ever been a doubt entertained *on this point, it is now re- [*89 moved by numerous adjudications.

*Judgment affirmed.*³

1.—They cited *Wain v. Warlters*, 5 East, 10; *Champlion v. Plummer*, 1 New Rep. 252; *Symonds v. Hall*, 4 T. R. 151; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Bayley and Bogert v. Ogdens*, 3 Johns. Rep. 399; *Roberts on Frauds*, 113, 116.

2.—They cited *Ballard v. Waller*, 3 Johns. Cas. 60; *Leonard v. Vredenburgh*, 8 Johns. Rep. 29; *Slingerland v. Morse*, 7 Johns. Rep. 463; *Ex-parte Minet*, 14 Ves. 189; *Roberts on Frauds*, 117, note, 58; *Ib.* 121; *Stapp v. Lill*, 1 Camp. N. P. R. 242.

3.—The 17th section of the statute of frauds, 29 Car. II., c. 3. which has been incorporated into the laws of most of the states, provides, "that no contract for the sale of any goods, wares, and merchandises, for the price of £10 or upwards, shall be good, except the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain be made and signed by the parties

to be charged by the contract, or their agents thereunto lawfully authorized."

That no contract for the sale, &c.—It was formerly supposed that executory contracts (that is, where time is given for the delivery of the goods) were not within this section of the statute, but that it only related to executed contracts, or where the goods were to be delivered immediately after the sale. *Towers v. Osborne*, Str. 506; *Clayton v. Andrews*, 4 Burr. 2101. But this distinction has been since exploded; and it is now settled, that where the goods bargained for are complete, and existing *in solido*, ready for delivery at the time of the contract, it is within the statute; but that where they are not complete and ready for delivery, but are either to be made, or work and labor is required to be done, and materials found, in order to put them into the state in which they are contracted to be sold, such a contract is out of the statute, and need not be in writing. *Rondeau v. Wyatt*, 2 H. Bl. 63; *Bennett v. Hull*, 10 Johns. Rep. 364; *Groves v. Duck*, 3 Maule & Selw. 178; *Cooper v. Elston*, 7 T. R. 14.

[INSTANCE COURT.]

THE SYBIL.

DANGERFIELD ET AL., Claimants.

In a case of civil salvage, where under its peculiar circumstances the amount of salvage is discretionary, appeals should not be encouraged upon the ground of minute distinctions of merit, nor will the court reverse the decision of an inferior court, unless it manifestly appears that some important error has been committed.

The demand of the ship-owners for freight and general average, in such a case, is to be pursued against that portion of the proceeds of the cargo which is adjudged to the owners of the goods, by a direct libel, or petition; and not by a claim interposed in the salvage clause.

APPEAL from the Circuit Court of South Carolina.

This was a case of civil salvage, in which the District Court decreed a moiety of the net proceeds, as salvage, to be distributed in certain proportions among the salvors; which was

reversed by the Circuit Court on appeal, and one-fourth decreed as salvage, to be divided among the respective salvors, in proportions somewhat different from those ordered by the District Court.

The cause was submitted to this court without argument.

MARSHALL, *Ch J.*, delivered the opinion of the court: This is a case in which, under its peculiar circumstances, the amount of salvage is discretionary. In such cases, it is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution. Appeals should not be encouraged upon the ground of minute distinctions; nor would this court choose to reverse the decision of a circuit court, in this class of cases, unless it manifestly appeared that some important error had been committed. In this particular case, the court is well satisfied, both with the amount of

Of any goods, wares, and merchandises, &c.—Quære. Whether shares of a company or public stock are comprehended under the words "goods, wares, and merchandises." *Pickering v. Appleby*, Com. R. 354; *Mussell v. Cooke*, Prec. in Chan. 533; *Rob. on Frauds*, 185; *Colt v. Netterville*, 2 P. Wms. 307. This point appears never to have been decided.

90*) *Except the buyer shall accept part of the goods, and actually receive the same, &c.*—A delivery without an ultimate acceptance, and such as completely affirms the contract, is not sufficient. *Kent v. Huskinson*, 3 Bos. & Pull. 233. Where the goods are ponderous, or from some other circumstance incapable of being immediately handed over from one to another, there need not be an actual acceptance of the goods by the vendee, but a symbolical delivery will be sufficient to dispense with a written agreement signed by the parties. *Searle v. Keoves*, 2 Esp. N. P. C. 698; *Anderson v. Scott*, 1 Camp. N. P. 235, note; *Chaplin v. Rogers*, 1 East, 186; *Hinde v. Whitehouse*, 7 East, 558; *Elmore v. Stone*, 1 Taunt. 458; *Vide ante*, Vol. I, p. 84, note d. And in the sale of a ship or goods at sea (like the principal case in the text), the delivery is always by such symbolical means as the circumstances allow. *Ex parte Matthews*, 2 Ves. 272; *Atkinson v. Maling*, 3 T. R. 462; *Ex parte Batson*, 3 Bro. Ch. Cas. 362. So, if the purchaser deals with the commodity as if it were in his actual possession, it is considered as an acceptance. *Chaplin v. Rogers*, 1 East, 182. And it is no objection to a constructive delivery of goods that it is made by words parcel of the parcel contract of sale. If, therefore, a man bargain for the purchase of goods, and desire the vendor to keep them in possession for a special purpose for the vendee, and the vendor accept the order, it is a sufficient delivery within the statute of frauds. *Elmore v. Stone*, 1 Taunt. 458. But the delivery of a sample, if it be considered as no part of the bulk, is not a delivery within the statute. *Cooper v. Elston*, 7 T. R. 14. But if the sample be delivered as a part of the bulk, it then binds the contract. *Talver v. West*, 1 Holt's R. 178. And *quære*, whether part performance of the agreement will take the case out of the statute at law. There is a *dictum* to that effect by Justice Buller, in *Brodie v. St. Paul*, 1 Ves., Jun., 433; but it is denied by Lord Eldon, in *Cooth v. Jackson*, 6 Ves. 39, and by Chief Justice (now Chancellor) Kent, in *Jackson v. Pierce*, 2 Johns. Rep. 224; and the principle is considered as applicable in a court of equity only. But in the principal case in the text there was a complete execution of 91*) the agreement, as far as practicable, the goods being at sea, and only capable of a symbolical delivery.

Or give something in earnest to bind the bargain, or in part payment.—Where the defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned; this was held not to be a sufficient compliance with the statute. *Blenkinsop v. Clayton*, 1 B. Moore's R. 323.

Or that some note or memorandum in writing of

the bargain be made, &c.—Under the 4th section of the statute, which provides that no action shall be brought in certain cases, unless "the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" it has been held, in a celebrated case, that the term "agreement" includes the consideration upon which the promise is founded, and that therefore it is necessary the consideration should be expressed upon the face of the written memorandum. *Wain v. Wariters*, 5 East, 10; *S. P. Sears v. Brink*, 3 Johns. Rep. 210. But this strictness of construction is not applied to a contract for the sale of goods under the 17th section, the word "bargain" being there substituted for "agreement," and it is thus distinguished from the 4th section. *Exerton v. Matthews*, 6 East, 307. Indeed the case of *Wain v. Wariters* itself has been questioned by high judicial authority (per Lord Eldon, *ex parte Minet*, 14 Ves. 189, and *ex parte Gordon*, 15 Ves. 236), and by very eminent elementary writers. *Roberts on Frauds*, 117, note 58; *Fell on Mercantile Guaranties*, 244, Appendix No. IV. And it manifestly did not meet the approbation of Lord Chief Justice Gibbs, in *Minis v. Stacey*, 1 Holt's R. 153, who said: "I do not think it necessary in this case to overrule the decision in *Wain v. Wariters*." It is also doubted by Mr. Chief Justice Parsons in *Hunt v. Adamson*, 5 Mas. R. 358. It has been expressly held, that no engagement need appear on the face of the memorandum in writing, on the part of the person to whom the promise is made, to do that which is the consideration for the other party's promise. In other words, the mutuality of the contract need not appear on the face of the memorandum. 92*) It is sufficient that the party to whom the promise is made, in point of fact, does that which is the consideration for the other party's undertaking. *Stapp v. Lill*, Camp. N. P. 242; *Exerton v. Matthews*, 6 East, 307. And in the principal case in the text (*Weightman v. Caldwell*), the actual performance of that which was the consideration of the other party's undertaking, was properly left by the court to the jury, as a question of fact. Printing or writing with a lead pencil is a sufficient writing within the statute. *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Clason v. Bailey*, 14 Johns. Rep. 484; *Merritt v. Clason*, 12 Johns. Rep. 102. A letter, by whomsoever written, and to whomsoever addressed, if written by the assent of one party, for the purpose of being communicated, and actually communicated to the other, is a note or memorandum in writing within the statute. *Moore v. Hart*, 2 Ch. Rep. 147; 1 Vern. 110; *Hodgson v. Hutchinson*, 5 Vin. 522; *Coleman v. Upcott*, 5 Vin. 527; *Wankford v. Fotherly*, 2 Vern. 322. But a letter not written to be communicated to the other party, nor actually communicated to him, is not a sufficient note or memorandum. *Ayliff v. Tracy*, 2 P. Wms. 65. If, however, the letter sets forth the terms of an agreement, and recognize it as already

Wheat. 4.

salvage decreed by the Circuit Court, and with the mode of distribution; and the decree is therefore affirmed with costs.

Decree affirmed.

A question afterwards arose, upon a claim of the ship-owners for freight, &c.

JOHNSON J., delivered the opinion of the court: In this case, the attention of the court has been particularly called to the claim interposed by the ship-owners, for freight and average.

This court, as at present advised, are very well satisfied that no freight was earned, and that average may have been justly claimed. But in the case then depending the Circuit Court could not have awarded either of those demands. The question is *inter alios*. There was no pretext for claiming either, as against the salvors; and the ship-owners ought to have 100*] *pursued their rights by libel, or peti-

tion by way of libel, against the portion of the proceeds of the cargo which was adjudged to the shippers. These parties were entitled to be heard upon such a claim, and could only be called upon to answer in that mode.

But the ship-owners are not yet too late to pursue their remedy. The proceeds are still in the possession of the law, and may be subjected to any maritime claim or lien in the court below.

Claim rejected.

Cited—11 How. 528.

[PRIZE.]

THE CALEDONIAN. DICKEY, Claimant.

A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The

actually concluded by the party, although not written to the other party, or with a view of being communicated to him, it is sufficient. *Welford v. Beazley*, 3 Atk. 538. Although the letter itself does not state the terms of the agreement, yet if it refers to another paper that does, and the letter is signed by the party to be charged, it is sufficient. *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Tawney v. Crowther*, 3 Bro. Ch. Cas. 161, 318; *Clinan v. Cooke*, 1 Scho. & Lefr. 22. Nor is it material whether the party writing the letter intended to recognize the previous written agreement. It is sufficient if he does in fact recognize it as a past transaction. *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Coles v. Trecothick*, 9 Ves. 234, 280. But either the letter or the writing it refers to must contain the terms of the agreement; and it is not sufficient that they merely recognize that there was some agreement. *Clark v. Wright*, 1 Atk. 12; *Rose v. Cunningham*, 11 Ves. 93*] 560; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. And there must be such a reference in the letter or other paper signed, to the one containing the contract, as to show the letter to be the contract referred to, without the interposition of parol evidence, except merely as to the identity of the paper. *Brodie v. St. Paul*, 1 Ves., Jun., 383; *Boydell v. Drummond*, 11 East, 142; *Clinan v. Cooke*, 1 Scho. & Lefr. 22. Nor can parol testimony be admitted to contradict, add to, or substantially vary the note or memorandum of the bargain. *Blinded v. Coleman*, Bunb. 65; *Panteric v. Powlet*, 2 Atk. 283; *Meres v. Ansell*, 3 Wils. 275; *Preston v. Mercan*, 2 W. Bl. 1249; *Wain v. Wallers*, 5 East, 10; *Rich v. Jackson*, 4 Bro. Ch. Cas. 514; *Brodie v. St. Paul*, 1 Ves., Jun., 383; *Powell v. Edmunds*, 12 East, 6; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. But parol evidence is admissible with respect to the time, or other circumstances of delivery, which, though not essential parts of the contract, are frequently expressed in the memorandum, yet may be varied by parol testimony of a subsequent agreement. *Warren v. Stagg*, cited, 3 T. R. 501; *Cuff v. Penn*, 1 Maule & Selw. 21; *Keating v. Price*, 1 Johns. Cas. 22. So, also, by the French law (which requires certain contracts to be in writing), it is held that in a case where it becomes necessary to show the place where the bargain was made, it is not being expressed in the written memorandum, parol evidence of that fact is admissible: "le lieu et le temps auquel un marché est fait n'étant que des circonstances extérieures de la convention contenue dans l'acte." *Pothier, des Oblig.* No. 761. But *Pothier* observes, "Cette décision souffre difficulté." 1b. Where, however, a court of equity is called upon to decree a specific performance, the party sought to be charged may prove that, by reason of fraud, surprise, or mistake, the written instrument does not correctly express the contract; or, that after signing the written instrument, he made a verbal contract varying the former, provided the variation has been acted upon, so that the original contract can no longer be enforced without fraud upon the defendant. *Clinan v. Cooke*, 1 Scho. & Wheat. 4.

Lefr. 20; Clarke v. Grant, 14 Ves. 524; *Joynes v. Statham*, 3 Atk. 388; *Marquis v. Townsend*, 5 Stangeroom, 6 Ves. 328; **Woolam v. Hearn*, 7 Ves. *294 211. As, however, the Court of Chancery in England does not, except in some peculiar cases, enforce the specific performance of agreements relative to personal chattels (*Wile ante*, Vol. I., p. 154, note a), it is conceived that fraud would not take a case of the sale of goods out of the statute. Fraud will, undoubtedly, vitiate any agreement, whether required by the statute to be in writing or not; but in the case of the sale of goods, there is no instance either at law or in equity, where fraud has been admitted as a ground for setting up a contract not in writing, or to vary the terms of a contract as expressed in the written memorandum.

And signed, &c.—The agreement or memorandum need only be signed by that party who is sought to be charged. *Hatton v. Gray*, 2 Johns. Ch. Cas. 164; *Allen v. Bennett*, 3 Taunt. 169; *Fowler v. Freeman*, 9 Ves. 351; *Seton v. Slade*, 7 Ves. 265; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Cotton v. Lee*, cited, 2 Bro. Ch. Cas. 564; *Ballard v. Walker*, 8 Johns. Cas. 60; *Lawrenson v. Butler*, 1 Scho. & Lefr. 13. In this last case, Lord Redesdale expresses doubts as to those cases in equity where nothing has been done in pursuance of the agreement. But those doubts have not been adopted by other judges of equity. *Western v. Russell*, 3 Ves. & Beames, 192; *Ormond v. Anderson*, 2 Hall & Beatty, 370. Several of these cases arose upon contracts respecting the sale of lands under the 4th section of the statute, where the words are, "signed by the party to be charged therewith;" whereas, the words are in the 17th section, "signed by the parties to be charged therewith." However, no distinction has been taken between the two sections as to this point; and in several cases on the 17th section, the objection that it was not signed by both parties has been expressly overruled. *Allen v. Bennet*, 3 Taunt. 169; *Egerton v. Mathews*, 6 East, 307; *Champion v. Plummer*, 4 Bos. & Pull. 252; *Schneider v. Norris*, 2 Maule & Selw. 286; *Roget v. Merritt*, 2 Caines's Rep. 117; *Bailey v. Ogden*, 3 Johns. Rep. 399. As to what is a sufficient signing, it is settled, that if the name of the party to be charged appears in the note or memorandum, and is applicable to the whole substance of the writing, and is put there by him, or by his authority, it is immaterial in what part of the instrument *95 the name appears, whether at the top, in the middle, or at the bottom. It should, however, appear, that it was a complete agreement or instrument, not merely the sketch of one, and unfinished in its terms. *Fell on Guaranties*, ch. 4, p. 69, pl. 3; *Knight v. Crockford*, Esp. N. P. R. 190; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Welford v. Beazley*, 3 Atk. 538; *Stokes v. Moore*, 1 P. Wms. 171, note; *Lemaine v. Stanley*, 2 Bos. & Pull. 238; *Coles v. Trecothick*, 9 Ves. 239; *Morrison v. Tumour*, 18 Ves. 175; *Clason v. Bailey*, 14 Johns. Rep. 484. Making a mark is a signing. *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, 1b. 504; *Wright v. Wakeford*, 17 Ves. 454. And, *quære*, whether, if a party be in the habit of print-

delictum is not purged by the termination of the voyage.

Any citizen may seize any property forfeited to the use of the government, either by the municipal law or as prize of war, in order to enforce the forfeiture; and it depends upon the government whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.

A PPEAL from the Circuit Court of Rhode Island.

This cause was argued by *Mr. D. B. Ogden* for 101*] *the appellant and claimant,¹ and by the *Attorney-General* for the United States.²

STORY, *J.*, delivered the opinion of the court:
This is the case of an American ship which

1.—He cited *The Nelly*, note to *The Hoop*, 1 Rob. 219; *The Two Friends*, 1 Rob. 283; *The Thomas Gibbons*, 8 Cranch, 421, to show that the vessel could not be seized as prize after her arrival in port, nor by a non-commissioned seizer.

2.—He cited the *Ariadne*, 2 Wheat. 143.

ing, instead of writing his name, the insertion of his name in print in a bill of parcels, is not of itself a signing within the statute. *Saunderson v. Jackson*, 2 Bos. & Pull. 238. But at all events, if in a bill of parcels printed with the name of the vendor, he inserts the name of the vendee, this is a sufficient signing and recognition of the printed signature to bind the vendor. *Schneider v. Norris*, 2 Maule & Selw. 286. And, *quære*, whether sealing, in the presence of a witness who attests it, is equivalent to a signing within the statute. *Lemaine v. Stanley*, 3 Levinz, 1; 1 Roll. Abr. 245, s. 25. Sealing without signing would certainly not be a good signature within the statute of wills. *Wright v. Wakeford*, 17 Ves. 454; *Ellis v. Smith*, 1 Ves., Jun., 11.

By the parties to be charged by the contract, &c.—The word party or parties to the contract is not to be construed party, as to a deed, but person in general. *Welford v. Beazley*, 3 Atk. 508; S. C. 1 Ves. 6. Therefore, where a party, or principal, or person, to be charged, signs as a witness, he shall be bound. This, however, is true only where such person is consensual of the contents of the agreement, and it would be a fraud on the other party not to be bound by it. *Welford v. Beazley*, 3 Atk. 503; S. C. 1 Ves. 6; *Coles v. Trecothick*, 9 Ves. 234. And if a person properly authorized as an agent to sign an agreement, sign it as a witness, it is sufficient to bind his principal, if it appear that he knew the contents of the instrument and signed it, recognizing it as an agreement binding on his principal, as if he say, "witness A. B., agent for the sellers," and the paper be signed by the purchaser or his agent. *Coles v. Trecothick*, 9 Ves. 234. Lord Eldon, indeed, in this case, collects the doctrine to be, that where either the party himself or his agent ascertains the agreement by a signature, not in the body of the instrument, but in the form of an addition to it, that signature, though not a signing as an agreement, yet sufficiently ascertains the agreement, and is sufficient within the statute of frauds. *Ibid.*

Or their agents thereunto lawfully authorized.—The agent who is authorized to sign, need not be constituted by writing. *Rucker v. Camayer*, Esp. N. P. R. 105; *Coles v. Trecothick*, 9 Ves. 230; *Laurenson v. Butler*, 1 Scho. & Lefr. 13; *Merritt v. Clason*, 12 Johns. Rep. 102. As to who is an agent lawfully authorized, it has been held, that a broker employed by one person to sell goods, who agrees with another person for the sale of them, and makes out and signs a sale note (containing the substance of the contract), and delivers one to each party, is a sufficient agent for both parties. *Rucker v. Camayer*, Esp. N. P. R. 105. And where a broker had been employed by one party to sell, and by another to buy goods, and had entered and signed the terms of the contract in his book, it was determined that such entry and signature was a contract binding upon both parties; although one of them, upon having a bought note sent to him, which was a copy of the contract, immediately objected to the terms, and returned the note. *Hayman v. Neale*, 2 Camp. N. P. R. 337. An auctioneer who writes down the

sailed from Charleston, S. C., with a cargo of rice, bound to Lisbon, about the 28th of May, 1813, under the protection of a British license. In the course of the voyage the ship was captured by a British frigate, and sent into Bermuda for adjudication. Upon trial she was acquitted, and her cargo being prohibited from exportation, was afterwards sold by the agent of the claimant at Bermuda and the proceeds were remitted for his use. The ship sailed from Bermuda for the United States, in November, 1813, and upon her arrival at Newport, in Rhode Island, was seized by the collector of that port as forfeited to the United States. The libel contains four articles propounding the causes of forfeiture; first, for the ship's having on board, and using a British license; second, for the ship's being engaged in trade with the enemy; and thirdly and fourthly, for using a British license contrary to the act of Congress of the 2d of August, 1813, ch. 56, prohibiting the use of British licenses.

name of the purchaser at a public sale, has also been considered the agent of both parties. No doubt ever could be, whether he was the agent of the vendor, for that was quite clear: and the cases turn on the point whether he is also the agent of the purchaser; and it is settled in the affirmative. *Simon v. Motivos* (or *Motivier*), 3 Burr. 1221; 1 W. Bl. 599; *Bull N. P.* 290; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Hinde v. Whitehouse*, 7 East, 558. Independently of the circumstance of the auctioneer being considered as a sufficient agent of both parties, and his writing down the name of the purchaser [*97 as a sufficient memorandum and signature, it has been sometimes said that sales at auction are not within the statute of frauds, on account of the peculiar solemnity of that mode of sale precluding the danger of perjury. Per Lord Mansfield and Justice Willmot in *Simon v. Motivos*, 1 W. Bl. 599. But this idea is repudiated by Lord Ellenborough, in *Hinde v. Whitehouse*, 7 East, 558, though he does not question the principle that the auctioneer is to be considered as the agent of both parties, and his memorandum as a sufficient note in writing; but only denies that auctions, abstractedly considered, are not within the statute. *Ib.* 572. There is some slight difference in the phraseology of the 4th and 17th sections of the statutes, which has been made the ground of a supposed distinction, in this respect, between the sale of lands (which is included in the 4th section), and the sale of goods in the 17th. The *vis prius* case of *Symonds v. Bull*, 8 T. R. 151, and *Walker v. Constable*, 1 Bos. & Pull. 303, seem to inculcate the doctrine that the auctioneer writing down the name of the purchaser is not sufficient to satisfy the statute in a sale of lands. *Buckmaster v. Harrop*, 7 Ves. 341. Lord Eldon, however, has questioned the authority of these cases in *Coles v. Trecothick*, 9 Ves. 249. And in *White v. Proctor*, 4 Taunt. 208, it was expressly held, that an auctioneer is, by implication, an agent duly authorized to sign a contract for lands on behalf of the highest bidder. *S. P.* *Emmerson v. Heells*, 2 Taunt. 28. And that his writing down his name in the auction book is a sufficient signature to satisfy the statute of frauds. *Id.* And whether the first-mentioned cases are to be considered as law, or not, in respect to a sale of lands, there can be no doubt that in a sale of goods, the auctioneer writing down the name of the purchaser, is a signing by an authorized agent of the parties. But the agent must be some third person, and one of the contracting parties cannot be agent for the other. As where the plaintiff made a note of the bargain, and the defendant overlooking him while he was writing it, desired him to make an alteration in the price, which he accordingly did. It was contended, that the defendant, who was the party sought to be charged, had made the plaintiff his agent, for the purpose of signing the memorandum. But Lord Ellenborough was of opinion that the agent must be some third person, and could not be either of the contracting parties; and, therefore, consulted the plaintiff. *Wright v. Danah*, 2 Camp. N. P. R. 203. See also *Bailey v. Ogden*, 3 Johns. Rep. 399.

It is unnecessary to consider the two last articles [*102] which are founded upon statutory prohibitions, because, it is clear that the two preceding articles, founded on the general law of prize, are sufficient to justify a condemnation *jure belli*, the proof of the facts being most clearly established.

The only questions which can arise in the case are whether the ship was liable to seizure for the asserted forfeiture, after her arrival in port; and, if so, whether the collector had authority to make the seizure. And we are clearly of opinion in favor of the United States on both points. It is not necessary, to enable the government to enforce condemnation in this case, that there should be a capture on the high seas. By the general law of war, every American ship sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. If captured on the high seas, by a commissioned vessel, the property may be condemned to the captors as enemy's property; if captured by an uncommissioned ship, the capture is still valid, and the property must be condemned to the United States. But the right of the government to the forfeiture is not founded on the capture; it arises from its general authority to seize all enemies' property coming into our ports during war; and also from its authority to enforce a forfeiture against its own citizens, whenever the property comes within its reach. If, indeed, the mere arrival in port would purge away the forfeiture, it would afford the utmost impunity to persons engaged in illegal traffic during war, for in most instances the government would [*103] have no means of ascertaining the offense until after such arrival.

In respect to the other point, it is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command.

Decree affirmed with costs.

[PRIZE.]

THE LANGDON CHEVES.

LAMB, Claimant.

A question of fact upon a seizure in port, as a droit of admiralty, for trading with the enemy, and using his license. The circumstance of the vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, held to raise a violent presumption that she had a license, which the claimant not having repelled by explanatory evidence, condemnation was pronounced.

APPEAL from the Circuit Court of Rhode Island.
Wheat. 4.

This cause was argued by Mr. Hunter and Mr. *Wheaton for the appellant and [*104 claimant, and by the Attorney-General for the United States.

STORY, J., delivered the opinion of the court: This case differs in no essential respect from that of *The Caledonian*. The brig sailed from the United States on a voyage to Lisbon, with a cargo of provisions, in May, 1813, and was captured by a British sloop of war and sent into Bermuda, where she was either not proceeded against as prize, or was acquitted on trial; and after a detention of about six weeks, was permitted to resume her original voyage; and on the return voyage from Lisbon, with a cargo of salt, was, on her arrival at Newport, on the 16th of December, 1813, seized by the collector of that port, as forfeited to the United States *jure belli*, for using a British license and trading with the enemy.

There is no positive proof that the brig had a British license on board; but, we think, that under the circumstances, there arises a violent presumption that she had such a license, and that the burthen of proof to repel this presumption rests on the claimant. He has not attempted this in the slightest degree, there being a total absence of all evidence in his favor; and, therefore, as the case remains with all its original imperfections, the decree of the Circuit Court is affirmed with costs.

Decree affirmed with costs.

[PRIZE.]

[*105

THE FRIENDSCHAFT.

MOREIRA, Claimant.

The property of a house of trade established in the enemy's country is condemnable, as prize, whatever may be the personal domicile of the partners.

APPEAL from the Circuit Court of North Carolina.

The shipment in this case was made on the 31st of March, 1814, at London, by the house of trade of Moreira, Vieira & Machado, of that city, on account and risk of the house, to Mr. Moreira, one of the partners, who was a native of, and domiciled at Lisbon, in the kingdom of Portugal. The shares of the two partners, Messrs. Vieira and Machado, who were domiciled at London, were condemned as prize of war in the court below, without appeal. The share of Mr. Moreira, the partner domiciled at Lisbon, was condemned in the court below; but the claimant was allowed to make further proof to be offered to this court, and to be admitted or rejected in the discretion of the court, as to his proprietary interest and connection with the house of trade in the enemy's country. On the production of the further proof, the proprietary

1.—They cited *The Imina*, 3 Rob. 167; *The Lisette*, 8 Rob. 387. *The Joseph*, 8 Cranch, 451, to show that the *delictum* of contraband, of trading with the enemy, and navigating under his license, are all purged by the termination of the voyage.

interest of Mr. Moreira in one-third part of the goods was clearly proved, and also the fact of his personal domicile at Lisbon.

Mr. Hopkinson, for the claimant, relied upon this evidence as sufficient to show that the claimant was entitled to restitution of his share, on account of his personal domicile, notwithstanding **106***] his being a partner *in the house of trade established in the enemy's country.

Mr. D. B. Ogden and *Mr. Wheaton*, contra, insisted, that the shipment being made by a house of trade established in the enemy's country, for the account and risk of that house, the neutral domicile of one of the partners would not avail to save his share from condemnation as prize.¹ In the British tribunals, this principle is recognized by the highest authority known to the prize law, that of the Lords of Appeal, and if it be material (as it seems to have been intimated by this court²), to distinguish whether the decision was pronounced before or since our independence, the *onus* is thrown upon the claimant to show that the case of *Mr. Coopman*, decided in 1798, was determined contrary to former practice, or former precedents. It does, indeed, appear that an erroneous notion had been adopted by some persons, that the domicile of the party was all that the prize court had a right to consider. But in *Coopman's* case, that motion was exploded by the lords, and the true principle on which the cases from which it had been imbibed were determined, was explained as applying to cases merely at the commencement of a war; whilst the rule, applicable to a neutral partner entering into a house of trade in the enemy's country during the war, **107***] or continuing that connection after *a declaration of war, is developed, not as a new rule then for the first time prescribed, but as the application of an anciently-established principle.³

STORY, J., delivered the opinion of the court: The shipment in this case was made by Moreira, Vieira & Machado, a house of trade established in London, on the account of the house, to Moreira, one of the partners in the house, who was a native of, and domiciled in, Lisbon, in the kingdom of Portugal; and the only question is, whether the share of Moreira in the shipment is exempted from condemnation by reason of his neutral domicile. It has been long since decided in the courts of admiralty that the property of a house of trade established in the enemy's country, is condemnable as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company. The rule, then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new.

Decree affirmed with costs.

See 3 Wheat. 14.
Cited—3 Wall. 233; 1 Dill. 384.

1.—The *Nancy*, claim of Mr. Coopman, cited in *The Vigilantia*, 1 Rob. 14, 15; *The Susa*, 2 Rob. 256; *The Indiana*, cited in the *Portland*, 3 Rob. 44.

2.—9 Cranch, 108.

3.—1 Rob. 12, 14, 15.

*[CHANCERY.]

[*108

THE UNITED STATES

v.
HOWLAND & ALLEN.

The Circuit Court has jurisdiction, on a bill in equity filed by the United States against the debtor of their debtor, they claiming a priority under the act of 1799, c. 128, s. 65, notwithstanding the local law of the state where the suit is brought allows a creditor to proceed against the debtor of his debtor, by a peculiar process at law.

The circuit courts of the Union have chancery jurisdiction in every state; they have the same chancery powers and the same rules of decision in all the states.

The United States are not entitled to priority over other creditors, under the act of 1799, c. 128, s. 65, upon the ground of the debtor having made an assignment for the benefit of creditors, unless it is proved that the debtor has made an assignment of all his property.

Where the deed of assignment conveys only the property mentioned in the schedule annexed, and the schedule does not purport to contain all the property of the party who made it, the *onus probandi* is thrown on the United States to show that the assignment embraced all the property of the debtor.

Upon a bill filed by the United States, proceeding as ordinary creditors against the debtor of their debtor for an account, &c., the original debtor to the United States ought to be made a party, and the account taken between him and his debtor.

APPEAL from the Circuit Court of Massachusetts.

This was a bill in equity filed in the name of the United States, in the court below, stating that several judgments had been obtained by the United States on duty bonds, against Shoemaker & Travers, and Jacob Shoemaker and their sureties, amounting to the sum of \$5,292; which judgments were obtained in the District Court of Pennsylvania, at the February term of 1808, and upon which executions *had [*109 issued, which remained in the marshal's hands unsatisfied; that after the execution of the duty bonds, but before they were payable, to wit, on the 6th of December, 1806, Shoemaker & Travers became insolvent within the true intent and meaning of the act "to regulate the collection of duties on imports and tonnage;" that on the first of February, 1808, goods, effects, money and credit of Shoemaker & Travers, to the amount of \$6,000, had come to the hands of Howland & Allen, which, the bill alleged, they refused to subject to the executions of the United States; it prayed, that they might be compelled to account for, and deliver up, these goods, &c., in satisfaction of the claim of the United States, and for an injunction in the meantime to restrain them from disposing of, paying away, or in any manner applying the goods, &c., aforesaid, to any other object. The injunction was, accordingly, awarded. An amendment to the bill stated, that after the debts to the United States accrued by bond as aforesaid, and after Shoemaker & Travers had become insolvent, to wit, on the 6th day of December, 1806, they made a voluntary assignment by deed, of all their property, for the benefit of their creditors, within the true intent and meaning of the act of Congress aforesaid, and an ex-

See note to *Prince v. Bartlett*, 8 Cranch, 431.

NOTE.—See note to *Thelasson v. Smith*, 2 Wheat. 396.

emphiled copy of the deed of assignment was annexed to the amended bill. The deed recited, that the parties being justly indebted to divers persons, whose names are mentioned in a list thereto annexed, and unable at present to pay the said debts, they assign to trustees therein [*110*] mentioned, *all and singular, the estate and effects contained in a schedule annexed, in trust, to pay the debts due the enumerated creditors, and first, that due to the United States. The schedule was entitled "Schedule of property assigned by Shoemaker & Travers, and Jacob Shoemaker, to the creditors of Shoemaker & Travers," and contained many items of property, and among others, the proceeds of the cargo of the brig Deborah, which vessel was then at sea, and belonging to Howland & Allen, but had been chartered by Shoemaker & Travers. Howland & Allen, by their answer, admitted the receipt, on the 1st of January, 1807, of 4,000 Spanish dollars, the property of Shoemaker & Travers, and which the master of the Deborah had received in Guadaloupe for Shoemaker & Travers; but insisted on their right to apply it to an unliquidated debt of greater amount (composed of freight, demurrage, damages, &c., the particulars of which are detailed by the answer) due, as alleged, from Shoemaker & Travers to them, and applied by an entry in their books, to the credit of Shoemaker & Travers, at the time of the receipt of the money aforesaid. They insisted, therefore, on the right of retaining it. To this answer there was a general replication, and the depositions of several witnesses were taken.

The court below decreed, that the said Shoemaker & Travers were, and are, indebted to the United States, and that they became insolvent, and made an assignment as alleged in the bill, and that there was an outstanding unsettled demand existing in their favor, at the time [*111*] of their insolvency, against the *defendants, arising from the voyage of the brigantine Deborah, and which is still unsettled and unpaid, but the court is not satisfied that the defendants, being merely debtors to said insolvents, are by law liable to this process, and thereupon decree that the said bill be dismissed. From this decree the present appeal was taken.

The *Attorney-General*, for the appellants, argued: 1. That the prior right of the United States attached to all the property of Shoemaker & Travers, on the 6th of December, 1806, the time of their insolvency, and the date of the deed of assignment from them. It is immaterial whether the priority of the United States, in any case, be asserted under the act of 1797, c. 368, s. 5, or under that of 1799, c. 128, s. 65. The decisions, as to this point, under the one statute, are applicable to the other. It is insisted that this is one of the cases specified by Congress, in which the debts due to the United States are to be first satisfied; a case in which the debtor, not having sufficient property to pay all his debts, has made a voluntary assignment thereof, for the benefit of his creditors. This is the allegation of the bill, and it is supported by the deed itself. Although the granting clause does not literally express it to include all the property of the debtors, yet the clause which gives the power to sell, by using the words "all the property of them, the said

Shoemaker & Travers, and Jacob Shoemaker," clearly shows that the assignment was intended to convey all their property. The very objects of the deed, as set forth in the recital, *aids this construction. 2. If, then, [*112*] the priority of the United States has attached, a court of equity is the proper forum in which it should be asserted. A trust exists, and an account is to be taken. The Court of Chancery is the only tribunal that can enforce the trust, and take the account, having also the power of calling all the parties before it. Nor are the chancery powers of the Circuit Court at all affected by the statute of Massachusetts of 1794, c. 64, giving a peculiar process, in the nature of a foreign attachment, by which the creditor may attach in the hands of the debtor of his debtor. The powers and practice of the circuit courts, in chancery cases, are not to be controlled by the local laws of the states where those courts sit. They are the same throughout the Union. 3. But even supposing that the United States have no priority in this case; they are, on the common footing of ordinary creditors, entitled to an account against Howland & Allen, and to the payment of any sum which, on a settlement of such account, may be found due from them to Shoemaker & Travers.

Jones, contra, insisted: 1. That the act of Congress only extended to executors and administrators, or to assignees, but not to the debtors of the debtors of the United States. A court of equity cannot have power to settle an account in this way, without some statutory provision to authorize the proceeding. The act of Congress gives no such authority. Shoemaker & Travers are not made parties to the bill, and a decree between the United States and the present *defendants, would not [*113*] bind in a suit between the defendants and Shoemaker & Travers. Nor is it too late, in the Appellate Court, to take advantage of the want of parties.¹ 2. The cases are uniform, that in order to enable the priority of the United States to attach upon this ground, the assignment must be of all the debtor's property.² There is here no evidence, either in the deed or in the depositions, that this assignment embraced all the property of Shoemaker & Travers. The power to sell all the property cannot be construed to enlarge the granting clause, which merely refers to the property mentioned in the schedule annexed to the deed. The defendants claim a balance from Shoemaker & Travers, and the right to apply the money received to the liquidation of that balance. They had acquired a special lien upon the money for the payment of this balance, long before the alleged act of insolvency. The court has repeatedly determined, that if before the right of preference to the United States has accrued, the debtor has made a *bona fide* conveyance of his estate, or has mortgaged it, to secure a debt, the property is divested out of the debtor and cannot be made liable to the claim of the United States.³ The spirit of

1.—*Russell v. Clarke's Executors*, 7 Cranch, 98.

2.—*United States v. Fisher*, 2 Cranch, 356; *United States v. Hooe*, 3 Cranch, 73.

3.—*United States v. Fisher*, 2 Cranch, 390; *United States v. Hooe*, 3 Cranch, 90.

these decisions is, that any *bona fide* lien will be protected, and not merely an actual mortgage or hypothecation. All specific liens are [114*] highly favored *by the law; such as that of a factor who has advanced his money on the credit of the goods, or a ship-owner, who, having let out his ship for their transportation, has a right to the same security. It is true that the court has said that the lien of a judgment creditor shall not be protected as against the prior right of the United States. But that is upon the ground that the judgment is a mere general lien, not affecting the *jus disponendi* of the owner of the property, nor vesting any specific interest in the creditor.

MARSHALL, *Ch. J.*, delivered the opinion of the court: The bill in this case was filed by the United States in the Circuit Court for the District of Massachusetts, to recover from the defendants a sum of money in their hands, alleged to be the money of Jacob Shoemaker and Charles R. Travers, merchants and partners, who are stated to be insolvents, and to be indebted to the United States for duties.

It appears that Shoemaker & Travers, on the 6th day of December, 1806, executed an indenture, in which, reciting that they are justly indebted to divers persons, whose names are expressed in a list thereto annexed, and are unable at present to pay the said debts, they assign to trustees therein mentioned all and singular the estate and effects contained in a schedule annexed, in trust, to pay the debt due to the enumerated creditors, and first that due to the United States. The schedule contains many items of property, and among others the [115*] proceeds of the *cargo of the Deborah, then at sea. The Deborah was the property of Howland & Allen; and on her coming into port, her captain delivered to her owners a sum of money which he had received in Guadalupe for Shoemaker & Travers, and which is in the schedule annexed to the deed of assignment already mentioned. At the hearing the Circuit Court dismissed the bill, in the opinion that it was not sustainable. From this decree the United States have appealed to this court, and now insist,

1. That it is a case in which a court of equity has jurisdiction.

2. That the United States are entitled to priority, this being a case within the provisions of the act of Congress.

On the first point no difficulty would be found, had the proper parties been before the court. A trust exists, and an account would be proper, to ascertain the sum due from Howland & Allen to Shoemaker & Travers. The case, even independent of these circumstances, would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor. Still the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there, in such cases, ascertained with more certainty and facility; and as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states.

*This being a case of which a court [*116 of chancery may take jurisdiction, we are next to inquire whether it is one in which the United States are entitled to priority.

This depends on the fact whether the deed of assignment executed by Shoemaker & Travers was a conveyance of all their property. The words of the deed, after reciting the motives which led to it, and the consideration, are "have granted, &c., and by these presents, do grant," &c., "all and singular the estate and effects, which is contained in the schedule hereto annexed, marked A." The caption of the schedule is, "schedule of property assigned by Shoemaker & Travers, and Jacob Shoemaker, to the creditors of Shoemaker & Travers."

The deed then conveys only the property contained in the schedule, and the schedule does not purport to contain all the property of the parties who made it. In such a case, the presumption must be that there is property not contained in the deed, unless the contrary appears. The *onus probandi* is thrown on the United States.

It is contended for the United States, that the clause which gives the power to sell, by using the words "all the property of them, the said Shoemaker & Travers, and Jacob Shoemaker," indicate clearly that this deed does convey all their property. But these words are explained and limited by those which follow, so as to show that the word "all" is used in reference to the schedule, and means all the property in the schedule. The depositions do not aid the deed. The question, whether the whole *property is assigned, is still left [*117 to conjecture, and this being the fact on which the preference of the United States is founded, ought to be proved. Not being proved, the court is of opinion that this is not a case in which it can be claimed.

But the United States are the creditors of Shoemaker & Travers, and have a right as creditors to proceed against their property in the hands of Howland & Allen. They have a right to so much of that property as remains after the debt due to Howland & Allen shall be satisfied. But to ascertain this amount, an account between Howland & Allen and the debtors of the United States should be taken, and the persons against whom the account is to be taken should be parties to the suit. Although, if they cannot be found within the District of Massachusetts, the process of the court cannot reach them, still they may appear without coercion. At any rate, an account ought to be taken, since the matter controverted between the parties is more proper to be stated by a master than to be decided in court without such report.

The decree is to be reversed, and the cause remanded, with directions to allow the plaintiffs to amend the bill and make new parties. The United States will, of course, be at liberty to take testimony, showing the assignment to be of all the property of the parties who made it.¹

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Massachusetts, and was

1.—Justice Story did not sit in the court below in this cause.

118*] argued by counsel. *On consideration whereof, this court is of opinion that the Circuit Court erred in dismissing the bill of the plaintiffs, and at their decree ought to be reversed, and it is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to allow the plaintiffs to amend their bill and make new parties.¹

Cited—4 Pet. 656; 9 Pet. 656, 657; 5 How. 316; 12 How. 148; 13 How. 272; 20 How. 563; 21 How. 502, 604; 7 Wall. 430; McAll. 363, 444; 2 Wood. & M. 31, 82, 33, 40; 2 Sumn. 431; 3 Sumn. 352; 1 Cliff. 231; 2 Brock. 526; Deady, 364; 2 Mason, 270; 5 Mason. 105, 284; Bald. 411, 416, 559; 1 Blatchf. 488; 2 Story, 567; 3 Story, 81; 4 Wash. 356; 1 Abb. U. S. 305.

122*] *[CONSTITUTIONAL LAW]

STURGES v. CROWNINSHIELD.

Since the adoption of the constitution of the United States, a state has authority to pass a bank-

1.—The act of March 3, 1797, c. 368, entitled, "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money," declares (s. 5): "That where any revenue officer or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The collection act of March 2, 1799, ch. 123, s. 65, provides, that "in all cases of insolvency, or where any estate in the hands of executors, administrators, or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall become answerable, in their own person or estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof;" and, "That if the principal in any bond which shall

be given to the United States for duties on goods, wares or merchandise imported, or other [*119] penalty, either by himself, his factor, agent, or other person, for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators, or assignees, shall be insufficient for the payment of his or her debts, and if, in either of the said cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators, or assignees, shall have and enjoy the like advantage, priority, or preference, for the recovery and receipt of said moneys, out of the estate and effects of such insolvent, or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds, in law or equity, in his, her, or their own name, or names, for the recovery of all moneys paid thereon. And the cases of insolvency mentioned in this section shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor, shall have been attached by process of law, as to cases in which a legal act of bankruptcy shall have been committed."

The act of the legislature of the state of New York, passed on the 3d of April, 1811, (which not only liberates the person of the debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes), so far as it attempts to discharge the contract, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, and is not a good plea in bar of an action brought upon such contract.

THIS was an action of *assumpsit* brought in the Circuit Court of Massachusetts, against the defendant as the maker of two promissory notes, both dated at New York, on the 22d of March, 1811, for the sum of \$771.86 each, and payable to the plaintiff, one on the 1st of August, and the other on the 15th of August, 1811. The defendant pleaded his discharge under "An act for the benefit of insolvent debtors and their creditors," passed by the legislature of New York, the 8d day of April,

Under these acts the following points have been determined: 1. That the preference given to the United States by the act of 1797, ch. 368, s. 5, is not confined to revenue officers, and persons accountable for public money, but extends to debtors of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such laws. Ogden v. Saunders, 12 Wheat. 213; Adams v. Storey, 1 Paine, 97.

A contrary view to the doctrine of the above case of *Sturges v. Crowninshield*, was asserted in *Golden v. Prince*, 3 Wash. C. C. 313, and in *McLean v. Bank of Lafayette*, 3 McLean, 185.

It makes no difference whether the state law was passed before or after a debt contracted. *McMillan v. McNeil*, post 209.

It makes no difference that a suit was brought in a state court, even though it was of the state of which both the parties were citizens, where the contract was made, and the discharge obtained, and where they resided until the suit was brought. The constitution of the U. S. is binding on all courts and all citizens. *Farm. & Mech. Bk. v. Smith*, 6 Wheat. 131.

A bankrupt or insolvent law of any state, which discharges both the persons of the debtor and his

NOTE.—The right to imprison constitutes no part of the contract, and a discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects. This was clearly settled by this court in the above case of *Sturges v. Crowninshield*, 4 Wheat. 200, and *Mason v. Halle*, 12 Wheat. 370; *Beers v. Houghton*, 9 Pet. 359. To the same effect is *Mundy v. Monroe*, 1 Mich. 70, and *Woodhull v. Wagner*, Baldw. 300.

The authority of *Sturges v. Crowninshield*, *supra*, as to the validity of the state bankrupt or insolvent law, has never been successfully questioned. *Baldwin v. Hale*, 1 Wall. 223.

See the conflicting views on this subject analyzed and the doctrine of the case qualified in *Tonne v. Smith*, 1 Wood. & M. 115.

As to limits of state authority, see *Harlan v. People*, 1 Doug. (Mich.) 210.

Since the adoption of the U. S. constitution, the states have authority to pass bankrupt laws, provided such laws do not impair the obligation of

1811. After stating the provisions of the said act, the defendants plea averred his compliance with them, and that he was discharged, and a certificate given to him the fifteenth day of 123*] February, 1812. *To this plea there was a general demurrer and joinder. At the October term of the Circuit Court, 1817, the cause came on to be argued and heard on the said demurrer, and the following questions arose, to wit:

1. Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States.

2. Whether the act of New York, passed the third day of April, 1811, and stated in the plea in this case, is a bankrupt act, within the

meaning of the constitution of the United States.

3. Whether the act aforesaid is an act or law impairing the obligation of contracts, within the meaning of the constitution of the United States.

4. Whether the plea is a good and sufficient bar of the plaintiff's action.

And after hearing counsel upon the questions, the judges of the Circuit Court were opposed in opinion thereupon; and upon motion of the plaintiff's counsel, the questions were certified to the Supreme Court, for their final decision.

Mr. Daggett, for the plaintiff, argued. 1. That, since the adoption of the constitution, no state has authority to pass a bankrupt law, but that the power is exclusively vested in Congress. The 8th section of the 1st article of the constitution

the United States generally. *United States v. Fisher*, 2 Cranch, 358, 361, 365. And that the collection act of 1799, ch. 128, s. 65, does not repeal the 5th section of the act of 1797, ch. 368, though the 65th section of the collection act applies only to bonds taken for those duties on imports and tonnage, which are the objects of the act. *Ib.* 364. The United States are entitled to their preference on a debt due to them by the insolvent as indorser of a bill of exchange, as well as on any other debt. *The United States v. Fisher*, 2 Cranch, 358.

120*] 2. The acts do not create a lien, nor extend to a bona fide conveyance by the debtor to a third person in the ordinary course of business, or to a mortgage to secure a debt, or to a case where the debtor's property is seized under a *f. fa.* before the right of preference has accrued to the United States. *United States v. Fisher*, 2 Cranch, 360; *United States v. Hooe*, 3 Cranch, 73, 90; *Thelussion v. Smith*, *ante*, Vol. II., p. 396, 424. But the United States are not precluded from asserting their priority, by a voluntary assignment made by the debtor, under such circumstances as would be a fraud on the bankrupt laws. *Harrison v. Sterry*, 5 Cranch, 289, 301. A mortgage of part of his property made by a collector of the customs to his surety in his official bond, to indemnify the surety thereon, and also to secure him from his existing and future indorsements for the mortgagee at the bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew at the time of taking the mortgage the mortgagee was indebted to the United States. *United States v. Hooe*, 3 Cranch, 73. The priority of the United States is not affected by an assignment under a commission of bankruptcy. *United States v. Fisher*, 2 Cranch, 358.

3. A mere state of insolvency or inability in a debtor of the United States to pay all his debts, gives no right of preference to the United States, unless it is accompanied by a voluntary assignment of his property for the benefit of his creditors; or, unless his estate and effects shall be attached as those of an absent, concealed, or absconding debtor; or, unless he has committed some legal act of bankruptcy or insolvency. *United States v. Fisher*, 2

Cranch, 358; *United States v. Hooe*, 3 Cranch, 73; *Prince v. Bartlett*, 8 Cranch, 431; *Thelussion v. Smith*, *ante*, Vol. II., p. 396, 424. The priority is limited to some one of these particular cases when the debtor is living; but it takes effect generally, if he is dead. *United States v. Fisher*, 2 Cranch, 360. In this last cited case, *Marshall, Ch. J.*, intimated his own opinion, that it did not create a *devantail* in the administration of effects, and would require notice [*121] in order to bind the executor, or administrator, or assignee. *Ib.* 361, note a.

4. The assignment must be of all the debtor's property. *United States v. Hooe*, 3 Cranch, 73, 91. If, however, a trivial portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be allowed to avail themselves of such a contrivance. But where a bona fide conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the acts. *Ib.* 91.

5. The priority attaches at the time of the insolvency manifested in any of the modes specified in the acts, whether a suit has been commenced by the United States or not. *United States v. Fisher*, 2 Cranch, 356.

6. In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country, and although the United States had proved their debt under a commission of bankruptcy in this country and had voted for an assignee. The law of the place, where the contract is made, is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is to be expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. *Harrison v. Sterry*, 5 Cranch, 289, 298.

7. Though a judgment gives to a judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors, yet the acts defeat this preference in favor of the United States in the cases specified. *Thelussion v. Smith*, *ante*, Vol. II., p. 396, 423.

acquisitions of property, is not "a law impairing the obligations of contracts," so far as it respects debts contracted after the enactment of such law, in those cases, where the contract was made between citizens of the state under whose laws the discharge was granted, and the discharge is pleaded in the court of the same state. But the discharge under the state law is incompetent to discharge a debt due a citizen of another state. *Mather v. Bush*, 16 John. 233; *Ogden v. Saunders*, 12 Wheat. 213; *Hicks v. Hotchkiss*, 7 John. Ch. 297; *Sebring v. Mersereau*, 9 Cow. 344.

But such state statute is unconstitutional in its application to contracts made prior to the passage of the act, although made between citizens of the same state. *Roosevelt v. Cebra*, 17 John. 106; *Matter of Wendell*, 19 John. 153.

A bankrupt law, when enacted by the U. S., is exclusive of the state insolvent laws, and suspends their operation, as to persons afterwards insolvents, and the U. S. Court in which proceedings in bank-

ruptcy are pending, may enjoin proceedings in insolvency against the same debtor commenced in state court after the bankrupt law took effect. *Ex parte Earnes*, 2 Story, C. C. 323; 1 N. Y. Leg. Obs. 212; *Thornhill v. Bk. of La.* 3 Bank. Reg. 110; 5 Bank. Reg. 367; *Re Reynolds*, 9 Bank. Reg. 50.

Where jurisdiction has been acquired over a case by a state tribunal before the bankrupt law was in force, the bankrupt law has not a retroactive effect to invalidate the proceedings, legal when they took place, but the parties are entitled to proceed in the matter under the state law. *Ex parte Holmes*, 1 N. Y. Leg. Obs. 211.

A discharge of a bankrupt in a foreign country is not deemed here a bar to any action that may be brought. *Zaregor's case*, 1 N. Y. Leg. Obs. 40, note.

A decree of bankruptcy in a District Court of the U. S. cannot affect the title of the debtor to land without the U. S., although the territory in which the land lay was afterwards annexed to the U. S. *Oakey v. Bennett*, 11 How. 33.

Wheat. 4.

is wholly employed in giving powers to Congress. Those powers had hitherto been in the state legislatures or in the people. The people **124*** now thought fit to vest them in Congress. The effect of thus giving them to Congress may be fairly inferred from the language of the 10th article of the amendments to the constitution, which declares, that "the powers, not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The expression is in the disjunctive; not delegated nor prohibited. The inference is, therefore, fair, that if a power is delegated, or prohibited, it is not reserved. Every power given by the constitution, unless limited, is entire, exclusive, and supreme. The national authority over subjects placed under its control, is absolutely sovereign; and a sovereign power over the same subject cannot co-exist in two independent legislatures. Uniform laws on the subject of bankruptcies are contemplated in the constitution. The laws of the different states must be, of course, multiform; and, therefore, not warranted by the constitution. The same clause which provides for the establishment of uniform laws on the subject of bankruptcies, provides also for "a uniform rule of naturalization." In the first clause of the same section, it is declared, that "duties, imposts, and excises, shall be uniform throughout the United States;" and in the 9th section it is further declared, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." In the three last cases, it is admitted that Congress alone can legislate; and by the same reasoning, Congress only can make laws on the subject of bankruptcies. It is a national subject, and, therefore, the power over it is in the national **125*** government. Before the adoption of the constitution, partial laws were enacted by the states on the subject of foreign commerce, of the commerce between the states, of the circulating medium, and respecting the collection of debts. These laws had created great embarrassments, and seriously affected public and private credit. One strong reason for a national constitution was, that these alarming evils might be corrected. The constitution provides this remedy. It takes from the states the power of regulating commerce, the power of coining money, and of regulating its value, or the value of foreign coin. It prohibits, in terms, the issuing of paper money, the making anything but gold and silver a tender in the payment of debts. It provides for the establishment of national courts, extends the judicial power to controversies between citizens of different states, and between the citizens of the respective states and foreign subjects or citizens; and yet it is urged, that it leaves in the states the power of making laws on the subject of bankruptcies, whereby contracts may be destroyed. If the convention had intended that Congress and the state legislatures might legislate on this subject, we should expect to see the powers of these respective sovereignties expressed, and a definition of them, at least, attempted. We might expect this, because, in several cases in the constitution, it appears that this course had been pursued. Section 4, art. 1, sect. 8, art. 1, compared with sect. 2, art. 2, sect. 9, art. 1, Wheat. 4.

sect. 10, art. 1, sect. 1, art. 2, sect. 8, art. 4, and art. 5, furnish instances of power of this character. It is said ***that the powers [126** in question is not declared to be exclusive in Congress. We answer, nor is any power so declared, except that of legislating for the ten miles square, the seat of government. It is said, again, that the exercise of this power is not prohibited to the states. Nor is the power to provide for the punishment of piracy and other crimes committed on the high seas; nor of making a rule of naturalization; nor of the regulating the value of coin; nor of securing to authors and inventors the exclusive right to their writings and discoveries, prohibited. Yet who doubts that legislation by the states on those subjects is opposed to the spirit of the constitution? It is also objected that Congress are vested with the power of laying and collecting taxes; and yet, this power is rightfully exercised by the states. This is admitted, and we contend, that comparing the 8th and 10th sections of art. 1, there is a strong implication of a reservation of power, in this case, to the states. In the 8th section, granting powers to Congress, taxes, duties, imposts, and excises, are specified. In the 10th section, prohibiting the exercise of powers by the states, the word *taxes* is omitted, undoubtedly by design. Besides, there is no incompatibility in the exercise of this power by the two sovereignties; and we concede that, upon the true principles of the constitution, the powers not prohibited to the states, nor in their nature exclusive, still remain in the states. It will be argued that, if Congress declines to exercise the power of making laws on the subjects of bankruptcies, the states may exercise it. But we contend that the whole subject is entrusted ***to [127** the national legislature; and if it declines to establish a law, it is to be considered as a declaration, that it is unfit that such a law should exist; and much stronger is the inference, if, as in 1805, Congress repeal such a law. It will, perhaps, be asked, if this construction of the constitution be correct, how it is that so many states, since the adoption of the constitution, have passed laws on the subject of bankruptcies. On examination, it will appear that no acts, properly called bankrupt laws have been passed in more than four or five of the states. There are, indeed, insolvent laws by which the bodies of debtors, in one form or another, are exempted of imprisonment, in nearly all the states. Rhode Island had an act in existence, when the constitution was adopted, by which the debtor might, on application to the legislature, be discharged from his debts. In New York a law of the same character has been in operation since the year 1755, and also in Maryland, for a long period. In Pennsylvania, a bankrupt law operating only in the city and county of Philadelphia, existed for two or three years; and in Connecticut, the legislature has often granted a special act of bankruptcy on applications of individuals. But in all the other states, their laws on this subject have been framed with reference to the exemption of the body from imprisonment, and not to the discharge of the contract. In Massachusetts the idea has prevailed so extensively that the power of Congress is exclusive, that no bankrupt law was ever passed by the legislature of that

128*] state.¹ It cannot be denied *that if Congress exercise this power, the states are devested of it. But what species of power is this? Laws made by independent legislatures, expire by their own limitation, or are repealed by the authority which enacted them. Here, however, is a novel method of destroying laws. They are not repealed; do not cease by their own limitation; but are suspended by the interference of another independent legislature. It is difficult, upon this construction, to define this power of the states.

2. The act of the state of New York, pleaded in this cause, is a bankrupt law within the meaning of the constitution of the United States. By this law, on the application of any person imprisoned or prosecuted for a debt; or, on the application of any creditor of a debtor imprisoned, or against whom an execution against his goods and chattels hath been returned, [129*] ed *unsatisfied, he having sixty days' notice thereof, proceedings may be had before certain tribunals by the act established, whereby all his property may be taken and divided among his creditors, and he liberated from imprisonment, and discharged from all debts. It will be insisted, in support of the plea, that this law is an insolvent law. What is an insolvent law? Insolvent laws are derived from the *cessio bonorum* of the Roman law, and discharge the person, and not the future acquisitions of the debtor. A judgment, assignment, or cession, under that law, does not extinguish the right of action; it has no other effect than to release from imprisonment. A bankrupt law establishes a system for a complete discharge of insolvent debtors. An insolvent law is an act occasionally passed for the relief of the body of the debtor. A bankrupt law, as distinguished from an insolvent law, is a general law, by which all the property of the debtor is taken and divided among his creditors, and he discharged from his debts, and made, as it is sometimes said, a new man. But if this be not a bankrupt law, then it may remain in force if Congress should exercise its power. Would, then, the laws on the subject of bankruptcy be uniform? It is impossible to believe that the convention meditated such an absurdity. On this point the cases are numerous and strong. In *Golden v. Prince*,² the law of Pennsylvania, which was similar to that of New York, was treated, both by the bench and bar, as a bankrupt law. In *Blanchard v. Russell*,³ the statute now pleaded, was declared by the Supreme [130*] *Court of Massachusetts to be a bankrupt law. In *Smith v. Buchanan*,⁴ the law of Maryland was so considered by the English Court of K. B. In *Proctor v. Moore*,⁵ a special act of the legislature of Connecticut, is considered as a bankrupt law by the Supreme

Court of Massachusetts. In the case of *Blanchard v. Russell*, Chief Justice Parker says, speaking of the statute now in question: "The law under which the debtor claims to be discharged, is a general law, intended to affect all the citizens of the state of New York at least, and it provides a system by which an insolvent debtor may, upon his own application, or upon petition of any of his creditors, be holden to surrender all his property, and be discharged from all his debts. It is, therefore, a bankrupt law, and to be distinguished from insolvent laws, technically so called." But this is said not to be a bankrupt law, because such laws apply only to traders, and this embraces every debtor. The first English bankrupt statute, that of Henry VIII., c. 1, makes a general provision; and this is declared to be the foundation of the whole system. It is true, by various subsequent statutes, it was limited; but the construction now given to those statutes embraces various descriptions of persons, who are not merchants or traders. It is not, therefore, an essential feature of a law on the subject of bankruptcies that it should extend to traders only. It is further urged, that by the English bankrupt laws, an act of bankruptcy devests the debtor of his property, and the *pro- [131*] ceedings always originate with the creditor. By the 16th section of the law under consideration, the creditor may originate proceedings under certain circumstances; and all grants and dispositions of property made after a certain time are declared void. What constitutes this, and other similar laws, bankrupt laws, is, that thereby an absolute discharge of the body of the debtor and his future acquisitions of property is obtained. In this it differs from insolvent laws.

3. This act is a law impairing the obligation of contracts, and, therefore, unconstitutional and void. A contract is an agreement to do, or not to do, a particular thing. Its obligation binds the parties to do, or not to do, the thing agreed to be done, or not done, and in the manner stipulated. Whatever relieves either party from the performance of the contract in whole or in part, impairs its obligation. It is, however, said, that if the contract is made in the state where such law exists, the parties have reference to it, and it is a part of their contract. This is a *petitio principii*. If the act be unconstitutional and void, the parties regarded it as such, and, of course, did not look to it as binding. A law, declaring that debtors might be discharged on paying half the sum due, or that the creditor might recover double the sum due, are alike void; or else, all contracts are at the mercy of the legislature. Legislatures act within the limits of their powers, only when they establish laws to enable parties to enforce

1.—*Blanchard v. Russell*, 13 Mass. R. 1. "It has often been observed by those who advocated a bankrupt law in this commonwealth, with a view to the relief of an unfortunate class of debtors from existing embarrassments, that the object of the framers of the constitution, in this prohibition upon the states, was to prevent tender laws and other expedients of a like nature, which had been resorted to in some of the states, to the great prejudice of creditors; and that this article of the constitution ought to be construed with reference to such intention. But the words are too imperative to be evaded. 'No state shall emit bills of credit, make anything but gold and silver a tender in pay-

ment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' It would be contrary to all rules of construction to limit this latter clause of the constitution to a subject which is expressly prohibited in a preceding sentence. Full operation ought to be given to the words of an instrument so deliberately and cautiously made as was the constitution of the United States."

2.—5 Hall's Law. Journ. 502.

3.—13 Mass. Rep. 1.

4.—1 East, 6.

5.—1 Mass. Rep. 198.

contracts; laws to afford redress to the injured against negligence and fraud in not performing [132*] engagements; and *courts act within their proper sphere, when they confine themselves to the exposition of those contracts, and giving efficacy to the laws.

4. But even admitting this act to be constitutional as to all contracts made after it was passed, it was clearly unconstitutional and void as to all contracts then existing, as it was an act or law impairing their obligation. The first impression of any man, learned or unlearned, is, that a law which discharges a contract, without an entire performance of it, impairs its obligation. A law which declares that a bond given for the payment of \$1,000 may be cancelled, and the obligor freed from all liability to suit thereon, upon the payment of \$500, certainly materially affects the obligation of the contract, and impairs it. It will be urged, however, that though the words in the constitution are broad enough to include the case, yet they are to be construed according to the intent of the framers, and that the prohibition of such laws as that in question was not intended by the constitution. Surely, language here, as everywhere else, is to be understood according to its import. If, by a law impairing the obligation of contracts, we are not necessarily to understand a law relieving either of the contracting parties from the performance of any part, or the whole of the stipulations, into which he has entered, we ask for a definition of such law. In the case before the court, it appears that the defendant, in March, 1811, in New York, gave to the plaintiff his promissory note, payable in August, 1811, for \$771.86. In April, 1811, the law under consideration [133*] was *passed, and thereby the legislature of New York declare virtually, that if the defendant shall deliver up all his property for the benefit of all his creditors, and that property shall be sufficient to pay ever so small a proportion of his debts, the plaintiff shall never thereafter prosecute the defendant for the remaining sum, but that the contract shall be discharged. The language of the constitution expressly forbade the legislature from making such law. The prohibition is plain and unequivocal—needs no comment, and is susceptible of no misinterpretation. And why should we seek to affix any other than their natural meaning to the terms used? It is certainly a sound rule not to attempt an interpretation of that which is plain, and requires no interpretation. This is the rule in relation to treaties and public conventions;¹ and surely it is applicable to a constitution where every word and sentence was the subject of critical examination, and great deliberation. Nor is it admitted that the convention in their prohibition did not look directly to a law of this nature. It was notorious that the States had emitted paper money, and made it a tender; had compelled creditors to receive payment of debts due to them in various articles of property of inadequate value; had allowed debts to be paid by installments, and prohibited a recovery

of the interest. All these evils, so destructive of public and private faith, and so embarrassing to commerce, the convention intended, doubtless, to prevent in future. The language employed speaks only of paper *money [134 and tender laws, by a particular description. Was nothing else intended? Why, then, add the comprehensive words "or law impairing the obligation of contracts?" Its language, taken in connection with the subject, is equivalent to this declaration: "The state governments have abused their power. They shall no more interfere between debtor and creditor. They shall make no law whatsoever impairing the obligation of contracts." In *Golden v. Prince*,² and *Blanchard v. Russell*,³ already cited, the Circuit Court in Pennsylvania, and the Supreme Court of Massachusetts, expressly adopt this construction of the constitution. In the last case, Chief Justice Parker says: "A law made after the existence of a contract, which alters the terms of it by rendering it less beneficial to the creditor, or by defeating any of the terms which the parties had agreed upon, essentially impairs its obligation, and, for aught we see, is a direct violation of the constitution of the United States." The same doctrine is also recognized by the Supreme Court of Massachusetts in *Call v. Hagger*,⁴ by Mr. Justice (now Chancellor) Kent, in *Holmes v. Lansing*,⁵ and by the Supreme Court of North Carolina in *Crittenden v. Jones*.⁶

5. This act is retrospective, and, therefore, void. The act was passed after the note was made. *Ex post facto* laws which regard crimes are not only declared void by the constitution, but they are opposed to common right. The same is true of retrospective laws *in [135 civil matters. They are not made to enforce, but to violate contracts, and are, therefore, considered repugnant to natural justice. In the case of *The Society for propagating the Gospel, &c., v. Wheeler*,⁷ Mr. Justice Story says: "Upon principle, every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." In *Dash v. Van Kleeck*,⁸ the Supreme Court of New York says: "An act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. It is a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retrospective effect."

Mr. Hunter, contra, stated, that before he proceeded to the discussion of the question before the court, he would relieve himself, if not the court, from the pressure of an authority of the utmost respectability, which, if it stood single and unopposed, would be irresistible. He referred to the case of *Golden v. Prince*, decided by Washington, J.; but the truth is, that opinion was more conspicuous because it stood alone; no other judge of this court, or of any state court, had so decided; but, on the con-

1.—Vattel, l. 2, c. 17, s. 283.

2.—5 Hall's Law Journ. 502.

3.—13 Mass. Rep. 1.

4.—8 Mass. Rep. 423.

Wheat. 4.

5.—3 Johns. Cas. 73.

6.—5 Hall's Law Journ. 520.

7.—2 Gallis. 139.

8.—7 Johns. Rep. 477.

trary, that opinion had been decided against in several instances since its publication.¹ The [136*] counsel *also referred to the earlier opinions on the question; to the discussion and decisions which took place in the legislature of Maryland soon after the adoption of the constitution, as mentioned by Mr. Chief Justice Tilghman, in his opinion in Mr. Hall's Law Journal.² To a decision in Connecticut, in 1794, a MSS. statement of which had been furnished him by an eminent lawyer of that state, and the accuracy of which would be readily acknowledged. "One Huntington petitioned the general assembly for a special act of insolvency. While the petition was pending, he prayed for a writ of protection. His creditors directed the sheriff to attach his body, and commit him to prison, on the ground that the assembly had no power of granting his petition, and, of course, the writ of protection was void. The sheriff accordingly committed him. Huntington then prayed for a *habeas corpus* from the assembly, which was granted, commanding the sheriff to release him, which was done. The creditors brought an action against the sheriff, before the Circuit Court, in which it was determined by Chace, J., that a state had the right of passing special insolvent acts without infringing the constitution." In the Circuit Court of Rhode Island, several cases had occurred about the same period. In *Murray et al. v. Thurber*, a discharge under the insolvent law of Rhode [137*] Island was pleaded in *bar; and upon demurrer, and after argument, principally upon the constitutionality of the law, judgment was given by Mr. Justice Wilson, in favor of the plea. In 1798, the case of *Cock and Townsend v. Clarke and Burges* occurred. This was an action brought by the plaintiffs, citizens of New York, against the defendants, citizens of Rhode Island, on two promissory notes. After several continuances, the defendants pleaded in bar to the action, since the last continuance, their discharge under the insolvent law of Rhode Island; and upon a general demurrer, the constitutionality of the law was elaborately argued. Every leading principle laid down in the decision of *Golden v. Prince* was suggested by the plaintiff's counsel; but they were overruled in an elaborate opinion of Mr. Chief Justice Ellsworth. Other cases had occurred in the same state, but the most important was one, the name of which could not be recollected, determined by Chief Justice Jay, in his first circuit in Rhode Island, very soon after that state had adopted the constitution. The defendant pleaded a license or indulgence granted him, by a law of the legislature of Rhode Island, exempting him for a certain number of years from the payment of his debts, and suits, &c. The argument principally turned upon the proper construction of that clause in the constitution, which prohibits the state legislatures from passing any law impairing the obligation of contracts. The Chief Justice went fully into the principle; admitted the

power of the state to pass insolvent laws, from the power inherent in every community to give relief to distress, *and to protect its citi- [*138] zens from perpetual imprisonment; from the impossibility of compelling payment where there was no property; from the right of the states to pass insolvent laws as they had always previously done, as they had only granted to the United States the power of passing bankrupt laws, which were very different in his conception from insolvent laws. He stated it as his opinion, that, by an insolvent law, the contract was not, in the sense of the constitution, impaired. But the practice of suspending the collection of debts, of granting licenses and indulgences against the consent of the creditor, of impairing the obligation of a contract as to the important point of time when a debt by its terms was payable, and denying all remedy by action, merely for the convenience of the debtor, when his ability was confessed, he strongly and severely reprehended, as an infraction of the constitutional injunction. The accuracy of this statement of the case is verified by its effects. The docket of the legislature of Rhode Island was immediately cleared of every petition praying for time, licenses, indulgences, &c.; and no one has ever since been sustained. But they have continued to act, as heretofore, upon their insolvent system.

1. It is, however, admitted, that this question has not been determined by the Supreme Court, sitting as such; and we are bound to inquire whether these decisions of its former illustrious members were founded in error, and whether they cannot be supported by reasoning. On the other side it is said, in the first place, that Congress have power to pass uniform laws on the *subject of bankruptcy through- [*139] out the United States. That if an unqualified power be granted to a government to do a particular act, the whole of that power is disposed of, and not a part of it; consequently, that no power over the same subject remains with those who made the grant, either to exercise it themselves or to part with it to any other authority. If the principle were applicable to the subject, and correct in its hypothesis, it would be a truism which nobody would be disposed to dispute. But if it be not applicable to the subject, and if the hypothesis is not previously proved, it is a *petitio principii*; a gratuitous assumption of that which is to be proved. The test of this principle consists, in the first place, in the inquiry, what was the particular act to do which a power, an unqualified power, was granted? It was a power to pass uniform laws on the subject of bankruptcies throughout the Union; not on the subject of insolvencies in the particular states. It is to pass bankrupt, not insolvent laws. No two things are more clearly distinguishable; they mean and always have meant, in English and American jurisprudence, different things. Undoubtedly they are analogous subjects; but *nullam simile est idem*. In speaking of the state of suspension or denial of payment, we say *bankrupt*; that is, a merchant who, committing certain acts, gives evidence that he is criminally disinclined to pay, and who may nevertheless not be insolvent; or, we say, an *insolvent*; any man who is at once poor and in prison; who surrenders all he has; pays as far as he can; and who, from the abso-

1.—*Hannay v. Jacobs*, ruled by Johnson, J., in the Circuit Court of South Carolina; *Adams, et al. v. Story*, determined by Livingston, J., in the Circuit Court of New York. 6 Hall's Am. Law Journ. Blanchard v. Russell, 13 Mass. Rep. 1; *Farmers and Mechanics' Bank v. Smith*, 6 Hall's Am. Law Journ. 547.

2.—4 Hall's Am. Law Journal.

lute want of means, is physically incompetent 140* to pay *more.* We refer to terms in the English language, that have been contradistinguished in their use, so far as we can trace them, for nearly three centuries. Both the terms, *bankrupt* and *insolvent*, are familiar in the law of England; and it will be conceded, that whenever a term or phrase is introduced, without comment or explanation, into our constitution or our statutes, every question respecting the meaning of that term or phrase must be decided by a reference to that code from whence it was drawn. In the earliest times, neither bankruptcy nor insolvency were subjects of English jurisprudence. Of the general code of the primordial common law, they formed no part, for the plain reason that anciently imprisonment for debt, which is now the main proof of bankruptcy, and consummation of insolvency, was unknown to the common law. It was even against *Magna Charta*.¹ The nature of the population of England in feudal times develops the cause. The different counties of England were held by great lords; the greater part of the population were their vassals; commerce hardly existed; contracts were unfrequent. The principal contracts that existed were with the lords and their bailiffs, the leviers of their fines and amercements, receivers of their rents and money, and disbursers of their revenues. In the year 1267, imprisonment for debt was first given against the bailiffs, by the statute of Malbridge, 52 Hen. III., c. 23.² The statute of Acton Burnel, 11 Edw. I., gave 141* the *first remedy to foreign merchants by imprisonment, in 1288. The statute 13 Edw. I., c. 2, gave the same remedy against servants, bailiffs, chamberlains, and all manner of receivers.³ These instances show how imprisonment for debt first commenced, how few were at first included, and accounts for the non-existence of legal insolvency. The statute of 19 Hen. VII., c. 9, which gave like process in actions of the case and debt, as in trespass, is the true basis of the right, or wrong, of general imprisonment. This statute, and the usurpations of the various courts, produced their natural effects. They filled the gaols of England with prisoners for debt. This state of things produced, sixty years afterwards, the statute 8 Eliz., c. 2, restricting the right of imprisonment and guarding against its abuses; but this was not sufficient. She issued the proclamation of the 20th of April, 1585, authorizing certain commissioners, therein mentioned, to order and compound controversies and causes.⁴ This commission continued in force until her death, and, according to the political system of the times, had the force of law. James I., aided by the counsels and the pen of Lord Bacon, on the 11th of November, 1618, issued a similar, but enlarged commission, in which the term *insolvency* is expressly mentioned, and its nat-

ure described.⁵ Charles I., in 1630, issued a similar commission.⁶ *The first insol- [*142 vent law, similar in language and design to these ordinances, and meant to supply their place, was passed after the execution of Charles I. by the republican parliament in 1660.⁸ In the 23d Charles II., the first great regular insolvent act was made, the model of all that follow; its provisions and language having been copied by the subsequent parliaments in England, and by our colonial legislatures, with almost unvarying exactness. About forty acts of insolvency have passed from that time to the present in Great Britain; until at length a regular system of insolvency is established; and courts possessing a peculiar jurisdiction, clearly and practically contradistinguished from bankruptcy, decide cases of insolvency in one room of Guildhall, while commissioners of bankruptcy are deciding cases of bankruptcy in another.⁹ It appears, then, that insolvency is the creature of statute, and has been described, settled, and ascertained, in a course of centuries, by plain, positive, parliamentary enactments; and this is likewise true of bankruptcies. In strict chronology, the bankrupt laws existed first. The first statute of bankruptcy was passed in 1542, the 34th of Henry VIII.; but the 18th of Eliz. and the 21st of James I. are the principal and all-important statutes. These and others, amounting to fourteen or fifteen different acts, continued down to Anne and George III., form the present system of bankruptcy *in Eng- [*143 land. Thus, while the ordinances of Elizabeth and James, and the various statutes, down to the present times, were passed, expressly on the subject of insolvency, for the benefit of all poor prisoners confined for debt, including all classes in society, the parliament was, at the same time, passing statutes of bankruptcy, maturing and accumulating that peculiar code, confined as it was to merchants and traders only.¹⁰ The distinction between bankrupt and insolvent laws was perfectly well known to our ancestors, who, in their legislation and usages, have always considered insolvent as different from bankrupt laws. All the colonies, in some shape or other, had insolvent laws; few had bankrupt laws. In 1698, Massachusetts passed an insolvent law: that is, a law for the relief of poor prisoners confined for debt.¹¹ In 1713, that colony passed an act concerning bankrupts, and for the relief of the creditors of such persons as shall become bankrupts; this was a temporary law, which failed in experiment, and expired in 1716. By this historical deduction it is intended to prove that the particular act which the States granted to Congress a power to pass, was one having reference to bankruptcies; which meant something contradistinguished from insolvencies. It is not denied that insolvency, in its most comprehensive sense, is a universal, of which bankruptcy is a particular;

1.—Hassels v. Simpson, Dougl. 92, note.

2.—Burgess on Insolvency, 5, Co. Litt. 280, B.

3.—Burgess on Insolv. 18, 19; F. N. B. Accompt. 117.

4.—Burgess, 24, 27.

5.—Rymer's Fed. tom. 17, fol. 117; Burgess, 84.

6.—Rymer's Fed. tom. 17, p. 116; Rot. Parl. 16; Jac. I.; Burgess, 88.

7.—Burgess, 95.

Wheat. 4.

8.—Scobell's Ordinances, 56; Burgess, 93.

9.—Burgess, 176. See the Report to the British House of Commons on bankruptcies and insolvencies in 1817.

10.—Burgess, 212; 2 Bl. Com. 476; Christian's Note; 2 Wils. 172; Cooke's Bankr. Law, 42; Rees's Encyclop. Title Insolvency; 2 Montefiore's Com. and Law Dict. 390.

11.—Mass. Laws, 130; London edit. 1724.

but taking it in this sense, it is insisted that [144*] the grant to Congress narrows the universality of the previous power of the States, only by excluding from it the ancient, and well understood, distinct matter of bankrupt laws. But it is in more exact conformity to the facts, and, therefore, more precise language and safer reasoning, to say that modified as this matter is, and has been for centuries in practice, they are different things expressed by essentially different terms. How has this subject been considered between the two constitutional parties, the Congress of the United States and the individual states? Surely they knew what the one granted, what the other received. The last have always asserted their power of passing insolvent laws. The former have always assented to the exercise of this power without the smallest complaint of injury or usurpation. Very soon after the adoption of the constitution, a bankrupt law was introduced into Congress; it was postponed on the ground that the state insolvent laws were sufficient. The whole debate turns on the acknowledged and well-understood differences between the two laws.¹ Congress when at last, in the year 1800, it acted on this subject, took care solemnly to enact that the bankrupt law should not repeal or annul, or be construed to repeal or annul, the laws of any state now in force, or which may be hereafter enacted.² In all the abortive attempts to pass a new bankrupt law, every committee of the House of Representatives and Senate introduced the same clause. Thus, it appears that the [145*] two parties *whom it is sought to make litigant, essentially and cordially agree, and that upon a point of power. Who have a right to say they disagree? To interfere to make them disagree? Congress, in asserting the claim of the United States to priority of payment over other creditors, exerts this right solely in cases of legal insolvency; and this court has frequently, and after great deliberation, in sanctioning this claim, considered and defined legal insolvency.³ How preposterous this if no legal insolvency can exist! Congress itself has passed an insolvent law for the District of Columbia. This it has done, because there it had the power of exclusive legislation. It has done for its District of Columbia what the States can do for themselves: what Congress cannot do for them. Again, by the declaration of rights of many of the states, it is asserted, "that the person of the debtor, when there is not strong presumption of fraud, ought not to be continued in prison after delivering up his estate in such manner as shall be prescribed by law." This supposes a rightful, permanent system of insolvency by state authority.

2. But admitting, for the sake of the argument, that this grant of power to Congress includes all that can be comprehended both under insolvencies and bankruptcies, we contend that, from the peculiar nature of the subject, to convert the grant of power into an actual prohibition of its exercise by its former possessors, it must actually be exercised by its

*present possessors. This arises from [*146 the very nature of the subject; from the nature and condition of human affairs; from an overruling necessity; for, the duties of humanity are imperative and indispensable, and must be exercised by some one or the other of the guardian powers of the community. The existence of the power of granting relief in the extremities produced by debt and indigence, is morally necessary, not only to the well-being, but to the existence of civilized and commercial society; and if one authority in a nation dejects itself of this by a grant to another authority, it imposes its exercise as a duty on that other; and if the one does not exercise it, the other, by necessity, must. The power, in this sense, remains concurrent. This principle may be illustrated by an analogous question of international law. Denmark, by its position as to the Baltic and its entrances, owes a duty to the navigating interest of the world, of guarding their ships from peril and from shipwreck. She has, so far as is practicable, by her buoys, her light-houses, her pilots, performed this duty. Suppose she were to cede, by treaty, the benefit she derives from this source: grant the right, and impose the duty upon her neighbor and rival, Sweden. Suppose Sweden was to forbear or neglect to exercise it; could not Denmark exercise it? Would she not be bound to exercise it, by all the obligations of humanity? Are the buoys to be torn up, the pilots to be suppressed, the lights to be extinguished? Are the coasts of both countries to be lined with shipwrecks, her own subjects to suffer, and her great duties to the civilized world to be neglected and violated? *Is this analogy too remote? All the duties of humanity are associated: *quoddam commune vinculum habent*. Why was this power over bankruptcies granted at all? Undoubtedly that it might be exercised, being necessary for the good of the community; and, if its exercise is suspended, may it not, justly and properly, be reassumed, until again exercised by that which is conceded to be the paramount authority. This concurrent power of the states, from a similar, though less imperative necessity, exists in various other cases. Congress has the whole power of regulating commerce with foreign nations. The most important medium of foreign commerce is foreign bills of exchange, which are, therefore, important subjects of commercial regulation. There can hardly be imagined a duty more incumbent on Congress than this exercise of its admitted power of legislation. Yet it has neglected that duty; and as it is a power that from the necessity of the thing must be exercised, the states may and do exercise it, and their rightful use of this power has been sanctioned by this court in innumerable instances. Congress has power to regulate the value of foreign coins; it was long before it exercised this power as to any foreign coins, and still omits to do it, as to the greater number. Have these foreign coins then no value? So, also, Congress has power to fix an uniform standard of weights and measures. This has never been done. Is there, then, no standard, and are all contracts relative to quantity, to weight and measure, destitute of a legal medium of ascertainment? If Congress had *neglected to establish post-roads, [*148

1.—Debates of Congress, Vol. II., p. 204.

2.—Act of April 4th, 1800, c. 173, s. 51.

3.—The United States v. Fisher, 2 Cranch, 358; United States v. Hoce, 3 Cranch, 73; Prince v. Bartlett, 8 Cranch, 431; Thelsson v. Smith, 2 Wheat. 306.

would not the states have had power to provide for so great a public convenience; a benefit which they always enjoyed, even in colonial times? As to the power of Congress to establish an uniform rule of naturalization, it may be necessarily exclusive, because if each state had power to prescribe a distinct rule, there could be no uniform rule on the subject; and naturalization, or the power of making aliens citizens, must have uniformity; since the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states; it is a power that must pervade the Union. But insolvent laws have no extra-territorial force unless by consent; they are made by the state, for the state; at any rate, a single state has no inherent power of forcing them upon the other states. This depends upon the old question of the *lex loci*. The reasoning adopted by that learned lawyer and accomplished scholar, Mr. Chancellor Kent, in the case of *Livingston v. Van Ingen*,¹ may, with the strictest propriety, be applied to this case. Congress has the power of securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. To the mere importers of foreign inventions, or foreign improvements, Congress can grant no patent; are not the states at liberty, in this omitted case, in this different matter, to promote the progress of science and useful arts, by pursuing their own measures, and dispensing their own rewards? Even sup-^{140*} posing they cannot legislate upon "the peculiar and admitted objects of congressional legislation, yet they may on others. If not, this great subject of imported improvements would be entirely unprovided for, and unprotected. Applications to Congress on this very subject, have been frequently made, and always rejected for want of power. The analogy between our argument and that presented in the case of *Livingston and Van Ingen*, is this: that if Congress had exercised all its power, it would not have exhausted the subject. Congress has not the power to pass a general insolvent law; the states have a power to pass state insolvent laws; the objects and spheres of legislation are different; Congress has power to pass a bankrupt law, and if it does, that will be paramount. Having safely possessed ourselves of this ground, we may ascend a little higher. We are justified in saying that the states are not prohibited from passing even bankrupt laws. They once had the power, and they gave away, in conjunction with the other states, only that of passing uniform laws of bankruptcy throughout the United States. In this sense, the power they have granted, and that they retain, are different. The grant to Congress is not incompatible. We have shown that the mere grant of a power to Congress does not vest it exclusively in that body. There are subjects upon which the united, and the individual states, must of necessity have concurrent jurisdiction. The fear that the rights and property of the citizens will be worn away in the collision of conflicting jurisdictions, is practically refuted; and is even theoretically unfounded, because the constitution itself has guarded against this, by providing that the

*laws of the United States, which [¹⁵⁰ shall be made, shall be the supreme law of the land, anything in the constitution or the laws of any of the states to the contrary notwithstanding.

3. But the other great point remains; is not this law unconstitutional and void, inasmuch as it impairs the obligation of a contract? As preliminary to this inquiry, it may be suggested, that if it has been proved that a bankrupt law is not an insolvent law, and that the convention, with a perfect knowledge of the subject, left the states in the full enjoyment of the right they had always possessed, of passing insolvent laws, and subjected them to the domination of uniform bankrupt laws only, whenever Congress might pass them, the position is disproved, which alleges that such laws are still void, as impairing the obligation of contracts. From the nature of the subject, it is not supposable that the convention left a power in the states, which, if exercised, must necessarily violate another part of the constitution. It is not conceivable that a power was given, directly repugnant and contradictory to a prohibition imposed; as almost all the states have passed insolvent laws, and Congress has sanctioned them, and the people assented to, and approved them, let us find out some other interpretation that will reconcile these opposite powers, and obviate this flagrant inconsistency. The judges of the state courts, and of this court, have confessed that there is in these words, "impairing the obligation of contracts," an inherent obscurity. Surely, then, here, if anywhere, the maxim must apply, *semper in obscuris quod minimum est sequimur*. *They [¹⁵¹ are not taken from the English common law, or used as a classical or technical term of our jurisprudence in any book of authority. No one will pretend that these words are drawn from any English statute, or from the states' statutes before the adoption of the constitution. Were they, then, furnished from that great treasury and reservoir of rational jurisprudence, the Roman law; we are inclined to believe this. The tradition is, that Mr. Justice Wilson, who was a member of the convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase.² If, then, these terms were borrowed from the civil code, that code presents us with a system of insolvency in its *cessio bonorum*; and yet, as it is said by Gibbon, "the Goddess of Faith was worshipped, not only in the temples, but in the lives of the Romans." The rights of creditors, we know, were protected by them with the utmost vigilance and severity. They did not, however, it seems, conceive that a *cessio bonorum* was inconsistent with the rights of creditors, or impaired the obligation of contracts. England, also, anxiously guards the rights of creditors. On commerce, on the integrity of her merchants and manufacturers, her best reputation and interest depends. And yet England, more than any other country, has her system of insolvency and bankruptcy. Good sense, in all ages, in all countries, is the same; as in Rome, in England, and in all other commercial countries, so in this, bankrupt and insolvent laws have never been considered as impairing the

1.—4 Johns. Rep. 572.
Wheat. 4.

2.—See Reid's Essay, Vol. IV., p. 183.

obligation of a contract. If included in the [152*] literal *acceptation of the words of this clause of the constitution, from the nature of things, they form an implied exception. Insolvent laws are based upon the confessed and physical inability of a party to perform a pecuniary contract, otherwise than by a surrender of all he has. How idle, then, to make a provision in respect to such laws, guarding against the impairing a contract; that is, providing for its strict, adequate, and undiminished performance, when the impossibility of any performance is presupposed. The total, physical inability of the individual is his exemption, and this is tacitly and necessarily reserved and implied in every contract. This is the doctrine of Vattel, of a nation as to a public treaty;¹ and is it not the law of nations, that the obligations of a treaty shall not be impaired? To impair an obligation has reference to the faculty of its being performed. The obligation of a contract, and a remedy for its performance, are different things. Whether a contract shall be fit matter for judicial coercion is a different question from its being preserved perfect and undiminished where it is. When the courts do take cognizance, they shall not adjudge less, or differently, either as to the amount or other terms and conditions of the contract. The performance of the contract shall be exact; imprisonment is the remedy for enforcing it; but where there is a confessed and adjudicated inability, the society withholds the power to protract indefinitely and miserably, what can never be an effectual remedy, but only a vindictive [153*] punishment. *The moral obligation of a contract may, perhaps, remain forever, but misfortune and extreme indigence put an end to the legal obligation, as war does to a treaty; as revolution does to a pre-existing government; as death does to personal duties. The impossibility of payment discharges from contracts, as insanity does from crimes: "*Impossibilitatem*," says even the severe Bynkershoek, "*nulla est obligatio*." To impair, means, as to individuals, you shall not pay less; you shall not have an extension of time in which to pay; you shall not pay in goods when your contract is cash; you shall not pay in depreciated coin, or even current bank notes, when your contract binds you to the payment of pure coin; interest shall not be diminished; in fine, there shall be no alleviation of its terms, or mitigation of its conditions. The facts as to which you engage shall remain the same. The insolvent law is something independent of the obligation of the contract, and extraneous to it. It is a matter of peremptory nonsuit to the action; or rather a bar, having reference to nothing inherent in the contract, but to something exterior and posterior to it. The insolvent law, so far from impairing the contract, sets it up, admits its obligation, and endeavors to enforce it, so far as it is possible, consistently with the misfortunes of the debtor, to enforce it. If it was meant by these words of the constitution to prohibit the passage of insolvent laws, why not in plain terms have said so? It would have been as clearly understood as the plain prohibition, that no state shall grant any title of nobility. It could not have been meant to bury such a

meaning under such *obscurity. To suppose that the framers of the constitution were designedly obscure on this delicate and dangerous subject, is an impeachment of their integrity; to suppose that they had so little command of appropriate and perspicuous language as to employ such terms to express such a thought, is an unjust imputation upon their acknowledged talents. Upon the construction contended for, statutes of limitation would be repugnant to the constitution. Statutes of limitation take away the remedy after six years. The insolvent law, at once. But suppose the statute of limitation confined the remedy to sixty days, or six days; it would be an indiscreet, impolitic, and unwise, but not an unconstitutional law. If such statutes be valid, it must be because they do not impair the obligation of a contract. Yet the one law has the same effect on the contract as the other. They both take away the remedy, and neither annuls the obligation; for a subsequent promise in both cases revives the debt. If the contract was annulled, or its obligation impaired, a promise to pay would be void; because it would be without consideration, and would be contrary to the very law that destroyed it. The writers on the civil law most clearly express the difference between the obligation of a contract, and the legal remedy for its performance.² Ayliffe, among other instances, refers to the very subject now under discussion: "Neither a civil nor a natural obligation," says he, "is dissolved by a *cessio bonorum*; though it produces a good exception in law, and suspends the force of an obligation *for a time; the extinguish- [155*] ment of an obligation being one thing, and the cessation of it another; for when the cessation of an obligation is once extinct, it never revives again." This is leaving the matter untouched and unregulated, as we contend it is, by the great fundamental law, to be provided for by ordinary legislation. If the states, influenced by the eloquent reasoning of Burke and Johnson, were to abolish imprisonment for debt entirely, could their right be disputed? And yet this might prevent the creditor from getting his money. The contract would remain to be enforced by other, but perhaps not equally efficacious means. This reasoning, as to the distinctness of the remedy from the contract, is applicable to cases even where insolvency does not interfere; with how much more force where it does. It would be monstrous to parade the show, or urge the violence of a nominal remedy, when it could be none in reality. You must submit to necessity. When the sages of the convention inserted this clause in our constitution, they meant no more or less, than the inviolability of contracts; and what system of religious faith, or of ethics, or of jurisprudence, ever meant less? But they likewise meant, that this salutary but universal principle, should be subjected to the salutary and indispensable exceptions to it, which always had prevailed, and always must prevail. Every contract must be subjected to, limited and interpreted by the law of nature, which everywhere forms a part, and the best part, of the municipal code; and it is the primary canon of that code, that necessity—physical, moral necessity—knows no law

1.—Vattel, l. 3, c. 6, s. 91.

2.—Ayliffe's Civ. Law, l. 4, tit. 1, Dig. 46, 3, 28, 3.

156*] but itself. Laws or *constitutions cannot create property in the individual; and, in a certain sense, in the absence of all fraud, where there is no property there can be no injustice; of course no violation of the contract.

Locke, in endeavoring to prove that the principles of morals are susceptible of as strict demonstration as those of mathematics, says, where there is no property there can be no injustice; for the idea of property being a right to anything, and that the idea of injustice being an invasion of that right, it is evident that these ideas being thus established, and these names annexed to them, we can as certainly know these propositions to be true as that a triangle has three angles equal to two right angles. And the civil law, perhaps the most exact, consistent, and comprehensive code the sagacity of man ever framed and systematised, expressly asserts the same principle: *Nam is videtur nullam actionem habere cui propter inopiam ad- cerarii inanis actio est. Desinit debitor esse is, qui nactus, est exceptionem justam, nec ab naturali equitati abhorrentum.*¹ The states, then, in exercising the natural, inherent, and indispensable power, of discharging poverty, distress, and absolute indigence and inability, from payment, have not only conducted themselves lawfully and constitutionally, but the omission to have done it would have been impiously absurd; and it is an unjust imputation upon the constitution of the United States to suppose a prohibition against the exercise of such a power somewhere in society. As to insolvencies, Congress cannot exercise it. As to bankrupt- **157***] cies, *they refuse. The states, therefore, must exercise this power. The obligations of natural law, and the injunctions of our religion—which religion is a part of our common law—imposes it as a duty that the wants of the poor should be relieved. Strange, indeed, is it, that the laws should at the same moment press upon society two duties, so inconsistent and contradictory, as that of exacting for the payment of his debts, what the impoverished and imprisoned debtor has not; and obliging those who have something, to give him a share of what they have, to save him from suffering or death. Although it has been strenuously insisted that the abstraction of the remedy is a violation of the contract, yet it has also been intimated, that if erroneous in this particular, the substance of the argument on the other side would still remain correct, inasmuch as not only the person of the debtor, but the debt itself, was discharged. It may perhaps be doubted, whether, though the person be discharged from the debt, the debt itself be extinguished. At the utmost, the tendency of the doctrine contended for would be but to give the creditor a right to the miserable chance of the future acquisitions of the insolvent, by a future action; and that chance, rendered the more desperate by the consideration that arrest—that is, imprisonment—is almost the only mode of instituting actions in the United States. Grant that the remedy may be given, or withheld, or modified, by the legislatures of the states, and the difference between us, in practical result, is not

worth contending for. This could not be what the convention had in view. According to the doctrine on *the other side, you dis- ***158** charge the debtor from prison, to condemn him to work in the mines, and that, too, with the chains upon him. You remit the lesser to inflict the greater punishment. You take him from a life of listless indolence, where you are obliged to maintain him, and doom him to a life of labor without hope. Nay, worse, you so place him as to have every step watched by a lynx-eye avarice; every morsel he puts into his mouth counted and weighed; every personal indulgence censured; every family sympathy scanned and reprimanded. Well was it said by a learned judge, that such freedom would be a mockery; nay, worse, it would be aggravated slavery and complicated misery. It is admitted that the state has a right to the service of its citizens. It may open its prison doors even to criminals; what services can ever be rendered by him who is pressed down to the earth by a poverty that must be hopeless and interminable? The state wants the services of its citizens to fight its battles on the land and ocean, to cultivate its fields, to enlarge its industry, to promote its prosperity, to signalize its fame. It does not want a heartless, purposeless, mindless being—but half a man—a worse than slave. It wants a citizen with all his worth and all his energies of body, mind and soul. The line of distinction drawn, by the opposite counsel, between bankrupt and insolvent laws, is wholly mistaken. So far from the difference between them consisting in the circumstance of the bankrupt law discharging the debt itself, whilst the insolvent law discharges the person of the debtor only, it is an historical *fact that ***159** the early English statutes of bankruptcy did not provide for the discharge either of the debt or of the person. Discharge is not mentioned, or in any way provided for, until the 4th or 5th of Anne; that is, after the system of bankruptcy had been established almost two centuries. But it is expressly provided for, it is the object and intention of the first regular insolvent law of England, in the time of Charles II., and of the act of 1755, which served as a model for colonial legislation. The law of New York of 1755, and that of Rhode Island of 1756, were copied almost *verbatim* from this last. There is even now no discharge in the case of a second bankruptcy, unless the debtor pays seventy-five per cent. of his debt, and, in England, none at all, if he has even had the benefit of an act of insolvency.³ A construction merely technical ought not to be given to such an instrument as a constitution of government. If any instrument ought to receive an equitable and liberal interpretation, affected by the events which preceded, it is that of a great treaty of confederation between various states who were compressed into union by obvious motives and considerations, of common wrongs sustained, mutual errors committed, and equal advantages to be gained. Our interpretation of such an instrument ought, at least, to be as liberal as of a remedial statute. We ought to be as unshackled as in the interpretation of a last will and testament, where the intention of the testa-

1.—Locke's Works, lib. 4, p. 258, fol. edit.

2.—Ayliffe, 506; Dig. l. 4, tit. 3, s. 6.

Wheat. 4.

3.—Cullen's Bankr. Law, 386, in note; Act of Congress of 1800, c. 173, s. 67.

160*] tor is the polar star to direct us; *where we have a right, if the words are ambiguous, to seek for illustration from the condition and circumstances of the testator's family. What was the condition of the American family? What were the evils which this article of the constitution was intended to remedy? Undoubtedly those acts of desperation and violence, to which many of the states, in a paroxysm of revolution, resorted, and those acts of impolitic and selfish injustice to which they continued to resort, in that more dangerous moment, after the effect of mighty impulses had ceased, and was succeeded by inevitable relaxation and debility. These plainly indicate what were the evils, and demonstrate for what this remedy was intended. As to the effects of poverty, of indigence, of natural and moral impossibility to perform contracts, neither foreign nations nor our own citizens complained. These must, and do, from the vicissitudes of human life, and the long catalogue of human ill, exist in all countries and societies. This provision of the constitution is applicable to those cases which suppose a freedom from imprisonment, and ability of payment, and a fraudulent evasion of it. They suppose the case of a man who would pay all his debts, but that from the course of events, if his contracts were literally interpreted and immediately enforced, he would pay too much, if he paid according to its terms. The apology for these laws, which the constitution intended to interdict, was, that he contracted the debt when society was peaceful and prosperous; when land was high; when coin was in circulation; when markets for produce were 161*] open, and the whole course *of commercial intercourse free and unembarrassed; and he was called upon to pay, when every particular, in this state of things, was reversed. In providing a remedy for this terrible fluctuation of affairs after a storm, and the subsidence of the agitated ocean of society into that dangerous calm which always succeeds, the states erred extravagantly; they issued paper money; they set off barren lands, by an arbitrary appraisal, for the payment of debts; they curtailed interest; they made specific articles a tender; they altered the contract as to its facts, its terms, its conditions; they revoked their own grants; they interfered in private concerns—not as they had a right to do, by the equal pressure of a general and permanent system, granting relief to avowed insolvency and distress, but by extending indulgences in particular cases, and arming debtors with privileges against their creditors. In reviewing the history of the period referred to, it will be seen that insolvent laws were complained of by no one as the evil of the times, except by Mr. Hammond, the British minister, in his correspondence with Mr. Jefferson, who indignantly and eloquently repelled the imputation that they were a violation of treaty; and yet the words of the treaty of 1783 were on a similar subject, stronger and plainer, perhaps, than the words of the constitution. British creditors were to “meet with no lawful impediment to the recovery of the full value of their debts in sterling money.”¹ In the debates of the various 162*] conventions, no supposition *was start-

ed that this clause of the constitution was prohibitory of the accustomed relief to poverty by insolvent laws; and no amendment was offered for the purpose of avoiding this possibly lurking danger, except in the convention of Rhode Island, the last that acted upon the constitution; and there it was rejected, on the ground that the passage of insolvent laws was nowhere prohibited in the constitution, and that the contrary apprehension was a dream of distempered jealousy. The practice of passing insolvent laws, which had begun so early in colonial times, which had uninterruptedly continued, and was then in daily unblamed operation, was not even referred to as an evil. This is expressive silence—this is a negative argument of conclusive force. They have since been sanctioned by upwards of thirty years' practice; by the absence of all complaint; by the decisions of state and federal courts; by the acquiescence of Congress; and, what is more, by the acquiescence of creditors. It has taken upwards of thirty years of curious inspection to discover this occult meaning, covered under the mystical veil of constitutional language. The constitution had reference to those acts which had palpably caused discontent and shame, and were, unfortunately for us, peculiar to our history. To have inserted them in odious detail would have disfigured the constitution, and have eternized a disgrace upon the most brilliant page of our history. Against paper money the convention had provided. They then guarded against the other expedients of wrong. They did not mean the insertion of an abstract dogma, indefinite in its extent, of *sweep- [*163 ing and dangerous generality. They anticipated, that discreet expositors would arrive at their meaning, from the previous history of the country, and from the consideration of the well-known evils which they intended to remedy. For if we were to give only a technical common law construction to this article of the constitution, innumerable absurdities would thicken upon us; we should frequently lose the benefit, in the plainest case for which it was intended; and be obliged to apply it in others, from which the instinctive feeling and irresistible common sense of mankind would repel it. For instance, if we are to be bound in verbal fetters, what shall we do with a judgment? The judges of England have declared that a judgment is no contract.² What an inlet this to fraud and evasion! The creditor has merged his contract in a judgment; but arriving at this point, he is unprotected by the constitution. What shall we do with marriage, which is a contract, the most solemn and sacred of all, by its very terms indissoluble and eternal; but yet the states impair it by divorces *a menso et thoro*, and dissolve it by divorces *a vinculo matrimonii*. If it impairs the obligation of a contract for a living insolvent not to pay all his debts, why is the case altered when he is dead? Can a different rule take effect with regard to his substitute, his executor or administrator? This would not be more unreasonable than what is pretended to be done in the case of the living man, whose contract you make to be, that he will, at all events, be able to pay; you *make it an insurance against accident, [*164

1.—Waite's State Papers, Vol. I., p. 287.

2.—Biddleston v. Whytel, 3 Burr. 1548.

against misfortune, against irresistible force, wide-wasting calamity, inevitable necessity; against the decrees and acts of God himself. Let, then, the rule of interpretation, as to insolvent laws, be the common sense of mankind, the universal agreement of those who have been affected, who may be affected by them. A whole nation, on such a subject, cannot be in the wrong. The parties contracted with the full knowledge of these laws, and the practice of the states upon them. Every creditor knows he is liable to be paid only so far forth as the property of a distressed debtor, on a legal, and *bona fide* surrender, can pay. The universal consent of the nation and its public authorities is strongly shown by the practice of Congress itself, whose privileges, it is said, the states are usurping. According to the argument on the other side, Congress, in the only bankrupt law it ever passed, impaired the obligations of contracts, since it made the discharge of the debtor referable to past as well as future contracts. Is it, indeed, to be said, that Congress has power to do this, and that the prohibition of this power to the states is an implied permission of it to the United States? Is a different rule of right and ethics to be applied to these different authorities? Certainly not. Where, indeed, mere political power is prohibited to the states, Congress may exercise that power exclusively. For instance, Congress may emit bills of credit. But the matter is different in a moral prohibition. Congress have no more right to impair the obligation of a contract than the states. It is a preposterous presumption, that Congress **165*** meant, by its bankrupt law, to violate the injunction of the constitution, when they left the payment of debts, according to the undeviating course of the civilized world, to be discharged out of the surrendered estate, rather than by the imprisoned person of the debtor. *Communis error facit jus*. In a most important matter in the constitution of this very court, a co-ordinate branch of the government, in giving a construction to its own powers and organization, it has chosen to collect an interpretation of the constitution from acts of Congress, from the uninterrupted and unimpeached practice under them, rather than from the bare literal words. The constitution of the United States has said, "there shall be one Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior," &c. Depending solely on the plain signification of the words, one can hardly conceive of language that establishes, with more distinctness, two separate judicial departments. One court, existing in unity and supremacy; other courts multifarious and inferior. One original, the other appellate: and yet, both Congress and this court have decided that it is, at the same time, one and many; inferior and supreme, original and appellate. Nay, more; that with a commission, which, framed in the words of the constitution, has only reference to one appointment, that, nevertheless, you hold both. But *communis error facit jus*; and all these apparent inconsistencies were reconciled by the propriety of acquiescing in a

construction of the constitution, [***166** which had been fixed by a practice under it, for a period of several years.]

Mr. D. B. Ogden, on the same side, argued, that, supposing the law of New York in question to be a bankrupt law, there is nothing contained in the constitution of the United States to prohibit the legislature of that state from passing such a law. There is no express prohibition to be found in the constitution; and if any prohibition exists, it must be sought for either in the clause giving Congress power "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States," or in the clause which prohibits the States from passing "any *ex post facto* law, or law impairing the obligation of contracts."

1. Does the first clause, which has been mentioned, prohibit the States from passing bankrupt laws? The constitution, after giving certain powers to Congress, in some cases prohibits, by express words, the States from exercising those powers, and in other cases it contains no such prohibition. Why should the convention insert express prohibitions as to some powers, and not as to all, if it was intended that all should be prohibited? The mention of one in the prohibition is the exclusion of all others, not mentioned, from it. The constitution first declares what powers Congress shall have; and, then, what powers the States shall no longer have. Among the powers thus taken from the States, this of passing bankrupt laws ***is not enumerated**. Is it not a fair [***167** conclusion from this, that the convention did not intend to take this power from the States? Would they not have expressly done so, as they did in the case of other powers, where such was their intention? And let it be remembered, that this subject of bankruptcies was brought immediately to the view of the convention in a preceding article, in which the powers of Congress are enumerated. The powers given to Congress by the constitution, may be divided into three classes: First. Those which are national in their nature, and which are vested in Congress, as the sovereign power of the nation or Union. Second. Those powers which are given to Congress, and from the exercise of which the States are expressly excluded. Third. Those which are given to Congress, and from the exercise of which the States are not excluded. Under the first class may be enumerated, the power to borrow money on the credit of the United States; to regulate commerce with foreign nations and among the several states; to provide for the punishment of counterfeiting the securities and current coin of the United States; to constitute tribunals inferior to the Supreme Court of the United States; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to provide for organizing, arming, and disciplining the militia, &c. Most of the powers which have been enumerated could manifestly never ***be** [***168** exercised by the States, because they apply to the Union, for which the legislature of no one

1.—Stuart v. Laird, 1 Cranoh, 200.
Wheat. 4

state ever could legislate. The remainder of them regard our intercourse with foreign nations, and, therefore, necessarily concern the whole nation collectively, and no one part of it in particular. There was no necessity for the constitution to prohibit the States from exercising these powers, because, from their very nature, they would only be exercised by the general government. Second. Those powers which are given to Congress, and from the exercise of which the States are expressly excluded, are, the power to levy and collect duties and imposts; to coin money and regulate the value thereof; and to this class might, perhaps, be also added the powers to raise armies and maintain a navy, which have been before stated in the first class of powers, but from the exercise of which the states are in terms prohibited in time of peace. Under the third class of powers, or those which are given to Congress, and from the exercise of which the states are not precluded, are the powers to levy and collect taxes and excises; to establish a uniform rule of naturalization, and uniform laws upon the subject of bankruptcies throughout the United States; to regulate the value of foreign coins, and fix the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their writings and discoveries. From the exercise of any of these powers, the states are **169*** neither expressly, nor by any fair rule of construction, excluded. To levy and collect taxes and excises, is a power given to Congress. Is it taken from the individual states? If it were, the state governments must have expired at the moment the general government came into existence. Without the power of levying and collecting taxes, no government can exist. If this power to levy and collect taxes and excises, which is given to Congress, be not an exclusive power, why should the others be so? Every argument which has been used, applies with equal force to this as to the other powers. The power is expressly given to Congress, and if it be true, as it has been contended, that every power given to Congress is necessarily exclusive, this must be so; and if it be not exclusive, there is nothing in the argument of the counsel for the plaintiff. But it may be asked, do, then, the government of the United States, and of the individual states, both possess these powers? And have they a concurrent right to exercise them? We answer, that they have a concurrent power on the subjects; they may both legislate in any of this class of powers. Congress and the individual states may both tax the same article of property, and both taxes must be paid. Congress has passed laws imposing a land tax; was it ever supposed that their exercising that power necessarily took from the state legislatures their right of exercising it? Congress has power to establish a uniform rule of naturalization; is this an exclusive power? The power of admitting foreigners to the rights and privileges of natural born citizens was a right which had been **170*** exercised by every state in the Union, from the date of their independence down to the adoption of the federal constitution. With a large portion of their territory uncultivated,

and uninhabited, except by savages, the power and right of encouraging the emigration of foreigners had become a sort of common law of the country; it originated with our fathers, when they first settled in the country, and had continued ever since; it formed a prominent feature in the system of laws in every state in the Union. Suppose Congress had never thought proper to exercise the power given to it, of establishing a uniform rule of naturalization; was it intended by the convention that the states should no longer exercise that power, and that the omission of Congress to legislate on the subject should operate as a bar to the admission of foreigners to the rights and privileges of citizens, and thus put an end to emigration? The first act of Congress, entitled, "An act to establish an uniform rule of naturalization," was passed in March, 1790, and prescribed the mode in which a foreigner might become a citizen of the United States; but it did not declare that the mode therein prescribed should be uniform throughout the United States, and that no state should thereafter admit foreigners to the rights of citizenship. After the passage of this law, some of the states, Virginia and Pennsylvania—the former certainly, and it is believed the latter—continued to exercise this power of naturalization until January, 1795, when Congress passed an act, entitled, "An act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject," which act, ***for the purpose "of carrying into [*171 complete effect the power given by the constitution to establish a uniform rule of naturalization throughout the United States," declares, that any alien may be admitted to become a citizen of the United States, or any of them, upon the conditions contained in the said act, "and not otherwise." After Congress had thus legislated upon the subject, and had established, what by the constitution it had a right to establish, a uniform system of naturalization, no state could legislate, and none ever attempted to legislate on the subject. Wherever a power is exercised by Congress, and there is nothing incompatible in its exercise by the states, they may both exercise it, and the laws passed by both are binding and constitutional. If Congress has a power, and exercises it in such a way that the exercise of the same power by the individual states would be incompatible with its exercise by Congress, then the state law must give way; it must yield to the law of Congress; not, because the law of the state is unconstitutional, and therefore void, but because the power of Congress is supreme, and where the state laws interfere with it they must yield. The 6th article of the constitution declares, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." From this clause the convention evidently supposed that ***[172 the laws of the United States, and of the individual states, might, in some cases, conflict with each other (which they never could do, if****

they could never legislate upon the same subject), and meant to provide, when they did conflict, that the state laws should yield, and the laws of the United States be supreme. But until Congress does legislate, and in such a way as to preclude the states, the states retain their power to legislate, on the class of cases we are now considering. Congress has power to fix the value of foreign coins. If it had never legislated upon that subject, were the states prohibited from fixing the value of foreign coins? Congress has power to fix a standard of weights and measures. If it should never exercise that power, were the individual states to be left without any standard of weights and measures? But it is said, that an act of legislation is an act of the sovereign authority of the society, and that it would be a strange act of sovereign authority, whose power can be put an end to whenever Congress choose to legislate, and is to revive again when Congress choose no longer to legislate. This is said to be an anomaly in political science, and absurd upon the face of it. But we ask, whether our whole form of government is not new and unheard of, until established here? Is not our constitution an anomaly? Is it, therefore, not to be executed? To a person unacquainted with the nature, power, and extent of our political institutions, before and at the time the constitution of the United States was formed and established, many parts of it would be wholly unintelligible, and no proper construction could be given to it without bearing in mind the political condition of the people who ordained and established it. Citizens of separate and independent governments, they adopted this constitution, not because they had no government, but because they had several governments; to secure to themselves those blessings of peace and independence which they had earned by their common sufferings, and which were the reward of their common blood and treasure. Fearing the approaches of those petty jealousies, which are always engendered in petty states, and which might soon array against each other those arms which had been so lately united against the common enemy, they established this constitution. It is without example; and it is no argument against it to say that the powers vested by it in Congress, and left by it in the several states, are novelties. If the construction for which we contend be given to it, there is perfect harmony in all its parts. But another argument has been stated, and urged with some earnestness against us, which is founded upon the declaration in the constitution, that the rule of naturalization and the laws of bankruptcy are to be uniform throughout the United States. The argument is this: The constitution says the system of bankruptcy shall be uniform throughout the United States. If the several States have power to legislate on the subject, the systems would be multifarious; it is, therefore, evident, that the convention intended that Congress should alone have the power of establishing the system of bankruptcy, and that the States were to be excluded from the exercise of any such power. Now, if there be any solidity in [174*] this argument, it would prove, that whenever the convention declares that any laws passed by Congress shall be uniform through-

Wheat. 4.

out the United States, the power of passing such laws is necessarily exclusive. But Congress has the power of levying and collecting duties, imposts, and excises; and the convention declares, that "all duties, imposts, and excises shall be uniform throughout the United States;" and yet it never has been contended that this power is exclusive. As to excises, many, and, it is believed, most of the states, have always exercised, and still do exercise, the power of levying and collecting excises. And so far was the convention from considering the power given to Congress to levy and collect duties, imposts, and excises, as an exclusive power because they were to be uniform, that in the next article of the constitution the states are, in express words, prohibited from levying and collecting imposts and duties. Why was this prohibition inserted, if the states were already prohibited from the exercise of that power? If the power of establishing uniform laws as to duties, imposts, and excises, vests no exclusive power in Congress, in relation to those subjects, why should the power of establishing uniform laws of bankruptcy and naturalization exclude the states from the exercise of those powers? It has been said, that every power given to Congress is necessarily exclusive and unlimited, unless it be expressly limited in the constitution; or unless, from the power itself, it is necessarily a limited power. If this be true, then it follows that if the constitution had given power to Congress to pass a law establishing a rule of naturalization, and [*175] a system of bankruptcy, the power would have been exclusive, and the states would have retained no power to legislate on those subjects. Why, then, was it thought necessary by the convention, to declare that the laws upon these subjects should be uniform? Not because the power was to be an exclusive one, but because, as each state retained the power of legislation upon these subjects, a variety of laws and systems might, and necessarily would be, introduced, which might, and probably would, have an effect upon the general commerce of the country, and be attended with consequences unfavorable to the general welfare and prosperity; and, therefore, power was given to Congress, whenever they thought proper, to put an end to these various and discordant systems, by establishing one uniform system, to pervade the whole United States. So far, therefore, from the insertion of the word *uniform*, in this clause of the constitution, affording any argument in favor of the exclusive power of Congress to make laws upon the subject of bankruptcies and naturalization, it was the existence and probable exercise of the power of the states to legislate upon those subjects, which induced the convention to give power to Congress to establish a uniform system throughout the United States. A system of bankruptcy is the creature of commerce; its end and its object are at once to give and support commercial credit. Some of the United States are, from their situation, habits and pursuits, commercial; others are agricultural. To the one, a system of bankruptcy may be very convenient, if not essential; to the other, such a system may not only be unnecessary, but [*176] ruinous. Hence the difficulty which was foreseen, and is now felt, of establishing any uni-

form system, to pervade the Union, and hence would have been the manifest impropriety of taking from the states all power of legislating upon the subject, and vesting that power exclusively in Congress. It is said, that as Congress has the power to legislate upon this subject of bankruptcies, and omits to exercise it, it is an expression of the opinion of Congress that no such system ought to exist. The omission of Congress to legislate amounts to a declaration that they do not think a uniform system is necessary; and they therefore leave the states to legislate upon the subject, whenever they may think it proper and expedient to do so. That Congress considers the states as possessing this power is evident from the 61st section of the bankrupt law of 1800.

2. The second question is, whether this law of New York is repugnant to that clause of the constitution which prohibits the states "from passing any *ex post facto* law, or law impairing the obligation of contracts." We have already endeavored to show that the individual states have the power of passing bankrupt laws. What is a bankrupt law? It is a statute which, upon a surrender of the property of the bankrupt, discharges both his person and his future acquired property from the payment of his debts. This discharge from all future liability is one of the principal objects in all bankrupt laws, which, for the benefit of the creditors, provide by heavy penalties, for a fair and full surrender of the debtor's property; and for the 177* benefit of the unfortunate debtor and his family, leaves him to the full enjoyment of whatever his talents and industry may enable him to earn for the future advancement of himself and family. If, then, the constitution recognizes the right and power of the states to pass bankrupt laws, it seems to follow that the clause of the constitution which prohibits the states from passing laws impairing the obligation of contracts, does not include a prohibition to pass bankrupt laws. Whether this law of the state of New York is to be considered as an insolvent law or a bankrupt law, it is unnecessary for us to inquire; because, though great pains have been taken to prove that it is a bankrupt law, we do not think it necessary to show that it is not. If it be a bankrupt law, the state had a right to pass it. If it be an insolvent law, it is equally within the scope of our reasoning; because, if an insolvent law, which discharges the person and future property of the insolvent, be a law impairing the obligation of a contract, within the meaning of the constitution, so is a bankrupt law, which does the same thing. But we have shown that the states have the power of passing bankrupt laws. They have, therefore, the power to declare that an unfortunate debtor, upon the compliance with certain conditions, shall be discharged from all liability to the payment of his debts; unless, indeed, it can be supposed that the convention intended to leave to the states the power of passing a bankrupt law, and yet, intended to deprive them of the power of incorporating into that law a provision, without which no system of bankruptcy could exist. 178* Is a bankrupt law a law impairing the obligation of contracts, within the meaning of the constitution? We insist that a bank-

rupt law, so far from being considered as a law impairing the obligation of contracts, ought to be regarded as a mode of enforcing the performance of contracts. The first object of a bankrupt system is to enforce and secure the rights of creditors, to save them from the consequences of fraudulent and secret conveyances of the debtors; and to give them the benefit of all the debtor's property, and thus compelling the debtor, as far as he is able, to pay his debts and perform his contracts. It acknowledges the existence of the contract; and the binding force of the contract is the very ground upon which it proceeds. Insolvent laws, and insolvent laws discharging as well the person as the future acquisitions of a debtor, from the payment of his debts, had been passed by many of the states, both before and after the revolution, and many of them were in force when the constitution was adopted. The nature and existence of these laws was well known to the convention, in which were some of the greatest lawyers in the country. If they had intended to deprive the states of this power, so long exercised, and so well understood, would they not have expressed that intention in direct terms, instead of leaving it to be inferred from words of doubtful import? or can it be contended that the convention intended that the states, by construction, should be deprived of their power, and were afraid to deprive them of it by express words, for fear that if such deprivation was understood by the states, they would not consent to it? *No such motive can or [*179 ought to be attributed to the convention; and if not, then it is inconceivable that they should not have expressly included insolvent laws in the prohibition, if they had intended they should be included in it. It has already been shown that Congress has acted upon the supposition that the states were not deprived of the power in question. What, then, it will be asked, did the convention mean by prohibiting the states from passing a law impairing the obligation of contracts? We answer that they meant to include in their prohibition all those unusual, and perhaps unwise laws, which the exigencies of the times had originated; which the distress and difficulties of the revolution seemed to have rendered necessary, protecting individuals from the payment of their just debts, either by allowing them to make a deduction from the amount of interest due on them, by protracting the payment, or by permitting them to withhold their property from their creditors. They meant to put a check upon the sovereign authority of the states themselves, by preventing them from breaking their own contracts, from revoking their own grants, and violating the chartered rights of corporations. In short, they meant to suppress all those interferences with private rights which are not within the proper province of legislation, the evils of which had been felt in an uncommon degree in this country. But they did not mean to repeal all those laws, or to prevent the enactment of other similar laws, which have existed in every civilized age and country, for the protection of unfortunate debtors, and the punishment of frauds upon creditors; [*180 which do not impair the obligation of contracts, but enforce it in the only mode the nature of things will permit; and which Congress itself

has the power, though not the exclusive power, of passing.

Mr. Hopkinson, for the plaintiff, in reply, insisted that the construction of the constitution contended for by the defendant's counsel was fallacious; and even if sound would be insufficient for their purpose. That the power of passing uniform laws on the subject of bankruptcies was, from its very nature, a national power; and must, therefore, even according to the opposite argument, be exclusively vested in the national government. That the power of passing naturalization laws is exclusively vested in Congress has already been determined by the court.¹ Yet both this and the power of legislating on the subject of bankruptcies, are contained in the same clause, and expressed in similar terms; and it is argued, on the other side, that the interpretation must be the same as to both. It is also said, that the power of Congress to pass uniform laws on the subject of bankruptcies is consistent with the states passing laws to operate until Congress act upon the same subject. But we give a different interpretation to the word *uniform*. When the constitution declares that "Congress shall have power to pass uniform laws," it implies that none but uniform laws shall exist; that Congress alone shall establish a bankrupt system, and that this system [181*] shall be uniform. *One of the principal motives for adopting the constitution was to raise the credit of the country, by establishing a national government with adequate powers to redress the grievances of foreigners, instead of compelling them to rely upon the capricious and contradictory legislation of the several states. The laws on the subject of bankruptcies, from their very nature, ought to be the same throughout the Union. A merchant has seldom all his creditors confined to one place or state; and a discharge, local in its nature, gives rise to various intricate questions of the *lex loci contractus*, the difficulties of which are all avoided by uniformity in the laws. It is impossible to maintain that this law of New York, or any other state bankrupt law, can be limited in its operation to the state where it is passed. If it be constitutional, it must operate extraterritorially, so far as it may, consistently with the principles of universal law. Nor is the power of Congress confined to the enacting of a bankrupt law between the states. This power, like all the other powers of the national government, operates directly and universally upon all the citizens of the Union. The 61st section of the bankrupt law of 1800, ch. 173, gives nothing to the states which they did not before possess. If it intended to recognize in them an authority not reserved by the constitution, it was ineffectual for such a purpose. Congress could not give them what the constitution had not given them; nor does the silence of Congress on the subject, since the act of 1800 was repealed, manifest the opinion of that body that there should be various laws on the subject throughout the Union; it [182*] only shows that Congress has deemed it expedient that there should be no law on the subject. If such have hitherto been the views of Congress, although we may suppose them to be mistaken views, in what other mode could

they be made known but by silence—by omitting to do what, perhaps, wiser views might induce Congress to do? The only other mode in which Congress could secure the country against the evils of numerous and inconsistent bankrupt laws, would be by establishing a uniform bankrupt law, against its own opinions and judgment. If the states have the power contended for, when Congress does not exercise the authority vested in it, then Congress must keep up a continual claim, by maintaining at all times a bankrupt system which it thinks inexpedient, for the purpose of preventing the evils and confusion that spring from various laws on such a subject. But we believe that the convention expected that Congress would exercise the power, and in that way a bankrupt system would be produced. But still this is left to the discretion of Congress, and to that body must such considerations be addressed, since it is evident that the individual states cannot produce a uniform system by their separate laws. That the law of New York in question is a bankrupt law, or a law on the subject of bankruptcies, there can be no doubt. It has the distinguishing feature of a bankrupt law. It discharges the party from the obligation of the debt entirely; whilst an insolvent law discharges only his person from imprisonment. Such is the distinction in England between the permanent bankrupt system, and *the insolvent [*183 laws which are occasionally passed (commonly called the Lord's acts), for the relief of debtors, as to the imprisonment of their persons, upon their making an assignment of all their property for the benefit of their creditors. The same distinction prevails on the continent of Europe, between the bankrupt system, which discharges both the person and future property, and the *cessio bonorum*, which discharges the person only, leaving the future acquisitions of property liable for the debt. If this law of New York were an insolvent law, it might co-exist with a uniform bankrupt code; but the provisions of this law are such that it cannot co-exist with a uniform system of bankruptcy. It therefore follows that it is a bankrupt law in the sense of the constitution. If the power of making laws on the subject of bankruptcies be exclusive, its nature, as such, was irrevocably fixed at the establishment of the new constitution. On the other hand, if it be a concurrent power, it has always been, and must always be, concurrent. There is nothing contingent in it; nor can it shift and alternate. But whether this be a bankrupt or an insolvent law, and whether the power of passing bankrupt laws be exclusive or concurrent, we insist that this law is repugnant to the constitution, as being a law impairing the obligation of contracts. It has been urged that parties contracting in a state where a bankrupt law is in force, make their contract with a view to that law, so that the law makes a part of the contract. But this is assuming the law to be constitutional; for if it be unconstitutional, it is a void law, as being repugnant *to the supreme law; and [*184 parties cannot be presumed to contract with a view to acts of the local legislature, which, though clothed with the forms of law, are nullities, so far as they attempt to impair the obligation of contracts. The idea of a contract made with reference to a law which impairs

1.—*Chirao v. Chirao*, 2 Wheat. 259.

Wheat. 4.

U. S., Book 4.

the obligation of contracts, is absurd and incomprehensible. The constitution was intended to secure the inviolability of contracts according to the immutable principles of justice. To restrict the operation of the clause of the constitution which prohibits the states from making any law impairing the obligation of contracts, to laws affecting contracts existing at the time the law is passed, would be to confine the operation of this salutary prohibition within very narrow limits. Is it credible that the convention meant to prohibit the states from making laws impairing the obligation of past contracts, and to leave them free to impair the obligation of future contracts? The prohibition against thus impairing existing rights of property would have been almost superfluous, since the principles of universal jurisprudence had already prohibited such retrospective legislation upon vested rights.¹ But the terms of the prohibition are adapted to include both prospective and retrospective laws impairing the obligation of contracts.

Suppose a state should enact a law providing that any debt, which might thereafter be contracted, should be discharged, upon payment by the debtor of half the amount. This law would **185*** be "manifestly repugnant to the constitution; nor could it be said that the creditor would be bound by this law, because it was in existence at the time when the contract was made; since the obligation of the contract is guaranteed by the constitution, which is the supreme law. Such a state law would not have the binding force of the *lex loci contractus*, as between citizens of different states; because, being repugnant to the constitution of the United States, it is, in effect, no law. Nor would it be obligatory between citizens of the same state, as a domestic regulation; because all the citizens of the United States are entitled to the benefit of this clause of the constitution, which was not meant merely to protect the citizens of one state from the injustice of the government of another, but to guarantee to the whole people of the Union the inviolability of contracts by the state legislatures. It was not intended to have an internal or federal operation merely, but to act, like all the other sanctions of the constitution, directly upon the whole body of the nation. The operation of this law, and of all laws which discharge the debt as well as the person of the debtor, is to compel the creditor to release his debt upon receiving a dividend which may be less than his demand, or even without any dividend, if the bankrupt's estate will not yield one. The obligation of the contract is as much impaired as if the law had provided in terms that the debtor should be discharged from the debt by paying half, or any other proportion, of the sum due; or that he should be discharged without paying any part of the debt. The law, **186*** in this *case, not only impairs, but it annuls, the obligation of the contract—*et legis abolitum est*. But will it be pretended that the states have a right to pass laws for the abolition of debts, even if such laws have only a prospective operation? Or can it be supposed that they have authority to pass installment or suspension laws (which are contended, by the defendant's counsel, to be the evil meant to be guarded

against by the constitutional prohibition), provided such laws are only applied to contracts made subsequent to the passage of the laws? During the pressure of the late war, the legislature of the state of North Carolina passed an act providing that any court rendering judgment against a debtor for debt or damages, between the 31st of December, 1812, and the 1st of February, 1814, should stay the execution until the first term of the court after the last-mentioned day, upon the defendant's giving two freeholders as sureties for the debt. The Supreme Court of North Carolina determined the act to be unconstitutional, upon the ground of its impairing the obligation of contracts. Though it is not of binding authority as a precedent, the principles of this decision are strongly applicable to the present case.² But we insist, in the case now before the court, that even *admitting the act now in question to be [*187 constitutional as to all contracts made after it was passed, it is clearly repugnant to the constitution as to all contracts previously made, as it is a law impairing the obligation of those contracts. It is, however, said that this law does not impair the obligation of the contracts, but merely deprives the creditor of the usual means of enforcing it; since it may be revived by a new promise, for which the moral obligation, which is still left, is a sufficient consideration. But it cannot be conceived that the constitution meant to prohibit the passage of laws impairing the moral obligation of contracts, since this obligation can only be enforced in *foro conscientia*, and it depends solely upon the volition of the party, whether he will make that new promise which is necessary to revive the debt. The legal obligation being gone forever, unless the party chooses to revive it, it is not only impaired, but absolutely extinguished and destroyed. It does not require, as in the case of a debt barred by the statute of limitations, a mere slight acknowledgement that the debt has not been paid or satisfied; but an express promise is indispensably necessary to revive a debt barred by a bankrupt certificate, which does not proceed on the presumption of payment; but, on the contrary, supposes the debt not to have been satisfied, and absolves the debtor expressly from the performance of his contract. The present inability of the debtor to perform his contract, arising from poverty, is indeed the motive or ground of the legislative interference to dispense with its performance; but this ground is taken away when that inability *ceases; [*188 and it can only justify the discharge of his person from arrest and imprisonment, but cannot authorize the discharge of his future acquisitions of property. Such a discharge impairs all that remains of the obligation of the contract. If the right of coercing the debtor by imprisonment is taken away; if his property, assigned for the benefit of his creditors, is not sufficient to pay all his debts; and if the property which he may afterwards acquire, of whatever nature,

2.—Crittenden v. Jones, 5 Hall's Am. Law Journ. 520. In this case the court says, "whatever law relieves one party from any article of a stipulation, voluntarily and legally entered into by him with another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever correspondent to, and co-extensive with, the duty of the debtor."

1.—Vide ante, p. 184.

or by whatever title, is not liable for his debts; surely the obligation of the contract is impaired. If its terms and conditions are not changed, they remain unperformed; which is the same thing to the creditor. If the time of performance is not enlarged, the obligation of performance is entirely dispensed with; which is a still greater infringement of his rights. It is said that imprisonment for debt is not a common law remedy for the non-performance of contracts, and makes no part of their obligation. Be it so; but the responsibility of the debtor as to his property, is coeval with the common law, and exists also in every other system of jurisprudence. It is the fund to which the creditor has a natural right to resort for payment. The liability of the person of the debtor to arrest and imprisonment may be modified, changed, or entirely taken away, according to the discretion of the local legislature. It has been in all ages and countries subjected to the sovereign discretion of the legislative will; and has been permitted, in various degrees, from the extreme severity of the Roman jurisprudence, which gave the creditor an absolute power over the liberty, and even **189*** life, of his debtor, to the mild system which prevails on the continent of Europe, which confines imprisonment for debt to commercial contracts and cases of fraud or breach of trust. It has also been urged, that the same reasoning which tends to establish the position, that the obligation of contracts is impaired by bankrupt laws, would extend to statutes of limitation, which make an essential part of the jurisprudence of every state. We answer, that there is a material distinction between statutes of limitation and bankrupt laws. A law of limitations, or prescription, does not strike at the validity of the contract. It is of the remedy, and not of the essence or obligation of the contract. It is a mere rule of evidence; and is founded on the presumption, arising from the lapse of time, that the debt has been paid or satisfied. This legal presumption may be negatived by positive evidence. It is not a *presumptio juris et de jure*, which is conclusive, and cannot be contradicted; for it may be repelled by any, the slightest evidence, amounting to an admission that the debt has not been paid, even though that admission be qualified by the declaration of the party that he means to insist upon the statute. The statute may also be prevented from running, and the demand perpetuated by the act of the creditor himself. It is a rule of evidence, or legal presumption, which is incorporated into every system of jurisprudence independent of positive institution. It was a part of the civil law, and is still a part of the common law. It is adopted by courts of equity, by analogy, from the statute of limitations. The **190*** particular length of time which shall bar the right of action, is indeed prescribed in some cases by the legislature; and if the period of limitation were to be arbitrarily altered by the legislature, so as to take away vested rights under contracts existing at the time the law was passed, the law would be so far unconstitutional; not that the constitutional prohibition is in general confined to existing contracts; but because, in this particular case, a new rule of evidence or legal presumption could not justly be applied to deprive the parties of rights already acquired under the old rule. The same principle

applies to laws for altering the rate of interest. They cannot have a retrospective operation. But, generally speaking, "the constitution could not have an eye to such details, so long as contracts were submitted without legislative interference to the ordinary and regular course of justice, and the existing remedies were preserved in substance, and with integrity." But this bankrupt law is not a mere matter of detail, and a part of the *lex fori*; it is a legislative interference with the ordinary and regular course of justice; and the existing remedies, so far from being preserved in substance, and with integrity, are entirely abolished. It is incredible that the convention intended to provide against such evils as suspension or installment laws, and to leave untouched the much greater evils of local bankrupt laws of this character. In truth, the framers of the constitution did not mean to limit their prohibition to any particular description of legislative acts. They meant to incorporate into the constitution a provident principle which should apply to every possible case that might arise. The inviolability of contracts from state legislation is guaranteed by the Union to all its citizens. But, it is said, that this prohibition is of a moral, as well as legal nature; and is equally binding upon Congress as upon the state legislatures, though Congress is not expressly mentioned in the prohibition; that, consequently, if a bankrupt law be a law impairing the obligation of contracts, Congress ought no more to assume the right of passing such a law than the states. The answer to this objection is, that Congress is expressly vested with the power of passing bankrupt laws, and is not prohibited from passing laws impairing the obligation of contracts, and may, consequently, pass a bankrupt law which does impair it; whilst the states have not reserved the power of passing bankrupt laws, and are expressly prohibited from passing laws impairing the obligation of contracts.¹

MARSHALL, *Ch. J.*, delivered the opinion of the court: This case is adjourned from the court of the United States, for the first circuit and the district of Massachusetts, on several points on which the judges of that court were divided, which are stated in the record ***192** for the opinion of this court. The first is,

Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States.

This question depends on the following clause, in the 8th section of the 1st article of the constitution of the United States:

"The Congress shall have power," &c., to establish a uniform rule of naturalization, and "uniform laws on the subject of bankruptcies throughout the United States."

1.—Per Mr. Justice (now Chancellor) Kent, in *Holmes v. Lansing*, 3 Johns. Cas. 73.

2.—This case was elaborately argued in the Circuit Court, by Mr. Saltonstall for the plaintiff, upon the same grounds and principles as were maintained in this court. The reporter has been favored with the perusal of a note of his instructive and able argument, which, as the case was not decided in the court below, does not appear in Mr. Mason's reports.

The counsel for the plaintiff contend that the grant of this power to Congress, without limitation, takes it entirely from the several states.

In support of this proposition they argue that every power given to Congress is necessarily supreme; and if, from its nature, or from the words of grant, it is apparently intended to be exclusive, it is as much so as if the states were expressly forbidden to exercise it.

These propositions have been enforced and illustrated by many arguments, drawn from different parts of the constitution. That the power is both unlimited and supreme is not questioned. That it is exclusive, is denied by the counsel for the defendant.

In considering this question, it must be recollected that, previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws. **193** *When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description?

The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the **194** *subject throughout the *United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of Congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors,

we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity.

When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the Union possesses the power of enacting bankrupt laws; and those of the states, the power of enacting insolvent laws. If it be determined that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the course of descents, *a distinct line of separation must be **195** drawn, and the power of each government marked with precision. But all perceive that this line must be in a great degree arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to Congress. It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised *or declined. **196** as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

It has been said that Congress has exercised this power, and, by doing so, has extinguished

the power of the states, which cannot be revived by repealing the law of Congress.

We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of Congress.

Without entering farther into the delicate inquiry respecting the precise limitations which the several grants of power to Congress, contained in the constitution, may impose on the state legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it **197*** contain no principle which violates the 10th section of the first article of the constitution of the United States.

This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States?

This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he

may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It has been argued that the states are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the states have been in the constant practice of passing insolvent laws, such as that of New York, and if the framers of the constitution had intended to deprive them of this power, insolvent laws would have ***199** been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant installments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the states the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the states may, until that power shall be exercised by Congress, pass laws concerning bankrupts; yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions.

The argument drawn from the omission in the constitution to prohibit the states from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the constitution to prohibit the passage of all insolvent ***200** laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no state shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no farther.

But a still more satisfactory answer to this



argument is, that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his **201*** contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. No argument can be fairly drawn from the 61st section of the act for establishing a uniform system of bankruptcy, which militates against this reasoning. That section declares that the act shall not be construed to repeal or annul the laws of any state then in force for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases it affords its sanction to the relief given by the insolvent laws of the state, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt.

The insertion of this section indicates an opinion in Congress that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview. It was for that reason only that a provision against this construction could be necessary. The last member of the section adopts the provisions of the state laws so far as they apply to cases within the purview of the act.

This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, **202*** unaffected by the act of Congress, *except where that act may apply to individual cases.

The argument which has been pressed most earnestly at the bar, is, that although all legislative acts which discharge the obligation of a contract without performance are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times that the mind of the convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property, not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to promise that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the

spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, *is to be disregarded, because we believe [***203** the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the colonial and state legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and, consequently, could not be within the view of the general convention.

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the states, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But, were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every state in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is in terms prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not indeed extend to insolvent laws by name, *because [***204** it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, with any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?

We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description there-

fore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration.

Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no state shall "emit bills of credit;" neither could these words be intended to restrain the states from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but **205*** gold and silver coin can be made a tender in payment of debts.

It remains to inquire, whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by installments.

This question will scarcely admit of discussion. If this was the only remaining mischief against which the constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used. It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by installment, would have expressed that intention by saying "no state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair, and, we think, the necessary construction of the sentence, requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which **206*** have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution therefore declares, that no state shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the convention; that it
Wheat. 4.

is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statute of limitations, and against usury, have been referred to in argument; *and it has been supposed [**207** that the construction of the constitution, which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the state whose law attempts to absolve a *con- [**208** fined insolvent debtor from this obligation. When such a case arises, it will be considered.

It is the opinion of the court that the act of the state of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the first circuit, and the district of Massachusetts, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, that since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of Congress in force

to establish a uniform system of bankruptcy, conflicting with such law.

This court is farther of opinion that the act of New York, which is pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action.

All which is directed to be certified to the said Circuit Court.

Cited—4 Wheat. 184; 12 Wheat. 255, 262, 272, 273, 296, 304, 312, 314, 315, 317, 326, 333, 349, 378-380; 5 Pet. 42, 47; 9 Pet. 359; 11 Pet. 581; 14 Pet. 75, 576, 591, 622, 625; 16 Pet. 622, 663; 1 How. 279, 323; 5 How. 313, 586, 625; 6 How. 328, 330, 342; 7 How. 397, 555, 556, 559, 560, 571; 12 How. 319; 1 Wall. 228; 4 Wall. 551-553; 12 Wall. 619, 667; 5 Otto, 170, 499, 533; 5 Bank. Reg. 373; 6 Bank. Reg. 261; 9 Bank. Reg. 52-57; 11 Bank. Reg. 31; 17 Bank. Reg. 197; 1 Wood & M. 121, 136-123, 130, 131, 428; 2 Wood & M. 460; 1 Palne, 570; 2 Story, 325, 326; Bald. 297, 298, 301; 1 Blae. 186; 1 Cliff. 514; 2 Cliff. 2; 3 Cliff. 386; 2 Mason, 189; 3 Mason, 89; 4 Cranch, C. C. 529; 1 Dill. 517; 7 Ben. 463; 1 Woods, 8; 3 Woods, 237.

209*] *[CONSTITUTIONAL LAW.]

M'MILLAN v. M'NEILL.

A state bankrupt or insolvent law (which not only liberates the person of the debtor, but discharges him from all liability for the debt), so far as it attempts to discharge the contract, is repugnant to the constitution of the United States, and it makes no difference in the application of this principle whether the law was passed before or after the debt was contracted.

A discharge under a foreign bankrupt law is no bar to an action, in the courts of this country, on a contract made here.

ERROR to the District Court of Louisiana.

This was a suit brought by M'Neill, the plaintiff below, against M'Millan, the defendant below, to recover a sum of money paid for the defendant's use, under the following circumstances: M'Millan, residing in Charleston, South Carolina, transacting business there as a partner of the house of trade of Sloane & M'Millan, of Liverpool, on the 8th of October and 9th of November, 1811, imported foreign merchandise, on which he gave bonds at the custom house, with M'Neill and one Walton as sureties. These bonds were payable the 8th of April, and 9th of May, 1812, and were paid, after suit and judgment, by M'Neill, on the 23d of August and 23d of September, 1813. Some time afterwards, M'Millan removed to New Orleans; where, on the 23d of August, 1815, the District Court of the first district of the state of Louisiana, having previously taken **210*** into *consideration his petition, under a law of the state of Louisiana, passed in 1808, praying for the benefit of the *cessio bonorum*,

and a full and entire release and discharge, as well in his person as property, from all debts, dues, claims, and obligations, then existing, due, or owing by him, the said M'Millan, and it having appeared fully and satisfactorily that the requisite proportion of his creditors, as well in number as amount, had accepted the cession of his goods, and had granted a full and entire discharge, as well with respect to his person as to his future effects, it was then and there ordered, adjudged, and decreed, by the said court, that the proceedings be homologated and confirmed, and that the said M'Millan be acquitted, released, and discharged, as well in person as his future effects, from the payment of any and all debts, dues, and demands, of whatever nature, due and owing by him previous to the day of the date of the commencement of said proceedings, to wit, previous to the 12th day of August, 1815. The house of trade of Sloane & M'Millan, of Liverpool, having failed, a commission of bankruptcy issued against both the partners in England, on the 28th of September, 1812, and on the 28th of November, 1812, they both obtained certificates of discharge, signed by the commissioners, and sanctioned by the requisite proportion of creditors in number and value, and confirmed by the Lord Chancellor of Great Britain, according to the bankrupt law of England. On the 1st of July, 1817, the present suit was instituted by M'Neill, describing himself as a citizen of South Carolina, against M'Millan, described as a citizen of Louisiana, *in the District [**211** Court of the United States for the District of Louisiana (having circuit court powers), to recover the sum of \$700, which M'Neill had paid, under the judgments of the custom-house bond, in South Carolina. To this suit M'Millan pleaded in bar his certificates, under the Louisiana and England bankrupt law; to which plea the plaintiff below demurred, the defendant joined the demurrer, and the court gave judgment for the plaintiff; from which judgment the cause was brought, by writ of error, to this court.

This cause was argued by *C. J. Ingersoll* for the plaintiff in error, no counsel appearing for the defendant in error. He contended, 1. That this case was distinguished from the preceding case of *Sturges v. Crowninshield*, because the state law, under which the insolvent obtained his discharge, was passed long before the contract was made, and, therefore, it could not be said to impair the obligation of a contract not then in existence. 2. That although the contract was made in South Carolina, between the parties who were at the time citizens of the state, yet the debtor having removed to Louisiana, and become a resident citizen of that state, and the creditor pursuing him thither, the local court had authority, under the local laws, to grant him a discharge, which might be effectual within the limits of the state, even if it had not extraterritorial operation. The discharge, being effectual in the courts of the state where it was obtained, would, of course, be equally effectual in the courts of the United States, sitting *in that state, the laws [**212** of the state being made by the judiciary act of 1789, c. 20, s. 84, rules of decision in the courts of the United States, in cases where they apply. 3. That the certificate of discharge under

NOTE.—See Note to *Sturges v. Crowninshield*, ante 122.

the English bankrupt laws, was a good plea in bar to the action.¹

MARSHALL, *Ch. J.*, delivered the opinion of the court, that this case was not distinguishable in principle from the preceding case of *Sturges v. Crowninshield*. That the circumstances of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle. And that as to the certificate under the English bankrupt laws, it had frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on the contract made in this country.

Judgment affirmed.

Cited—6 Wheat. 134; 12 Wheat. 254, 255, 272, 315, 333; 5 How. 308, 309, 316; 1 Wall. 228; Bald. 298, 299, 301; 1 Wood. & M. 127; McAll. 265; 1 Cliff. 514; 4 Cranch, C. C. 529.

[COMMON LAW.]

BARR v. GRATZ'S HEIRS.

A patent issued on the 18th November, 1784, for 1,000 acres of land in Kentucky, to J. C., who had previously, in July, 1784, covenanted to convey the same to M. G., the ancestor of the lessor of the plaintiff, and on the 23d June, 1786, M. G. made an agreement with R. B., the defendant in ejectment, to convey to him 750 acres, part of the tract of 1,000 acres, under which agreement R. B. entered into possession of the whole tract; and on the 11th of April, 1787, J. C., by direction of M. G., conveyed to R. B. the 750 acres in fulfillment of said agreement, which were severed by metes and bounds from the tract of 1,000 acres. J. C. and his wife, on the 26th of April, 1791, made a conveyance in trust of all his property, real and personal, to R. J. and E. C. On the 12th of February, 1813, R. J., as surviving trustee, conveyed to the heirs of M. G., under a decree in equity, that part of the 1,000 acres not previously conveyed to R. B. and in the part so conveyed, under the decree, was included the land claimed in the ejectment. R. B. (the defendant) claimed the land in controversy under a patent for 400 acres, issued on the 15th of September, 1795, founded on a survey made for B. N. May 12th, 1782; and under a deed of the 13th of December, 1796, from one Coburn, who had, in the winter and spring of 1791, entered into and fenced a field within the bounds of the original patent for 1,000 acres 214*) to J. C., claiming to hold the same under B. N.'s survey of 400 acres. Held, that upon the issuing of the patent to J. C., in November, 1784, the possession then being vacant, he became by operation of law vested with a constructive actual seizin of the whole tract included in his patent; that his whole title passed by his prior conveyance to M. G. (the ancestor of the lessor of the plaintiff); and that when it became complete at law by the issuing of the patent, the actual constructive seizin of J. C. passed to M. G., by virtue of that conveyance. Held, that when, subsequently, in virtue of the agreement made in June, 1786, between M. G. and R. B. (the defendant), the latter entered into possession of the whole tract, under this equitable

title, his possession being consistent with the title of M. G., and in common with him, was the possession of M. G. himself, and enured to the benefit of both, according to the nature of the respective titles. And that when, subsequently, in April, 1787, by the direction of M. G., J. C. conveyed to the defendant 750 acres in fulfillment of the agreement between M. G. and the defendant, and the same were severed by metes and bounds in the deed from the tract of 1,000 acres, the defendant became sole seized in his own right of the 750 acres so conveyed. But as he still remained in the actual possession of the residue of the tract, within the bounds of the patent, which possession was originally acquired under M. G., the character of his tenure was not changed by his own act, and, therefore, he was *quasi* tenant to M. G., and, as such, continued the actual seizin of the latter, over this residue at least, up to the deed from Coburn to the defendant, in 1796.

Held, that if Coburn, in 1791, when he entered and fenced a field, &c., had been the legal owner of B. N.'s survey, his actual occupation of a part would not have given him a constructive actual seizin of the residue of the tract included in that survey, that residue being at the time of his entry and occupation in the adverse seizin of another person (M. G.), having an older and better title. But there being no evidence that Coburn was the legal owner of B. N.'s survey, his entry must be considered as an entry without title, and consequently his disseizin was limited to the bounds of his actual occupancy.

The deed of the 16th of July, 1784, from J. C. to M. G., being more than thirty years old, and proved to have been in possession of the lessors of the plaintiffs, and actually asserted as the ground of their title in the equity suit, was admissible in evidence without regular proof of its execution.

The deed from J. C. and wife to D. J. and E. C., in 1791, was not within the statute of champerty and maintenance of Kentucky: *for as to all* 215 the land not in the actual occupancy of Coburn, the deed was operative, the grantors and those holding under them having at all times had the legal seizin.

In general, judgments and decrees are evidence only in suits between parties and privies; but the doctrine is wholly inapplicable to a case like the present, where the decree in equity was not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate.

The deed of 1813, from R. J., surviving trustee, under the decree in equity, was valid without being approved by the court, and recorded in the court, according to the statute of Kentucky of the 16th of February, 1808, c. 453.

ERROR to the Circuit Court of Kentucky.

This was an action of ejectment, in which the defendants in error were the lessors of the plaintiffs below, and which was brought to recover the possession of a tract of land in the District of Kentucky, claimed by them under a patent issued to John Craig, November 18th, 1784, for 1,000 acres of land, included in three separate warrants of 320 acres, 480 acres, and 200 acres, surveyed for John Craig, on the 14th of January, 1783. On the 16th of July, 1784, John Craig conveyed, by deed, the said tract of land to Michael Gratz, the ancestor of the lessors of the plaintiffs, and covenanted to cause a patent to issue to said Gratz, or if it could not

1.—He cited *Rutherf. Inst.* b. 2, c. 5, s. 3, c. 9, s. 6; *Huber. Prael.* l. 1, tit. 8; *Greenough v. Amory*, 3 Dall. 370, note; *James v. Allen*, 1 Dall. 188; *Miller v. Hall*, Ib. 229; *Thompson v. Young*, Ib. 294; *Gorgerat v. McCarty*, Ib. 360; *Donaldson v. Chambers*, 2 Dall. 100; *Harris v. Mandeville*, Ib. 256; *Emory v. Greenough*, 3 Dall. 369; *Smith v. Brown*, 3 Binney, 201; *Boggs v. Zeacle*, 5 Binney, 332; *Hilliard v. Greenleaf*, 5 Binney 336, note; *Van Raugh v. Van Arsedale*, 3 Caines' Rep. 154; *Smith v. Smith*, 2 Johns. Rep. 235; *Penniman v. Meigs*, 9 Johns. Rep. 325; *Hicks v. Brown*, 12 Wheat. 4.

Johns. Rep. 142; *Hamersley v. Lambert*, 2 Johns. Ch. Rep. 511; *Blanchard v. Russell*, 13 Mass. Rep. 1; *Bradford v. Farrand*, Ib. 18; *Walsh v. Farrand*, Ib. 19; *Baker v. Wheaton*, 5 Mass. Rep. 509; *Babcock v. Weston*, 1 Gullis. Rep. 168; *Van Reimsdyk v. Kane*, Ib. 371; *Golden v. Prince*, 5 Hall's Law Jour. 502; *Adams v. Story*, 6 Hall's Law Jour. 474; *Farm. & Mech. Bank v. Smith*, Ib. 547; *Burrows v. Jemimo*, 2 Stra. 933; *Ballantine v. Golding*, Co. Bankr. Law, 44; *Coop. Bankr. Law*, 332; *Smith v. Buchanan*, 1 East's Rep. 6; *Potter v. Brown*, 5 East's Rep. 124; *Terasson's case*, *Coop. Bankr. Law*, Appen. 80.

issue in his name, that said Craig would stand seized to the use of Gratz, and make such other conveyances as should be necessary to confirm the title. On the 23d of June, 1786, Gratz made an agreement with Robert Barr, the defendant in ejectment, to convey to him 750 acres of land, part of the said 1,000 acres; the defendant entered into possession of the whole tract, and settled a quarter and farm thereon, and on the 11th day of April, 1787, John Craig, by the direction of said Gratz, conveyed to the defendant, Barr, 750 acres, in fulfillment of said agreement, which were severed by metes and bounds from the said tract of 1,000 acres. On the 26th of April, 1791, John Craig and his wife made a conveyance in trust to Robert Johnson and Elijah Craig of all his property, real and personal. On the 12th of February, 1813, Robert Johnson, as surviving trustee, under a decree in equity of the Circuit Court for the District of Kentucky, conveyed to the lessors of the plaintiffs that part of the 1,000 acres not previously conveyed to the defendant, Barr, and in the part so conveyed was included the land claimed in this action.

The defendant, Barr, claimed the tract of land in controversy under a patent for 400 acres issued by the state of Kentucky, on the 15th of September, 1795, founded on a survey made for Benjamin Netherland, May 12th, 1782.

On the trial of the cause, the plaintiffs read in evidence to the jury the patent to John Craig for 1,000 acres of land; copies of two other surveys for John Craig; the deed of the 16th July, 1784, to Michael Gratz, the ancestor of the lessors of the plaintiffs; the deed of trust of the 26th of April, 1791, from John Craig and wife to Robert Johnson and Elijah Craig; the deed of the 12th February, 1813, from Robert Johnson (as surviving trustee) to the lessors of the plaintiffs; the decree in the chancery suit between Michael Gratz and John Craig and others, *under which that deed was made; the surveys, plats, and reports of the 14th of January, 1788, signed by John Price, and the agreement between the said Gratz and Barr. The plaintiffs also introduced parol testimony establishing the boundary of the land patented to John Craig, and proving the defendant's possession of the whole tract.

The defendant gave in evidence a deed from one Coburn to him, dated the 13th of December, 1796; the deed from Craig to him of the 11th of April, 1787; the plat and certificate of Netherland's survey; a certificate of its conveyance by Ann Shields to the defendant; and gave parol testimony that, in the winter and spring of 1791, Coburn entered into, and fenced a field within the boundary of Craig's patent, claiming to hold the same under the title of Netherland, as part of the land included in his survey of 400 acres.

The defendant objected to the admission in evidence of the record and proceedings of the Circuit Court in the chancery suit between Michael Gratz and John Craig and others; but the decree was permitted to be read to the jury, to which the defendant excepted. The defendant also excepted to the admission in evidence of the deed from John Craig to Michael Gratz, dated the 16th of July, 1784, because the same was not proved by the subscribing witnesses, nor their absence accounted for.

The court instructed the jury as follows: 1. That if they should be of opinion that neither the defendant nor John Coburn, under whom he claims, were in actual possession of the land now in dispute prior *to the 18th day [*218 of November, 1784, the date of the patent to John Craig for the land now in dispute, that the emanation of the said grant gave possession to the said John Craig of the whole of the said land; and that the present plaintiffs were entitled to the benefit of that possession. 2. That if the jury should be of opinion that Robert Barr, the defendant, entered upon and took possession of the land in contest under a contract with the ancestor of the plaintiffs, and was so possessed at the time of the settlement of Coburn, under whom the defendant now pretends title, that the possession of Coburn, when taken, did not extend within the patent lines, under which the lessors of the plaintiffs claim, beyond his actual occupancy. 3. That Coburn's claiming and fencing a part of the land in 1791, or whenever the jury should be of opinion he took possession and fenced within the patent limits aforesaid, did not give to him a legal possession to any other part of the land within the patent to Craig than that of which he had the actual occupancy. 4. That the possession of Coburn, attempted to be proved, more than twenty years before the bringing this suit, did not bar the plaintiffs' right to sue, further than he showed an actual possession for twenty years, or upwards, next before bringing this suit.

The defendant objected to the instructions so given the jury, and moved that the court should give certain other instructions to the jury, which were refused. A verdict was taken for the plaintiffs, and judgment rendered thereupon. The defendant afterwards moved for a new trial, which was refused by *the [*219 court. The cause was thereupon brought, by writ of error, to this court.

This cause was argued by *Mr. Trimble* for the plaintiffs in error, who made the following points: 1. That the court below erred in refusing the motion for a new trial. 2. That the decree in the chancery suit between Michael Gratz and John Craig and others was not admissible in evidence in this case. 3. That there was error in admitting in evidence the deed from John Craig to Michael Gratz of the 16th of July, 1784, without the regular proof of its execution by the subscribing witnesses. 4. That the deed of the 18th of February, 1813, from Robert Johnson, as surviving trustee, to the lessors of the plaintiff, under the decree in chancery, was not admissible in evidence, without preliminary proof that Elijah Craig was dead. 5. That the said deed was not approved by the court, nor recorded as required by the statute of Kentucky of the 16th of February, c. 453. 6. That the deed of the 26th of April, 1791, from John Craig and wife, in trust to Robert Johnson and Elijah Craig, was void under the statute of champerty and maintenance, the land being at the time in the adverse possession of Coburn. 7. That the court below erred in the instructions it gave to the jury.

Mr. Talbot and *Mr. Sergeant*, contra.

STORY, J., delivered the opinion of the court: In this case, it is unnecessary to travel

Wheat, 4.

220* *through all the exceptions taken by the defendant in the court below, because, upon the facts stated in the bill of exceptions, some of the opinions required of the court upon points of law, do not arise from the evidence; and as to others, the opinion of the court, if in any respect erroneous, was so in favor of the defendant.

The first error assigned is, that the court refused to grant a new trial; but it has been already decided, and is too plain for argument, that such a refusal affords no ground for a writ of error.

Another error alleged is, that the court allowed the decree of the Circuit Court, in the chancery suit between Michael Gratz and John Craig and others, to be given in evidence to the jury. In our opinion this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate; without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree, would be, in effect, to declare that no title derived under a decree in chancery, was of any validity except in a suit between parties and privies, so that in **221*** *a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*.

Another error alleged is, the admission in evidence of the deed of John Craig to Michael Gratz, dated the 16th of July, 1784, without the regular proof of its execution by the subscribing witnesses. But as that deed was more than thirty years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in the chancery suit, it was, in the language of the books, sufficiently accounted for; and on this account, as well as because it was a part of the evidence in support of the decree, it was admissible, without the regular proof of its execution.

Another error alleged is, that the deed from Robert Johnson to the plaintiffs, under the decree in chancery, was not admissible in evidence without proof that Robert Johnson was the surviving trustee, and that Elijah Craig was dead. But upon examining the bill of exceptions of the defendant, no point of this sort arises; for it is there stated that the plaintiff gave in evidence "the deed from Robert Johnson, the surviving trustee to the lessors of the plaintiff;" and no objection appears to have been made to its admissibility on this account.

Having disposed of these minor objections, we may advance to the only points of any real importance in the cause, but which, in our opinion, are of no intrinsic difficulty. Upon Wheat. 4.

the issuing of the patent *to John **[222]** Craig, in November, 1784, the possession then being vacant, he became, by operation of law, vested with a constructive actual seizin of the whole tract of land included in his patent. His whole title (such as it was) passed by his prior conveyance in July, 1784, to Michael Gratz, the ancestor of the lessor of the plaintiff, and the moment it became complete at law by the issuing of the patent, the actual constructive seizin of Craig was transferred to Gratz, in virtue of that conveyance.¹ When, subsequently, in virtue of the agreement made in June, 1786, between Michael Gratz and the defendant, for the purchase of 750 acres of the tract of 1,000 acres, the defendant entered into possession of the whole tract, under this equitable title, his possession being consistent with the title of Gratz, and in common with him, was the possession of Gratz himself, and eured to the benefit of both, according to the nature of their titles. When, subsequently, in April, 1787, by the direction of Gratz, Craig conveyed to the defendant a large portion of the land in fulfillment of the agreement between Gratz and Barr, and the same was severed by the metes and bounds in the deed from the tract of 1,000 acres, the defendant became sole seized in his own right of the portion so conveyed. But as he still remained in the actual possession of the residue of the tract within the bounds of the patent, and this possession was originally taken under Gratz, the character of his tenure was not changed by his own act, and therefore *he was *quasi* tenant to **[223]** Gratz; and as such, continued the actual seizin of the latter over the whole of this residue, at least up to the period of the deed from Coburn to the defendant in 1796. This brings us to the consideration of the period when the evidence first establishes any entry or possession in John Coburn. It appears by the evidence, that in the winter and spring of 1791, Coburn entered into, and fenced, a field within the boundary of Craig's patent, claiming to hold the same under the title of Netherland, as part of the land included in his survey of a tract of 400 acres. If Coburn at this time had been the legal owner of Netherland's survey, his actual occupation of a part, would not have given him a constructive actual seizin of the residue of the tract included in that survey, if at the time of his entry and occupation that residue was in the adverse seizin of another person having an older and better title. For where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seizin of the estate who has the better title. Both cannot be seized, and, therefore, the seizin follows the title. Now, it is clear that the title of Craig, and, of course, of his grantee, Gratz, was older and better than Netherland's; and the possession of Barr under that title, being the possession of Gratz, the legal seizin of the land which was not sold to Barr, was by construction of law in Gratz; and the disseizin of Coburn under a junior title, did not extend beyond the limits of his actual occupancy. This reasoning proceeds upon the supposition that Coburn had a good title to Netherland's survey.

1.— *Vide Green v. Litter*, 8 Cranch, 229, 245.

224*] But, in fact, no such title was shown in evidence, there being no proof that Ann Shield, from whom Coburn derived his title, was the legal owner of the title of Netherland. So that the entry of Coburn must be considered as an entry without title, and, consequently, his disseizin was limited to the bounds of his actual occupancy. This view of the case disposes of the objection to the deed from Craig and wife to Robert Johnson and Elijah Craig, in 1791, upon the ground that it was within the statutes of champerty and maintenance, the land being at the time in the adverse possession of Coburn; for as to all the land not in his actual occupancy (and to this alone the charge of the court applied) the deed was, at all events, operative; the grantors, and persons holding under them, having at all times had the legal seizin.¹

Another objection taken is, that the deed from Robert Johnson to the lessors of the plaintiff, under the decree in chancery, was not approved by the court, nor recorded in the court in conformity with the statute of Kentucky of the 16th of February, 1818, ch. 453. In our judgment no such approval was necessary; and upon examination of the statute in question, it is clear that it is not imperative in the present case.

Upon the whole, without going more minutely into the case, we are all of opinion that the judgment of the court below ought to be affirmed. No error has been committed which is injurious to the defendant. He **225*]** has had the full benefit of the law, so far as the facts of this case would warrant the court in applying it in his favor.

Judgment affirmed.

Cited—9 Wheat. 288; 1 Pet. 169; 5 Pet. 355, 440, 493; 5 Wheat. 124; 6 Pet. 140, 743; 9 Pet. 72, 735; 10 Pet. 224, 443; 12 Pet. 163, 456; 3 How. 690; 4 How. 15; 5 How. 224; 1 Wall. 598; 3 Wall. 105; 13 Wall. 604; 10 Otto, 81; 1 McLean, 124; 1 Wood. & M. 174.

[COMMON LAW]

ELIASON ET AL. v. HENSHAW.

Where A offered to purchase of B two or three hundred barrels of flour, to be delivered at Georgetown (District of Columbia), by the first water, and to pay for the same \$9.50 per barrel; and to the letter, containing this offer, required an answer by the return of the wagon by which the letter was sent. This wagon was at that time in the service of B and employed by him in conveying flour from his mill to Harper's Ferry, near to which place A then was. His offer was accepted by B, in a letter

1.—*Vide* Walden v. Gratz's Heirs, ante, Vol. I., p. 292.

NOTE.—An offer by letter is a continuing offer until the letter be received, and for a reasonable time, thereafter, during which the party to whom it is addressed may accept the offer, and communicate the fact of his acceptance. This offer may be withdrawn by the maker at any moment, and it is withdrawn as soon as notice of such withdrawal reaches the party to whom the offer is made, and not before. If, therefore, the party accepts the offer before such withdrawal, the bargain is completed. There is then a contract, founded on mutual assent. And an acceptance to this effect is made, and **556**

sent by the first regular mail to Georgetown, and received by A at that place; but no answer was ever sent to Harper's Ferry. Held, that this acceptance, communicated at a place different from that indicated by A imposed no obligation binding upon him.

An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter according to the terms on which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by *Mr. Jones* and *Mr. Key* for the plaintiff in error, and by *Mr. Swann* for the defendant in error.

WASHINGTON J., delivered the opinion of the court: This is an action, brought by the defendant *in error, to recover damages [***226** for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distance about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day was written by the defendant, addressed to the plaintiffs at Georgetown, *and des- [***227** patch by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take

is communicated, when the party receiving the offer puts into the mail his answer accepting it. 1 Pars. on Cont. 483; Adams v. Lindsell, 1 B. & Ald. 681; Kennedy v. Lee, 3 Meriv. 441; Potter v. Sanders, 6 Hare. 1. A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract, but an answer, posted on the day of receiving the offer, is sufficient; the contract is accepted by the posting of a letter declaring its acceptance; a person putting into the post a letter declaring his acceptance **Wheat. 4.**

the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledged the receipt of it, and add, "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiff's first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that, if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the

same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was despatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, [*229 about what time they should receive the desired answer, and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation

of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office.

Dunlop v. Higgins, 1 H. L. Cas. 381; Stockton v. Cullen, 7 M. & W. 515.

See also, establishing the same doctrine above mentioned: Beckwith v. Cheever, 1 Foster (N. H.) 11; Brisbane v. Boyd, 4 Paige, 17; Averill v. Hedge, 12 Conn. 436; Martin v. Frith, 6 Wend. 103; Vassar v. Camp, 14 Barb. 341; S. C. 1 Kern. 441; Clark v. Oates, 20 Barb. 42; Levy v. Cohen, 4 Geo. 1; Chiles v. Nelson, 7 Dana, 281; Falls v. Gaither, 9 Port. (Ala.) 606; Hamilton v. Locoming Ins. Co. 5 Penn. St. 329; Hutcheson v. Blakeman, 3 Met. (Ky.) 80; Underhill v. North Am., etc., 36 Barb. 364; Harris's Case, 3 Eng. Rep. (Moak's) 529; Matteson v. Scofield, 27 Wis. 671; Meyers v. Smith, 48 Barb. 614.

Where an insurance company made known by letter the terms on which they were willing to insure, the contract was complete when the insured sent a letter in the post-office accepting the terms; and the house having been burned down while the notice of acceptance was in progress by the mail, the company were held responsible.

The Columbia v. Merch. F. Insurance Co., 9 How. 380; Taylor v. Alto, 2 Ware, Davies, 344; Bentley v. Coe, The Palmetto, 4 N. Y. 423.

Ins. Co., 1 Ler., although the letter of acceptance never reaches its proper destination. Duncan v. Topham, 8 C. B. 225.

To take an offer containing the offer, requests an answer by letter, or by mail, and the letter containing

Wheat. 4.

the acceptance of the offer is not sent by return mail the person making the offer may consider it rejected, and may proceed in the same manner as if it had never been made. Taylor v. Rennie, 35 Barb. 272.

When the offer is by letter, or telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the knowledge of the proposing party, or whether the answer is ever received. Such acceptance is sufficient subscription to take the case out of the statute of frauds. Trevor v. Wood, 36 N. Y. 307; rev'g S. C. 41 Barb. 255; Newcomb v. DeRoos, 2 Ell. & E. 271; Minn. Oil Co. v. Collier Lead Co., 4 Dill. 431.

It is not necessary to prove that the assent actually came to the knowledge of the proposer, nor does evidence that it did not come to his knowledge avail. Vassar v. Camp, 11 N. Y. 441; aff'g. 14 Barb. 341; Parks v. Comstock, 59 Barb. 18.

Although the sender may make it a condition that the proposal shall not be binding upon him until the notice of acceptance is received by him. Fellows v. Prentiss, 3 Den. 520.

Or the time for acceptance may be limited. But-ton v. Phillips, 24 How. Prac. Rep. 111.

If there is any departure from or qualification of the terms offered, there is no binding agreement. Snow v. Miles, 3 Cliff. 608; Head v. Prov. Ins. Co., 2 Cranch, 127; Carr v. Duval, 14 Pet. 77; Ocean Ins. Co. v. Carrington, 3 Conn. 367; Myers v. Keystone Ins. Co., 27 Penn. St. 268.

binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and 230*] they were the only judges of its importance. There was therefore no contract concluded between these parties, and the court ought, therefore, to have given the instructions to the jury, which was asked for.

Judgment reversed. Cause remanded, with direction to award a venire facias de novo.

Cited—14 Pet. 82, 83; 9 How. 402; 3 Cliff. 613.

[COMMON LAW.]

SOMERVILLE'S EXECUTORS

v.

HAMILTON.

Where the defendant in ejectment, for lands in North Carolina, has been in possession under title in himself, and those under whom he claimed, for a period of seven years, or upwards, such possession is, by the statute of limitation of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself by positive proof within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title.

Quere, Whether in an action upon a covenant against incumbrances, the plaintiff is bound to show that the adverse claimant recovered, in the suit by which the plaintiff is evicted, by title paramount, or whether the recovery itself is *prima facie* evidence of that fact.

THIS was an action of covenant brought in the Circuit Court of North Carolina, by the executors of John Somerville, the younger, against John Hamilton, on the following covenants in a deed of land in North Carolina, from Hamilton to John Somerville, the elder, dated April 15th, 1772. The grantor covenanted 231*] *with the grantee, his heirs and assigns, that the premises "then were, and so forever thereafter should remain, free and clear of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, title, troubles, charges, and incumbrances whatsoever, done, committed, or suffered, by the said John Hamilton, or any other person or persons whatsoever, the quitrent afterwards to grow due to Earl Grenville, his heirs, &c., only excepted." There was also a covenant for a general warranty. Hamilton claimed the lands under a deed, dated the 4th of October, 1771, from one Stewart, who was then in possession, and who delivered possession to Hamilton. John Somerville, the elder, conveyed the same to his son, John Somerville, the younger, by deed dated the 8th of September, 1777; and Somerville, the younger, conveyed to one Whitmill Hill, by deed dated the 9th of October, 1795. W. Hill died on the 13th

of October, 1797, having by his last will devised the lands to his son, Thomas B. Hill. The latter having entered under the devise, an action of ejectment was brought against him in the Superior Court of the state of North Carolina for Halifax district, on the 7th of June, 1804, for two hundred and fifty acres, parcel of the said lands, by one Benjamin Sherrod, who, at the April term, 1805, of the said court, obtained a verdict and judgment for the possession of the said two hundred and fifty acres of land, and was put in possession of the same. On the 2d of September, 1804, Hamilton had notice from Somerville, the younger, of the institution of this suit, but did not aid in the defense. From the date of Stewart's deed to Hamilton *(October 4th, 1771), to the [*232 commencement of this suit by Sherrod against Hill, on the 7th of June, 1804, the land in controversy was in the possession of Hamilton, and of Somerville and the Hills, claiming under Hamilton. On the 6th of November, 1806, Somerville, the younger, died, leaving the plaintiffs executors of his last will and testament.

The above facts were found by a special verdict in the Circuit Court, and the case came before that court upon the special verdict at November term, 1816, when the judges differed in opinion upon the following questions:

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill by title paramount to that derived from Hamilton; or the recovery itself was *prima facie* evidence of that fact.

2. Whether the title shown by Thomas B. Hill under Hamilton was not so complete as to prove that Sherrod's recovery could not have been by title paramount.

Which questions were thereupon certified to this court for decision.

The cause was argued at the last term by Mr. Harper for the plaintiffs, no counsel appearing for the defendant.

*The opinion of the court was delivered at the present term by STORY, J.:

Upon the special verdict in this case, the judges in the court below differed in opinion on two points, which are certified to this court for a final decision.

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill by title paramount to that derived from Hamilton, or the recovery itself was *prima facie* evidence of that fact.

2. Whether the title shown by Thomas B. Hill under Hamilton was not so complete as to prove that Sherrod's recovery could not be by title paramount.

Upon the first point, this court also is divided in opinion, and, therefore, no decision can be certified. But as we are unanimous on the second point, and an opinion on that finally disposes of the cause, it will now be pronounced.

From the date of Stewart's deed to Hamilton, in October, 1771, until the commencement of the suit by Sherrod against Hill, in July, 1804,

1.—He cited Duffield v. Scott, 3 T. R. 617; the office of Bledale v. Babcock, 1 Johns. Rep. 517; the office of Bingham, 6 Johns. Rep. 168; Bender v. Bingham, 1 Johns. Rep. 436; Hamilton v. Cutts, 4 Mass. 255; and the office of the person number 4.

a period of thirty-three years, the land in controversy was in the exclusive possession of Hamilton, and those deriving title under him. A possession for such a length of time, under title, was, by the statute of limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities provided for by that statute.¹ The special verdict **234*** in this case does *not find either that Sherrod was or was not within those exceptions or disabilities. The case, therefore, stands, in this respect, purely indifferent. By the general principles of law, the party who seeks to recover, upon the ground of his being within some exception of the statute of limitations, is bound to establish such exception by proof, for it will not be presumed by the law. In the suit by Sherrod against Hill, it would have been sufficient for the defendant to have relied upon the length of possession as a statutable bar to the action; and the burthen of proof would have been upon Sherrod, to show that he was excepted from its operation. By analogy to the rule in that case, the proof of possession under title for thirty-three years was presumptive evidence, and, in the absence of all conflicting evidence to remove the bar, conclusive evidence that the title of Hill, **235*** *under Hamilton, was so complete that Sherrod's recovery could not have been by title paramount.

Certificate accordingly.

Cited—6 Pet. 743; 9 Pet. 735; 3 Wall. 255.

[CONSTITUTIONAL LAW.]

THE BANK OF COLUMBIA,
v.
OKELY.

The act of Assembly of Maryland, of 1793, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment, against its debtors who have, by an express consent, in writing, made the bonds, bills, or notes, by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States or of Maryland.

But the last provision in the act of incorporation, which gives this summary process to the bank is no

1.—This statute, which was enacted in the year 1715, provides (sec. 3), "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years after his, her, or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The 4th section contains the usual savings in favor of infants, &c., who are authorized, within three years after their disabilities shall cease "to commence his or her suit, or make his or her entry." Persons beyond seas are allowed eight years after their return; "but that all possessions held, without suing such claim as aforesaid, shall be a perpetual bar against all and every manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land." Vide Patton's lessee v. Easton, ante, Vol. I., p. 476.

Wheat. 4.

part of its corporate franchises, and may be repealed or altered at pleasure by the legislative will.

ERROR to the Circuit Court for the District of Columbia.

This was a proceeding in the court below, under the act of Assembly of Maryland of 1793, c. 30, incorporating the Bank of Columbia, the 14th section of which is in these words:

"And whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them: Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes *given or indorsed by them, with an [***236** express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same become due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid; or if not to be found, have the same left at his last place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or of the county in which the said delinquent or delinquents may reside, or did at the time he or they contracted the debt reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue *capias ad satisfaciendum, fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the general court, and the clerks of the several county courts are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same which shall first sit after issuing thereof, and shall be as valid and as effectual in law, to all intents and purposes, as if the same had issued on judgments regularly obtained in the ordinary course of proceeding in the said court; and such execution or executions shall not be liable to be stayed or delayed by any *superedeas*, writ of error, *ap- [***237** peal, or injunction from the chancellor; provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this state to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendants shall dispute the whole, or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made; and shall make such other proceedings, that justice may be done in the speediest manner."

A motion was made in the court below to

quash an execution, which had been issued against the defendant, under this section, upon the ground that it was contrary to the constitution of the United States, article 7th of amendments,¹ and to the 21st article of the bill of 238*] rights of Maryland.* *The court below quashed the execution upon these grounds, and the cause was brought by writ of error to this court.

Mr. Key, for the plaintiff, argued, that the act of Congress of the 27th of February, 1801, giving effect to the laws of Maryland in that part of the district of Columbia, which was ceded to the United States by the state of Maryland, was a re-enactment of those laws under the exclusive powers of legislation given to Congress over the district; and that consequently the question of the repugnancy to the local constitution of Maryland could not properly arise. That such summary proceedings, whether of a criminal or civil nature, which were in force at the time when the constitution of the United States was established, were to be preserved, notwithstanding the 7th article of the amendments to that constitution. That the statute of *Magna Charta* in England, from which the 21st article of the bill of rights of Maryland is copied, was never supposed to be infringed by the multitude of modern statutes, under which summary convictions for petty offenses were had, and the various summary proceedings authorized by the revenue laws, which had also been adopted in this country; but that what was conclusive of the question, was, that no person could ever be made liable to the peculiar process given by this act of Maryland, without his own express consent in writing that the bill, or note, drawn or indorsed by him, should be negotiable at the Bank of Columbia; which, taken in connection with the other provisions 239*] of the section, *was equivalent to an agreement that this summary process should issue against him in case of non-payment. It was, therefore, a case within the maxim, *lex pro se introducta*. Even after the consent thus given to waive the trial by jury, in the first instance, the party may dispute the demand on the return of the execution, in which case the court is to order an issue to be joined, and a trial to be immediately had by jury. So that the whole substantial effect of the provision is, to authorize the commencement of a suit by an attachment of the person and property of the debtor, instead of the usual common law process.

Mr. Jones, contra, insisted, that the act of Congress of the 29th of February, 1801, giving effect to the then existing laws of Maryland, in that part of the District of Columbia which had been ceded to the United States, by the state of Maryland, did not extend to such acts as are

repugnant to the state and national constitutions. The bill of rights of Maryland limits the legislative powers of the Assembly of Maryland. By the third article of that bill of rights, the right of trial by jury is secured in all cases at common law, and the same right is secured by the seventh amendment to the constitution of the United States in all cases at common law above the value of twenty dollars. The consent of the party that his paper should be negotiable at the bank, was by no means equivalent to an agreement that this summary process of execution before judgment, inverting the just and natural order of judicial proceedings, *should be issued against him. Nor [*240 could the party thus consent prospectively to renounce a common law right. As a stipulation in a policy of insurance not to sue, but to abide by the award of arbitrators, will not deprive the courts of common law of their ordinary jurisdiction, so neither will the consent of the party thus given deprive him of his right to a trial by jury. But even supposing the process were in other respects regular, the act under which it is issued does not empower the clerk of the Circuit Court of the district of Columbia to issue it. It is conferred by the letter of the statute upon the clerks of the general court, or the county court, and no provision is made in the act of Congress of the 27th of February, 1801, for vesting the same powers in the clerk of the Circuit Court of the district, and for giving to that court the same jurisdiction over the case which the state court of Maryland previously had.

Mr. Martin, contra, was stopped by the court.

JOHNSON, J., delivered the opinion of the court: In this case the defendant contended, that his right to a trial by jury, as secured to him by the constitution of the United States, and of the state of Maryland, has been violated. The question is one of the deepest interest; and if the complaint be well founded, the claims of the citizen on the protection of this court are peculiarly strong.

The 7th amendment to the constitution of the United States is in these words:

*"In suits at common law, where [*241 the value in controversy shall exceed \$20, the right of the trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The 21st article of the Declaration of Rights of the state of Maryland, is in the words of *Magna Charta*:

"No freeman ought to be taken or imprisoned, &c., or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."

The act by which this bank is incorporated, gives a summary remedy for the recovery of notes indorsed to it, provided those notes be made expressly negotiable at the bank in their creation. This is a note of that description; but it is contended that the act authorizing the issuing of an execution, either against the body or effects of the debtor, without the judgment of a court, upon the oath and demand of the president of the bank, is so far a violation of

1.—Which declares that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2.—Which declares, "That no freeman ought to be taken, or imprisoned, or diseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."

the rights intended to be secured to the individual, under the constitution of the United States, and of the state of Maryland. And as the clause in the act of incorporation, under which this execution issued, is express as to the courts in which it is to be executed, it is further contended, that there is no provision in the law of Congress for executing it in this district.

We readily admit that the provisions of this law are in derogation of the ordinary principles [242*] of private rights, and, as such, must be subjected to a strict construction, and under the influence of this admission, will proceed to consider the several questions which the case presents.

The laws of the state of Maryland derive their force, in this district, under the first section of the act of Congress of the 27th of February, 1801. But we cannot admit that the section which gives effect to those laws amounts to a re-enactment of them, so as to sustain them, under the powers of exclusive legislation, given to Congress over this district. The words of the act are, "The laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States." These words could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that state, it was void there, and must be so here. It becomes, then, unnecessary to examine the question, whether the powers of Congress be despotic in this district, or whether there are any, and what, restrictions imposed upon it, by natural reason, the principles of the social compact, or constitutional provisions.

Was this act void, as a law of Maryland? If it was, it must have become so under the restrictions of the constitution of the state, or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts [243*] of others. But, to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note negotiable at the bank of Columbia, the debtor chose his own jurisdiction; in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it would sustain this action, if we could

be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judges to make such rules and orders "as that justice may be done;" and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that in practice the evils so eloquently dilated on by the counsel do not exist. And if [244*] the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that "the trial by jury shall be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words from *Magna Charta*, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost, he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law in the first instance or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution.

In giving this opinion, we attach no importance to [245*] the idea of this being a chartered right in the bank. It is the remedy, and not the right; and, as such, we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures. This subject came under consideration in the case of *Young v. The Bank of Alexandria*,¹ and it was so decided.

The next question is, whether the courts of this district are empowered to carry into effect the summary remedy given to the bank in this case.

The law requires the application for process to be made to the clerk of the general court, or of the county court for the county in which the delinquent resides, and obliges such clerk to issue the execution, returnable to the court to which such clerk is attached. Unless, therefore, the clerk of this district is vested with the same power, and the courts with jurisdiction

1.—4 Cranch, 384.

over the case, the bank would not have the means of resorting to this remedy.

The third section of the act of February, 1801, does not vest in the courts that power. It only clothes the courts and judges of this district with the jurisdiction and powers of the circuit courts and judges of the United States. But we are of opinion that this defect is supplied by the fifth section of the same act, taken **246*** in connection with the fifth *section of the act of March 8d, 1801. By the former section, the courts of the district are vested generally with jurisdiction of all causes in law and equity; and, by the latter, the clerks of the Circuit Court are required to perform all the services then performed by the clerks of the counties of the state of Maryland. Among those services is that of instituting a judicial proceeding in favor of this bank, and the return of that process is required to be to the court with which such clerk is connected. That court has jurisdiction of all cases in law arising in this district, and thus the suit is instituted by the proper officer, by writ returnable to a court having a jurisdiction communicated by terms which admit of no exception.

Upon the whole, we are of opinion that the law is constitutional, and the jurisdiction vested in the courts of the district; and, therefore, that the judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

Cited—12 Wheat. 298, 342; 12 Wall. 281; 20 Wall. 457; 2 Otto, 554; 8 Otto, 295, 605; 2 Paine, 579; 2 Cranch C. C., 180, 708.

[COMMON LAW.]

THE UNITED STATES *v.* RICE.

By the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a foreign country, so far as respects our revenue laws.

Goods imported into it, are not imported into the United States; and are subject to such duties only as the conqueror may impose.

247* *The subsequent evacuation of the conquered territory by the enemy, and resumption of authority by the United States, cannot change the character of past transactions. The *ius postliminii* does not apply to the case; and goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory.

ERROR to the Circuit Court of Massachusetts.

This was an action of debt, brought by the United States against the defendant, upon a bond for the penal sum of \$15,000, dated the 17th of April, 1815, with the following condition: The condition of this obligation is such, that if the above bounden Henry, Rufus and David, or either of them, or either of their heirs, executors or administrators, shall and do, on or before the 17th day of October next, well and truly pay, or cause to be paid, unto the collector of the customs for the District of Penobscot, for the time being, the sum of \$7,500, or the amount of the duties to be ascertained as due and arising on certain goods, wares, and

merchandises, entered by the above bounden Henry Rice, as imported into Castine, during its occupation by the British troops, as per entry dated this date, then the above obligation to be void, otherwise to remain in full force and virtue.

Oyer of the condition being had, the defendant pleaded as follows: That before the time of the making of the supposed writing obligatory, to wit, on the 18th of June, in the year of our Lord 1812, war was declared by the Congress of the said United States, to exist between the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and the said United States and their territories, *and war and open hostilities existed, [***248** and were carried on between the said United States and the said United Kingdom of Great Britain and Ireland, and the dependencies thereof, from the said 18th of June, until the 17th of February, in the year of our Lord 1815, on which said last-mentioned day, a treaty of peace and amity between the said United States and the King of the said United Kingdom, was accepted, ratified, and confirmed. And the said Henry further says, that during the continuance of such war and hostilities, as aforesaid, and before the making of the said supposed writing obligatory, to wit, on the 1st of September, in the year of our Lord 1814, the said King of the said United Kingdom, in prosecution of said war against the said United States, did, with a naval and military force, and in a hostile manner, attack, subdue, capture, and take possession of the town and harbor of Castine, situated in the District of Maine, and continued to hold the exclusive and undisturbed possession of the same by a naval and military force, and in a hostile manner, and secured his said possession by muniments and military works, and had and exercised the exclusive control and government thereof, from the day last aforesaid, continually, until the said ratification of the treaty aforesaid. And immediately after the capture of said town and harbor, and before the importation of the goods and merchandises in the condition of said writing mentioned, the said King of the said United Kingdom caused a custom-house, or excise office, to be established at said Castine, and appointed a collector of the customs there, who thereupon entered *upon the discharge of the duties of his [***249** said office, and so continued to exercise the powers and discharge the duties of said office during all the time that the said town and harbor were so possessed as aforesaid, by the military and naval forces of the said King. And the said Henry further says, that afterwards, and while the said town and harbor were so held and possessed by the military and naval forces aforesaid, and were under the control and government of the said King, to wit, on the 1st of January, in the year of our Lord 1815, the goods and merchandises in the condition of said supposed writing obligatory mentioned, were purchased by Thomas Adams, Samuel Upton, and Greenleaf Porter, who were then and there merchants, resident and domiciled in said Castine, and there trading under the name and firm of Upton & Adams, having been citizens of said United States, resident in Castine, and there trading under said firm, before and at the time of said occupation, and still continu-

ing to reside and trade in said Castine, and said goods were imported into the said town of Castine, by them the said Thomas, Samuel, and Greenleaf, and were by them duly entered in the custom-house, or excise office, so established as aforesaid in said Castine, and the duties thereon were paid to said collector, so appointed as last aforesaid. And the said Henry further says, that at the time of the purchase and importation aforesaid, and during all the time that the said town and harbor were so held and possessed, as aforesaid, the said Thomas, Samuel and Greenleaf, were inhabitants of the said town of Castine, and domiciled, and carrying **250*** on *commerce in said town, under the protection, government, and authority of the said King. And the said Henry further avers, that after the said goods and merchandises were so imported as aforesaid, after the entry thereof with the collector of the District of Penobscot, as hereinafter mentioned, and the making and executing of the said supposed writing obligatory, to wit, on the 27th of April, in the year of our Lord 1815, in pursuance of the said treaty so made and ratified as aforesaid, the said town of Castine was evacuated by the troops and forces of said King, and possession thereof was taken by the said United States. And he further avers, that after the ratification of the treaty aforesaid, and after hostilities had ceased between the said United States and the said United Kingdom and its dependencies, to wit, on the 15th day of April, in the year of our Lord 1815, at Castine, to wit; at said Boston, the said Thomas, Samuel and Greenleaf, for a valuable consideration, then and there paid to them by the said Henry, bargained, sold, and delivered to him, the said Henry, the goods and merchandises aforesaid, in the condition of said supposed writing obligatory mentioned, the same being then in said Castine. And he further avers, that after the making and ratification of the treaty aforesaid, and after the bargain, sale, and delivery aforesaid, to wit, on the 17th of April, in the year last aforesaid, at Castine, to wit, at said Boston, Josiah Hook, then and ever since collector of the customs of the said United States for the District of Penobscot, in which said district the said town of Castine is contained, acting under color of the **251*** authority *of the said United States, and of his said office of collector, demanded and required of the said Henry, to enter the said goods and merchandises with him at his office in said Castine, and to pay, or to secure to the said United States, the same duties thereon, as though they had been imported into the said United States, from a foreign port or place, on the said last-mentioned day, in a ship or vessel not of the United States, and then and there threatened to seize and detain said goods and merchandises, and thereby to deprive the said Henry of all use and benefit thereof, unless he would immediately pay or secure to the United States such duties thereon as aforesaid. Whereupon, to prevent the seizure and detention of said goods and merchandises by said collector, and the losses and damages that would have ensued thereon, and that he, the said Henry, might, without any lawful interruption, or molestation by said collector, retain and dispose of said goods and merchandises, for his use and benefit, he, the said Henry, then and there en-

tered the said goods and merchandises with the said collector, in the said custom-house at Castine, and in pursuance of the demand and requirement aforesaid, of said collector, sealed and delivered the said supposed writing obligatory, with said condition annexed, to said collector. And the said Henry avers, that the goods and merchandises mentioned in the said condition are the same which were imported into the said port and town of Castine, while the said port and town were in the possession and under the control and government of the said King, and which were *entered at [***252** the said custom-house there, and not other or different. And that the same goods and merchandises, at the time of the importation aforesaid, and thence continually, until the sale and delivery thereof, in manner aforesaid, to the said Henry, were in the possession, and subject to the control and disposal of the said Thomas, Samuel and Greenleaf, and from the time of the sale and delivery aforesaid, until and at the time of making and executing the said supposed writing obligatory, were in the possession, and subject to the control and disposal of the said Henry, at Castine, to wit, at said Boston. By means whereof the said goods, wares and merchandises, were not, at the time of entering the same with the said Hook, or at any time before or since, goods, wares, or merchandises, brought into the said United States, from any foreign port or place, nor upon which any sum or sums of money whatsoever, were then and there due and arising, or payable to the said United States for duties, and this he is ready to verify. Wherefore he prays judgment." &c.

There was a second plea, not varying materially from the first.

To these pleas the Attorney for the United States demurred generally, and the defendant joined in demurrer.

Judgment was rendered for the defendant in the Circuit Court, and the cause was brought by writ of error to this court.

The cause was argued by the *Attorney-General* *for the United States, and by [***253** *Mr. Webster* for the defendant.]

Story, J., delivered the opinion of the court:

The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusiv-

1.—He cited *Grotius*, De J. B. ac. P. 1. 2. c. 1, s. 5, & seq. lb. 1. 3. c. 6, s. 4; lb. 1. 3. c. 9, s. 9, 14; *Puffendorf* by *Barbeyrac*, l. 7. c. 7, s. 5; lb. 1. 8. c. 11, s. 8; *Bynkershoek*, Q. J. Pub. l. 1. c. 6, 16; *Duponceau's* Transl. 46, 124; *Voet ad Pandect.*, l. 30, tit. 4, no. 7; *De Vectigalibus*, lb. 1. 19, tit. 2, no. 28; lb. 1. 49, tit. 15, no. 1; *United States v. Hayward*, 2 Gallis, 501; *The Fama*, Rob. 106; *The Polina*, Dodson, 450; 30 *Hogsheads of Sugar*, *Bentzon*, *Claimant*, 9 *Cranch*, 191; *Reves's Law of Ship*, 98, & seq.; *United States v. Vowell*, 5 *Cranch*, 368; *United States v. Arnold*, 1 *Gallis*, 348; 8. C. 9 *Cranch*, 106; *Emerson v. Bathurst*, *Winch. Rep.* 50, 50, *Winch. Entries*, 334, cited *Poph. 176*. 8. C. *Hutton*, 52; *Com. Dig. Officer*, H.

possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and among 254*] others, admitted the *goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and, upon the re-establishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, 255*] *did not, and could not change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretense to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed with costs.

Cited—8 Wall. 10; 9 Wall. 133; 15 Wall. 446; 16 Wall. 434; 2 Sprague, 148; Blatchf. Pr. 11; 7 Otto, 612, 617; 10 Otto, 183.

[CHANCERY.]

BROWN ET AL. v. GILMAN.

The scrip or certificate holders, in the association called the New England Mississippi Land Company, hold their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual sub-purchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; these titles being, in fact, now vested in the trustees of the New England Mississippi Company itself, as part of its common stock, and not in the individual holders.

The equitable lien of the vendor of land, for unpaid purchase money, is waived, by any act of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase money.

An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent.

Where the deed itself remains an escrow until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser indorsed by third persons, for the residue of the purchase money, this is such a separate security as extinguishes the lien.

APPEAL from the Circuit Court of Massachusetts.

This cause was by consent heard upon the bill, answer, and exhibits in the case. The material facts were these: In the month of January, 1796, sundry persons, and among them William Wetmore, purchased of the agents of certain persons in Georgia, called the Georgia Mississippi Company, then in Boston, a tract of land, then in the state of Georgia, and now in the Mississippi Territory, estimated to contain 11,380,000 acres, at ten cents per acre; which tract the Georgia Mississippi Company had purchased of the state of Georgia, and had received a grant thereof in due form of law. The conditions of the purchase were, that the purchase money should be paid as follows, viz.: two cents thereof on or before the first day of May, 1796; one cent more on or before the first day of October, 1796; two and a half cents more on or before the first day of May, 1797; two and a half cents more, on or before the first day of May, 1798; and the remaining two *cents on or before the first day of [*257 May, 1799. The whole of the purchase money was to be secured by negotiable notes of the several purchasers with approved indorsers, to be made payable to Thomas Cumming, President of the Georgia Mississippi Company, or order, payable at the bank of the United States at Philadelphia, or at the branch bank at Boston, and to be delivered to the agents upon the execution of the deed of conveyance by them. It was further agreed, that the deed, when executed, should be placed in the hands of George R. Minot, Esq., as an escrow, to be delivered over by him to the grantees upon the first payment of two cents, payable in May, 1796, for which first payment, and for that only, the purchasers agreed to hold themselves jointly responsible. Accordingly, a deed of conveyance was executed by the agents dated the 18th day of February, 1796, to certain grantees named by the purchasers, to wit, William Wetmore, Leonard Jarvis and Henry Newman, in trust for the purchasers; and the

Wheat. 4.

same was duly placed in the hands of Mr. Minot, as an escrow, and negotiable notes, with approved indorsers, were duly delivered to the agents by all the purchasers for their respective shares of the purchase money. And afterwards the first payment of two cents having been satisfactorily made to the agents, the said deed was, with their consent, delivered over to the grantees as an absolute deed; and a deed of confirmation thereof was afterwards, in February, 1797, duly executed and delivered to the grantees by the Georgia Mississippi Company. After the purchase, and before the delivery of **258***) the deed, *the purchasers formed themselves into an association by the name of the New England Mississippi Land Company, and executed sundry articles of agreement, and, among other things, therein agreed, that the deed of the purchase should be made to Jarvis, Newman and Wetmore, as grantees as above stated (art. 3d); that they should execute deeds to the several original purchasers for their proportions in the lands, but should retain these deeds until the purchasers should sign and execute the articles of association; and should also execute a deed of trust, to certain trustees, as provided for in the articles, of such their respective shares in the purchase (art. 3d); that the several purchasers should execute a deed of trust to Jarvis, Newman and William Hull, of their respective shares in the purchase, to hold to them and the survivor of them in trust, to be disposed of according to the articles (art. 4th); that the business of the association should be managed by a board of directors, who were to have full power and authority to sell and dispose of the whole or any part of the property of the company and to pay over to their respective proprietors their proportions of the money received from any and every sale, &c., (art. 8, 16, 20); that upon receiving a deed from any purchaser, according to the tenor of the articles, the trustees were to give to each proprietor a certificate, in a prescribed form, stating his interest in the trust, and that he should hold it according to the articles of the association; which certificate was recorded in the company's books, and was to be "complete evidence to such person of his **259***) right in said purchase," and was *to be transferable by indorsement; and upon a record of the transfer in the company's books, the transferee was to be entitled to vote as a member of the company. The share of Mr. Wetmore in the purchase was 900,000 acres. He paid the two cents per acre in cash; and of the notes given by him for the purchase money, \$40,000 were paid by Mrs. Sarah Waldo, his indorser, and the residue, \$45,000, still remains unpaid. Mr. Wetmore received his certificates from the trustees for his whole purchase; and having sold or conveyed 500,000 acres, he afterwards conveyed the remaining 400,000 acres to Robert Williams, to whom certificates for that amount were duly issued by the trustees, three of which certificates, each for 20,000 acres, duly indorsed by said Williams, came into the plaintiff's (Mrs. Gilman's) hands for a valuable consideration; and the assignment thereof having been duly recorded in the company's books, she was admitted, and has always acted, as a member of the company. From causes well known to the public, the New England Mississippi Land Company never obtained possession Wheat. 4.

of the tract of land so conveyed to them.¹ On the 31st of March, 1814, Congress passed an act, entitled, "An act providing for the indemnification of certain claimants of public lands in the Mississippi Territory." By this act, and other subsequent acts amending the same,² it was provided, that the claimants of the lands might file in *the office of the Secretary [***260** of State, a release of all their claims to the United States, and an assignment and transfer to the United States of their claim to any money deposited or paid into the treasury of Georgia, such release and assignment to take effect on the indemnification of the claimants, according to the provisions of the act. Commissioners were to be, and were accordingly appointed under the act, who were authorized to adjudge and determine upon the sufficiency of such releases and assignments, and also to "adjudge and determine upon all controversies arising from such claims so released as aforesaid, which may be found to conflict with, and to be adverse to each other." And the sum of \$1,550,000, to be issued in public stock, was appropriated by the act, to indemnify the claimants, claiming in the name of, or under, the Georgia Mississippi Company. The New England Mississippi Land Company duly executed the release and assignment required by the act of Congress, and presented the claims of the whole company before the commissioners. The commissioners awarded the company the sum of \$1,083,812 in stock, certificates for which were duly issued under the act of Congress, and received by the treasurer of the company. A further claim was made for the whole amount of the original share of Mr. Wetmore, but the board of commissioners decided that the Georgia Mississippi Company had a lien in equity on the land sold and conveyed to said Wetmore, for the purchase money due and unpaid by said Wetmore, and that the indemnity under the act of Congress should follow that lien, and be awarded to said *Georgia Mississippi Company to the [***261** amount thereof. And inasmuch as the said Sarah Waldo was the holder of certain certificates issued by said trustees, on account of said Wetmore's original purchase, the commissioners further awarded, that the sum of \$40,000 of the purchase money (which had been paid or satisfied by her for said Wetmore, on her endorsement) should be applied first to make good the scrip or certificates so issued to her; and that if there was any surplus, after making her scrip or certificates good, such surplus could not be applied to the scrip or certificates held under Robert Williams, who did not become the assignee of the said Wetmore until after the said sum was paid. And the commissioners further decided, that the certificates, issued by the trustees on account of any of the original purchasers, who failed to make payment of the purchase money to the Georgia Mississippi Company, were bad, and that the parties claiming under them must lose their indemnity under the act of Congress. By this award of the commissioners, the claim

1.—See the history of this case in *Fletcher v. Peck*, 6 Cranch, 80, and in the public documents of Congress, 1809.

2.—Act of 23d of January, 1815, ch. 706; Act of 3d of March, 1815, ch. 778.

of the New England Mississippi Land Company, for the amount of the share of the plaintiff, was completely excluded. But the plaintiff claimed her share of the stock actually received, as a proprietor in the New England Mississippi Land Company, notwithstanding the award of the commissioners, and to establish this claim, the present suit was brought; and in her bill she averred that, she was a *bona fide* purchaser for a valuable consideration, without notice of the non-²⁶² payment of the purchase money *by Mr. Wetmore, which averment was not denied by the answer.

The court below decreed that the complainant was entitled to the relief she claimed, and the cause was brought by appeal to this court.

Mr. Jones, for the appellants, argued, that the decision of the commissioners was correct in principle. The property acquired by the New England Company under their purchase from the Georgia Company, was not a legal, but a mere equitable interest, unassignable at law. Even if the Georgia Company had a legal estate, their deed to the New England Company does not pass such estate according to the local law of Georgia; it never having been acknowledged, and proved, and recorded. It amounted only to a covenant to stand seized to uses, an agreement to sell, which a court of equity would enforce. The rescinding act of Georgia has a double effect: one to annul the contract, the other to render all deeds conveying the property incapable of being recorded. It is only as to the first effect that the court has pronounced, or could pronounce, the act to be unconstitutional and void. The states have an unquestionable right to regulate the mode of conveying real property, and the rule of evidence as to land titles. Even supposing the trustees to have acquired a legal estate, the *cestui que trusts* have acquired an equitable interest only. The claim of the vendor for unpaid purchase money is the prior equity, which must be preferred. If the subsequent purchaser ac-²⁶³ quires a mere equitable interest, *he is entitled to no notice of the vendor's lien. The assignee of a chose in action, which is not assignable at law, has a mere equitable interest, and takes subject to the same equity as the assignor.¹ But even if notice be necessary, the lien of the vendor is sustainable, because there was notice either actual or constructive; and notice to the trustees of the New England Company was notice to the individuals whom they represented.² But all discussion on this point is cut short by the well-established principle that the purchaser who sets up the want of notice must positively deny the notice in her plea, and swear to it.³ Here the pleadings, so far from denying notice, impliedly admit it; and the rule of presumption against the party omitting to deny notice, is to be applied *a fortiori* in a case like the present, where the person insisting on the want of notice is the party plaintiff.

Nor has there been in this case any waiver of the equitable lien for the purchase money. All the facts of the case repel the presumption of a waiver of the lien. The notes, with approved indorsers, taken from the individual purchasers, cannot furnish such a presumption. The case of *Fawell v. Heelis*,⁴ which will be relied on to support this position, has been repeatedly overruled.⁵ *The taking of personal [²⁶⁴ security is not considered as a waiver of the lien.⁶ It is not necessary to prove affirmatively the intent to retain a lien. It is a natural equity; and he who would repel it must show that the vendor agreed to rely on the personal security, and to abandon the lien.⁷ As to the *lex loci* of Massachusetts, which does not recognize the equitable lien on land for unpaid purchase money, it has nothing to do with the question; for the record does not show that the deed was executed in that state; and even if it did, the *lex loci rei sita* of Georgia must govern the case, according to a well-known rule. But even supposing the award of the commissioners to be erroneous, it is still conclusive upon the parties. The commissioners had jurisdiction of the subject-matter under the act of Congress by which the board was established to determine upon all controversies arising from adverse claims to these lands. There is no analogy between this claim and the lien of a judgment. It is a real interest in the land; an equitable mortgage; a charge upon it which descends, and is assigned with it.⁸ The decision of the commissioners, then, as the force of *res judicata*.

**Mr. Amory*, contra, insisted, that Mrs. [²⁶⁵ Gilman was not the assignee of Mr. Wetmore, and did not hold his title. She could not be an assignee without a privity, either in fact or in law, which did not exist in this case. The intention of the associates, from the beginning, was to render the certificates of the trustees the only evidence of the title; for which purpose the legal title was vested in the trustees, and a new title in all the property was derived from them. The certificate possessed by Mrs. Gilman does not contain the name of Wetmore, nor was the certificate originally issued in his name; it could not have expressed a trust upon the portion, or title, acquired by him, and conveyed to the trustees; but such a certificate must have expressed a general interest, or title, pervading the whole land. Inasmuch as the trustees derived their title, not from Wetmore only, but from different sources, it must be presumed and intended that their certificates were to operate generally on all the right and title which they possessed, without reference to the mode of acquirement. If Mrs. Gilman, or any holder of certificates, was obliged to search into the title, this estate would be attended with all the consequences and incidents of other titles. But that difficulty was expressly intended to be avoided by the 12th art. of association, which declares, that such certificate shall be complete

1.—Finch, 9, 34; Davis v. Austin, 1 Ves., Jun., 247; Colles v. Jones, 2 Vern. 682; 1b. 765; 1 Ves., Sen., 123; 1 Bro. Ch. Cas. 302; Mackreth v. Simmons, 15 Ves. 329.

2.—Sugd. Vend. 492, 496; Mertins v. Jolliffe, Amb. 311.

3.—Sugd. Vend. 510-513.

4.—Amb. 734, 2 Bro. Ch. Cas. 422, note.

5.—Sugd. Vend. 252, *et infra*.

6.—Hughes v. Kearney, 1 Scho. & Lefr. 122; Mackreth v. Simmons, 15 Ves. 329; Grant v. Mills, 2 Ves. & Beames, 300; Elliot v. Edwards, 3 Bos. & Pull. 181.

7.—Frost v. Beatmen, 1 Johns. Ch. 288; Garson v. Green, 1b. 308; Mackreth v. Simmons, and the cases there cited; 15 Ves. 329.

8.—Cator v. —, 1 Bro. Ch. Cas. 302, 1b. 424; Pollexfen v. Moore, 3 Atk. 272.

evidence; thereby announcing to any purchaser, that the common rules of real property were dispensed with. Shall the trustees and associates now be permitted, contrary to their express stipulation, to depart from this [266*] rule of property, which they *themselves created, and thus entrap a *bona fide* purchaser without notice? This association was not incorporated; but the parties intended, as far as they could by law, to give it those facilities, and, in some degree, to convert this real estate into personal estate. The title at law was to vest in the trustees, until *bona fide* sales of the land were actually made. It is the proceeds of such sales only, or money acquired therefrom, that is assured to the holders of the certificates. The trustees and original purchasers undertook to examine each other's title, and precluded all further inquiries in relation to it. Wetmore gave a quitclaim deed only; the quality of his title the associates or trustees could judge of, of which they had as much knowledge as he had; and such deed of quitclaim, whether it conveyed a good or a bad title, constituted a good consideration for the compact with the associates and trustees. If the doctrine of lien for the purchase money, without mortgage, obtains in Georgia, the contract being made in Massachusetts, where the intention of both parties must be considered as constituting the contract, the laws of Massachusetts ought to construe such a contract in preference to those of Georgia. We contend that this doctrine of lien is only a creature of equity, and refers only to such estates or rights of real property as are especially recognized by that tribunal, and which do not derive their support from the ordinary rules of law. The title, in order to be what is commonly denominated equitable, must be such a one as is not recognized by law; such as the assignment of a chose in action, [267*] *which cannot be assigned by law; or the title must be equitable from the inefficient mode adopted for its transfer, such as the conveyance of real estate by an instrument without seal, or by an executory contract. The conveyance of land, in this case, did not pass an equitable title merely; the cases of *Fletcher v. Peck*,¹ and *Green v. Lister*,² show, that notwithstanding the Indian title be not extinguished, the freehold and seizin may be transferred; and, in this case, the most solemn deeds and instruments, duly acknowledged, were adopted for the conveyance of the title; and it is sustained by every legal form. Even in courts of equity, this lien is only raised by implication; and where other circumstances resist this implication, showing that the parties did not mean to rely on the estate sold for security, the lien is waived. This transaction is filled with circumstances repugnant to such implication. The design of the parties to sell the land, instead of cultivating the same, whereby to pay the notes, expressly excludes the idea of such a lien, as no man would have purchased who knew that such a note was given for the first purchase, without seeing that his money was appropriated to extinguish the notes; and the strongest circumstance, to repel such a lien for the consideration, consists in this, that the sum of five

dollars only is expressed as the pecuniary consideration. Any purchaser, therefore, making inquiry concerning the purchase money's being paid or not, is at once checked in the pursuit; and no *case of lien, for the purchase [268 money, can be shown, where the sum is not expressed in the deed of sale. It is also a doctrine in equity, that the vendee has a lien on the land, in case the title be defective, and proper conveyance not made to him; thus making the right reciprocal. But in this deed express provision is made, that the consideration money shall not be refunded by the vendor for any cause whatsoever; thus essentially distinguishing the present case from those in which such lien is maintained. It is said that the commissioners, having a right to decide upon adverse titles, here conclusively decided on our claims; but the adverse titles or claims, on which they were to decide, were adverse claims to the stock from the treasury of the United States, and between such persons as released their claims to the United States. Mrs. Gilman did not release any claim to the United States, or demand any money from the treasury; of course, her rights or claims could not be adjudged by the commissioners. Her claim is not on the government; but on her associates and trustees. The commissioners were bound to decide to whom the money or stock from the treasury should be paid; not the use the receiver should afterwards make of that money, or the obligations he might be under in relation to it. Decrees affect only those who are parties to the suit; and an opinion incidentally given by the commissioners ought not to control the plaintiff's right.

The *Attorney-General*, on the same side, contended, that no such lien as that insisted upon existed, *even as to Mr. Wetmore's [269 title; much less was Mrs. Gilman's affected by it. The question whether the legal title passed from the Georgia Company to the New England Company cannot be raised in the Appellate Court; because, so far from being raised in the court below, the pleadings admit the fact that the legal title did pass, and the cause was argued upon that ground in the court below. But supposing it were otherwise; as a *bona fide* purchaser, without notice, Mrs. Gilman cannot be affected with the equitable lien for purchase money unpaid by the original vendee, because a distinct personal security was taken, and all the other circumstances of the case combine to show that the original vendors did not mean to rely on the lien. It is worthy of observation that this doctrine of lien for unpaid purchase money, which has grown to its present extravagant height, seems to have originated in the inaccuracies and mistakes of some of the earlier chancery reporters. The first case is that of *Chapman v. Tanner*,³ which is erroneously reported. According to the reporter, it was the case of a bankrupt who purchased land, and the purchase money not being paid, the assignees would have had the vendor come in as a creditor under the commission for the remainder of his purchase money. "*Per Our*. In this case there is a natural equity that the land should stand charged with so much of the purchase money as was not

1.—6 Cranch, 59.

2.—8 Cranch, 229.

Wheat. 4.

3.—1 Vernon, 267.

paid; and that without any special agreement **270***] for that purpose." But Lord *Apsley says, "*Chapman v. Tanner* (1 Vernon, 267), according to the report, is in point; but it appears, by the register's book, that the vendor retained the title deeds till he was paid. The court said, that a natural equity arose from his having the title deeds in his custody." In the case of *Pollexfen v. Moore*² (which is also said, in the last-mentioned case, by Lord Apsley, to be badly reported), the title deeds were also kept back by agreement; and it was impossible for a court of equity to doubt, in either of these cases, that the lien was retained. But it is from them that the doctrine, as now understood, has originated; and, even according to the modern cases, it is nothing more than a lien raised by equity on the presumed intention of the parties.³ This presumption, however, may be repelled by evidence of a contrary intention. Among other circumstances to repel this presumption, is the delivering an absolute deed to the purchaser. Although this circumstance may not be considered strong enough to repel the presumption as between vendor and vendee, it is so as to a *bona fide* purchaser under the latter, without notice; otherwise such a deed would be a fraud on the public. In such a case, this circumstance, connected with that of taking a distinct security, must certainly be deemed sufficient to repel the presumed intention to rely on the lien. The rule is accurately laid down by President Pendleton: **271*** "The doctrine that the vendor of land not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person, without notice, the lien is lost."⁴ It has been much contested in England, whether passing the legal title to the vendee, and taking his bond or note alone, will not defeat the lien. But there has been no case, where, after passing an absolute deed, and taking the security of a third person, the lien has been held still to exist. In *Hughes v. Kearney*,⁵ the note was that of the vendee merely; and Lord Redesdale is understood to admit, that taking a distinct security would discharge the lien. *Grant v. Mills*⁶ is also relied on to show that the taking of the security of a third person would not discharge the lien; but the bills of exchange in that case were not considered as the security of a third person, but as a mode of payment merely. Sir W. Grant distinctly admitting that the security of a third person would repel the lien. In *Elliot v. Edwards*,⁷ which was a case at law, the point was not decided; and it depended upon its own peculiar circumstances; the surety himself might seem to have stipulated for the **272***] lien, by *requiring a covenant against the assignment of the premises, without the joint consent of himself and the vendor. If

further circumstances are necessary, in the present case, to remove the presumption that the vendor intended to rely upon the lien, they will be found to exist. Holding back the deed, or what is equivalent, depositing it as an escrow until after the first payment, has always been considered as indicating the intention to rely upon the lien; and if so, the delivery of the deed, after the first payment was made, equally manifests an intention to relinquish the lien. The counsel then proceeded to argue that, from other circumstances and facts in the case, it never could have been the intention of the parties that the lien should exist. But even supposing the lien did exist as against Mr. Wetmore, the original purchaser, would it follow the shares through every variety of modification into the hands of a remote purchaser without notice? But it is said that Mrs. G. has not denied notice. Nor could she deny notice in the manner pointed out by the authorities—that is, upon oath—being the party plaintiff. But the same authorities lay down the rule, that if notice is neither alleged by the bill nor proved, and the defendant by his answer denies notice, the court will not grant an inquiry to affect him with notice.⁸ This rule has more analogy to the present case; for the answer does not charge the plaintiff with notice; and it is denied in the bill. We insist, that where the legal estate has passed from the vendor, a *bona fide* purchaser *without [**273**] notice, even though he has no deed, will overreach the implied lien for unpaid purchase money. Mr. Sugden, after reviewing all the cases, expresses the opinion that even an equitable mortgage created by the vendee depositing deeds with a third party, *bona fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien for any part of the purchase money.⁹ Now, a mortgage is a mere security for a debt, and the same conclusion is much stronger in the case of an absolute purchaser. But supposing the lien to exist; according to *Frost v. Beekman*,¹⁰ it only exists to the amount of the consideration expressed on the face of the deed; which, in this case is only five dollars. And even if it exists to any extent according to the law of the English Court of Chancery, that is not the law of this case; the contract being made in Massachusetts, relative to lands in Georgia. It is admitted that the law of Massachusetts recognizes no such lien; but it is said that it is not the *lex loci contractus* which is to govern, but the *lex loci rei sitæ*; and that the law of Georgia adopts the English principle. We do not deny that the *lex loci rei sitæ* is to govern as to the transfer of real property; but we insist that the intention of the contracting parties is to be gathered from the law of the place where the contract is made. Admitting, however, that the law of Georgia is to give the rule, it remains to be shown, on the other side, that this peculiar doctrine of the English courts of equity is *adopted in that state. We [**274**] insist, we are not concluded by the decision of

1.—*Fawell v. Heelis*, Ambli. 724.

2.—3 Atk. 372.

3.—Sugd. Vend. 358.

4.—*Cole v. Scott*, 2 Wash. 141.

5.—1 Seb. & Lefr. 132.

6.—2 Ves. & Beames, 306.

7.—3 Bos. & Pull. 181.

8.—Sugd. Vend. 512.

9.—Sugd. Vend. 366.

10.—1 Johns. Ch. 288.

the commissioners, under the acts of Congress, because their power extended only to legal or equitable claims to the lands; such equitable claims as enabled the holder to call for the legal title, and such as conflict with each other; which, not being the case here, the commissioners had no jurisdiction to determine this question.

Mr. Webster, for the appellants, in reply, insisted that the title was no better in the plaintiff's hands than it was in the hands of Mr. Wetmore. The purchaser of an equity must abide by the case of the person from whom he buys. He must take the estate subject to all incumbrances. Want of notice, or payment of a valuable consideration, will not enable him to raise himself higher than his vendor. Lord Thurlow says, he takes that to be a universal rule.¹ It is unnecessary to say whether the commissioners were well founded in the decision they have pronounced. No fraud or negligence is at any rate imputable to the defendants. They have used due diligence, and sought to increase the fund by obtaining from the commissioners the stock which would have belonged to the original purchase of Wetmore, if his title had been deemed valid. In this they have failed, but without any fault of their own. The commissioners have decreed that that portion of Wetmore's purchase which was conveyed to 275*] Williams, *through whom the plaintiff derives her title, is not entitled to any indemnification. They proceed on the ground that the original Georgia vendors had a lien for the purchase money, and that they, if anybody, the purchase money not being paid, are entitled to the indemnity provided by the act of Congress. That the vendor has in equity a lien for the purchase money against the vendee, and all purchasers under him with notice, if it be a legal estate; and against all persons purchasing with or without notice, if it be an equitable estate; could not be denied as a general doctrine. The English cases on this point are all considered by Lord Eldon in *Maackreth v. Simmons*.² There may be a relinquishment of this lien; and the evidence of such relinquishment may result from the nature of the transaction, and the circumstances attending it. How far such evidence existed here, it was the duty of the commissioners to consider. If they have erred in judgment, the consequences of that error ought not to be thrown on the defendants. The stock, which the commissioners were to issue, may be considered as the product of the estate vested in the trustees. The bill does not complain that the defendants have injured the plaintiff by surrendering the estate to the United States. In this they are admitted to have done precisely what they ought to have done. The complaint is, that a just distribution has not been made of the proceeds. But the plaintiff's estate has pro- 276*] duced no proceeds. The *commissioners were empowered by the act to adjudge between adverse claims. They have decided against the claim of the plaintiff; and it would be manifestly unjust and unreasonable that, having a bad claim herself, she should partake with others in the benefit of their claims, which

are good, unless she clearly proves an agreement to form this sort of partnership. And indeed, if it were proved that Wetmore and others agreed to form this partnership, each at the same time covenanting for the title of what he himself brought to the common stock, he could not claim in equity a proportionate share of the proceeds of the whole, having broken his own covenant, and the general proceeds being thereby diminished in an amount equal to what he undertook to convey to the trustees. If the plaintiff could recover in this case against the defendants, one of whom is the surviving trustee, that trustee must have his action against Wetmore on the covenants of his deed of trust. But it is not the course in equity to treat covenants as distinct and independent, but to require of plaintiffs to allege and prove performance, or readiness to perform, on their part.³ If the land, or its proceeds, have been taken from the trustee by some one, whose title has been adjudged better than that of the *cestui que trust*, is it possible that the *cestui que trust* can have any claim on the trustee? The plaintiff relies on the articles of association, which say that the certificate shall be complete evidence of the title. So it may be; but they do not *say what [*277 title the holder of the certificate shall be taken to have. The articles mean no more than that the certificate should be evidence of the transfer. Whatever the vendor could sell, he might assign by indorsing the certificate. But in this there is no agreement to assure the title. The certificate itself refers to the articles of association, and the deeds of trust, to show the nature and condition of the property. These articles and deeds prove clearly that the original purchasers stand on their several distinct purchases, and decline all mutual responsibility. She must, therefore, be taken to have known what she purchased, as the reference in the certificate to the deed and articles was sufficient to put her on inquiry. Where one has sufficient information to lead him to the knowledge of the fact, he shall be deemed consant of it.⁴ Even if her estate had been a legal, and not an equitable interest, this constructive notice would have prevented her from standing in any better condition than those under whom she held.

MARSHALL, Ch. J., delivered the opinion of the court: The question to be decided is, whether, under all the circumstances of this case, the New England Mississippi Land Company, or Mary Gilman, shall lose the sum awarded by the commissioners to the Georgia Mississippi Company, in satisfaction for the lien that company was supposed to retain on the lands they sold, for the non-payment *of the notes [*278 of William Wetmore, given for the purchase money on his interest in the purchase.

In examining this question, the nature of the contract, the motives of the New England Mississippi Company, and their acts, are all to be considered.

The contract was made in January, 1796, for 11,380,000 acres of land, lying within the country occupied by the Indians, whose title was not extinguished. The purchase money, amount-

1.—*Davis v. Austen*, 1 Ves., Jun., 247. See also *Murray v. Silburn*, 1 Johns. Ch. 441; *Redfearn v. Ferrier*, 1 Dow. 50.

2.—15 Ves. 329.

Wheat. 4.

3.—2 Fonb. 383.

4.—*Sugd. Vend.* 498, and the cases there cited.

ing to \$1,880,000 was to be divided into five installments, the first of which, amounting to \$118,800, was to be paid on the 1st of May, 1796, and the last on the 1st of May, 1799. It is obvious that this purchase could not have been made with a view to hold all the lands. The object of the purchasers must have been to make a profit by reselling a great part of them. Accordingly, we find them making immediate arrangements to effect this object. In February, 1796, before the legal title was obtained, the purchasers formed an association, by which it was, among other things, agreed that the land should be conveyed to three of their partners, Leonard Jarvis, Henry Newman and William Wetmore, for the use and benefit of the company. It was also agreed that seven directors should be appointed, with power to manage their affairs, and after the company should be completely organized, as prescribed in the articles of association, to sell their lands for the common benefit of the proprietors. In addition to this mode of selling the lands themselves, which might be slow in its operation, it was agreed that each proprietor might transfer his interest, in whole or in part; and, to facilitate 279*] this transfer, the whole purchase was divided into 2,276 shares, and it was determined that an assignable certificate should be granted to each proprietor, or to such person as he should appoint, stating the amount of his interest in the company. No certificate was to issue for less than one share.

It is of great importance to inquire, how far the company pledged itself to the assignee of this certificate; and how far it was incumbent on him to look beyond the certificate itself, in order to ascertain the interest which it gave him in the property of the company.

In pursuing this inquiry, we must look with some minuteness into the state of the property, and the articles of association, as well as into the language of the paper which was to evidence the title of the holder.

Although the association was formed before the lands were conveyed, no certificate was to issue until the legal title in the company should be as complete as it could be made. It was obviously necessary for the purchasers, before they proceeded to sell, to examine well their title, and to use every precaution which prudence could suggest, for its security. This appears to have been done. On the 13th of February, 1796, a deed was executed by the Georgia Company, purporting to convey the lands to William Wetmore, Leonard Jarvis and Henry Newman; and, afterwards, in February, 1797, a deed of confirmation was executed and delivered. By these deeds the Georgia Company 280*] certainly intended to *pass, and the New England Company expected to receive, the legal title.

The articles of association direct these trustees to convey the purchased lands to the proprietors, as tenants in common, who are immediately to reconvey them to Leonard Jarvis, Henry Newman and William Hull, in trust, to be disposed of according to the articles.

The certificate granted to each proprietor, for the purpose of enabling him to dispose of his interest, certifies, that he is entitled to the trust and benefit of a certain specified proportion of the property contained in the trust deed, "to

hold said proportion, or share, to him, his heirs, executors, administrators and assigns, according to the terms, conditions, covenants, and exceptions, contained in the said deed of trust, and in certain articles of agreement entered into by the persons composing the New England Mississippi Land Company." This certificate purports on its face to be transferable by indorsement. If it amounted to no more than a declaration that the holder had a right to sell a specified part of the common property, it would be difficult to maintain that the company could afterwards charge this part exclusively with a pre-existing incumbrance. But the certificate proceeds farther, and declares that the share or shares thus transferred, shall be held according to the terms, &c., of the deed of trust, and of the articles of agreement. So far, therefore, as that deed, or those articles, encumber the property, it certainly remains encumbered in the hands of the assignee. To what *extent does either of those instru- [*281] ments affect the case?

The deed from the proprietors to Jarvis Newman and Hull, recites the grant of the state of Georgia, the conveyance of the grantees to Wetmore, Jarvis and Newman, in trust for the New England Company, the conveyance of those trustees to the members of the company to hold as tenants in common, according to their respective interests, and adds, that it is found necessary and expedient that the premises should be conveyed "in trust to Leonard Jarvis, Henry Newman and William Hull, Esquires, to have and hold the same, subject to all the trusts, provisions, restrictions, covenants and agreements contained in certain articles of agreement, constituting the New England Mississippi Land Company;" therefore, and in consideration of \$10, the parties of the first part, severally "remit, release, and forever quitclaim to the said Jarvis, Newman and Hull, all the interest, &c., which they have, or ever had, or of right ought to have, in the premises, subject, however, to and for the purpose mentioned in the agreement constituting the New England Mississippi Land Company. The parties of the first part, each for himself," and no farther, covenants, that the premises are free and clear of all incumbrances, by him made or suffered to be made, and warrants the same against himself and all claiming under him.

A separate conveyance was made by Wetmore, Jarvis and Newman, to John Peck, who conveyed *to Jarvis, Newman and Hull. [*282] But these conveyances are not supposed to vary the case.

In this deed of trust, each proprietor covenants for his own title, not for that of his copartners. This has been supposed to give notice to the assignee of each certificate issued by the company, that the property conveyed did not constitute a common stock in the hands of the trustees, out of which each holder was to draw in proportion to his interest, as expressed in the face of his title paper; but that the interest of each copartner was limited to the product of his own share, as under the original purchase, and that the holder of every certificate was bound to trace his title through the particular original purchaser under whom he claims, and in whose place he stands.

We do not think the fact will sustain the argument.

This deed conveys the estate of each partner to the company, and the covenants it contains ascertain the extent of each partner's liability for the title it passes. The lands thus conveyed are held by the company in like manner as if they had been conveyed by persons who are not members of it. The legal title is in the company; the power to sell is in the company; and if it was intended that the right of each individual to dispose of his interest should depend on the validity of the title he had made, and that the purchaser of such interest took it subject to any incumbrance with which the estate conveyed might have been burthened, previous to its conveyance, it would have been **283** unnecessary to make any provision respecting the sale of such interest. The right of sale is connected with the right of property, and without any regulation whatever, each member would have possessed it to the extent of his property. The object for granting the certificate seems to have been, to enable each share-holder to sell, unobstructed by those entangling embarrassments which may attend a mere equitable title. This object, in which every member was equally concerned, could not be effected without giving to each some evidence of his title, which should make it unnecessary for the purchaser to look farther in order to ascertain his interest in the general fund, whatever that fund might be. The history of the title, as well as the words of the certificate, would confirm this opinion. From its origin, every step of its progress was marked out and controlled by the company. The legal title was, by their order, conveyed to three persons, selected by themselves, and the deed contains no allusion to the interest of other purchasers. By this order, also, the title which was then made to the several purchasers, was immediately reconveyed to trustees in whom the company confided, to uses and purposes expressed in certain articles of agreement which the company had formed. They guarded the title against incumbrances from individuals, and this watchfulness was for the double purpose of enabling their agents to sell the lands themselves, for the common benefit, and enabling each member to sell to the best advantage his particular interest in that fund. It was scarcely possible for any individual to have encumbered the title after it was received by the first **284** agents of the company, and against defects in the title conveyed by the Georgia Company, the certificate does not profess to engage.

The articles of agreement, to which also the certificate refers, explain fully the views of the company. The great object of the association is to sell their lands to advantage. This is too plainly expressed to be mistaken. The words "terms, conditions, covenants, and exceptions," contained in the certificate, refer chiefly to provisions respecting the sale of lands, and to others which recognize the absolute control over the property which each member had ceded to the whole body. It is unnecessary to recite the particular articles which tend to this general result. It is the spirit which pervades the whole association. Only those articles which relate to the certificate need be adverted to.

Wheat. 4.

The 11th article divides the whole purchase into 2,276 shares.

The 12th directs that a transferable certificate shall be given to each proprietor, prescribes its form, directs it to be recorded, and declares that it shall be complete evidence to such person of his right in the purchase. No assignee is admitted as a member, to vote in the affairs of the company, until his assignment shall be recorded.

The 13th declares that no certificate shall issue for less than one share, and that the holder of any certificate for a larger quantity, may at any time surrender it to the trustees, and take out others for such quantities as he may choose.

The 16th obliges the directors to pay over to the respective proprietors their proportions of the moneys received from any and every sale, as soon after the receipt thereof as may be.

It is not more apparent that the general object of the association was to promote the sale of their lands than it is that the particular object of this certificate, and of the articles which relate to it, was to enable every proprietor to avail himself of his individual interest, and to bring it into circulation. On no other principle can we account for subdividing the stock of the company into such small shares; for issuing the certificate itself; for making it assignable; for declaring that it shall be complete evidence of title to that quantity of interest which is expressed on its face; for enabling every holder, by surrendering his certificate, to divide it as his convenience might suggest; and for declaring that each holder shall receive his proportion of the money arising from the lands which might be sold. All these provisions tend directly to the same object, and are calculated for the single purpose of affording to each member of the company every possible facility in selling his share of the stock. In this operation all were equally interested. Every member of the company was alike concerned in removing every obstruction to the free circulation of his own certificate, which could only be done by making it complete evidence of title; an advantage which, to be acquired by him, must be extended to all. In the particular benefit accruing to each member of the company from this arrangement, a full consideration was received for his joining in it. It is a mutual assurance, in which all the members **286** pledge themselves for each, that he is really entitled to sell what he offers for sale.

The articles of agreement then strengthen, instead of weakening, the language of the certificate. They prove that the company must have intended to give it all the credit they could bestow on it, and to give to the assignee all the assurance they could give him, that he would stand on the same ground with other members, and was liable to no casualty to which they were not all exposed.

It was scarcely possible for any member, unless it be one of the original agents to have eluded the precautions of the company, and have parted with, or encumbered any portion of his estate. But suppose the fact to have happened, and a certificate to have issued from any accident whatever, to him for a larger interest than that to which he was really entitled, would an assignee, without notice, have been

effected by this error on the part of the company?

We think it clear that he would not. The company has itself undertaken to judge of his title; and, for its own purposes, for the advantage of all its members, to certify what that title is. The object and effect of that certificate is to stop inquiry. The company has pledged its faith, that the title under this certificate shall not be questioned. This is not all. The articles require that an assignee shall have his assignment recorded. Here is a second confirmation of title.

We find a number of persons associated together for the purpose of purchasing an immense body of land, which they expect to re-**287*** sell upon a profit. *They watch the progress of the title, direct its course, leave no power to individuals over their individual shares, but keep the whole under the control of the company until they are perfectly satisfied with the state in which they have placed it. The legal title is by their order vested in three trustees, who are to be controlled by seven directors. Then, in order to enable each proprietor to dispose of any portion of his interest which he may incline to sell, assignable certificates are issued, declaring that the holder is entitled to a specified share of the land. This certificate refers to certain laws of the company, and these laws declare that such certificate shall be complete evidence of title, that the assignee shall become a member of the company, authorized to vote on having his assignment recorded in books kept for that purpose. These certificates are offered to the public; confiding to the promise they contain, an individual becomes a purchaser, has his assignment recorded, and is received, without objection, as a member. If any latent defect exists in the title of one of the original purchasers, which was unknown to the company when the certificate issued, we think the company cannot set up this latent defect against an assignee. The company possessed the means of obtaining full information of all circumstances which could affect the title, so far as information was attainable. They undertook to judge of it, and to assert, unconditionally, that the holder of the certificate was entitled to the quantity of interest it specified. However true it may be that the individual in whose default this defect orig-**288*** inated *might be held accountable for it, we cannot agree that the assignee stands in his place. The company which would set it up against him, has inquired into the title; has, for its own purposes, assured him that it is perfect, and, upon the faith of this assurance, he has purchased. Had he taken an equitable interest in trust, relying upon the faith of the vendor, his equity, it is conceded, would not be better than that of the vendor; but he has relied upon the company. He has mounted up to the source of the equitable title, and is there assured of its goodness. The company can never be permitted to say, that being themselves mistaken, they have imposed innocently upon him; and that, therefore, they will throw the loss from themselves on him.

If, then, Mr. Wetmore had really, by any act of his, diminished the estate he carried into the common stock, and if the deduction of his share from the sum awarded to the company

had been proper, he would have been personally answerable to the company for such diminution; but we do not think this liability passes with the certificate to his assignee without notice. We do not think the company could be permitted to assert against the assignee, the right they might assert against Mr. Wetmore.

But this is not a defect in the title itself created, voluntarily created, by Mr. Wetmore. It is a still weaker case on the part of the company. A sum of money, equal to the claim of the plaintiff, has been awarded to the Georgia, instead of the New England Company, by the commissioners, under the idea that so much of the original purchase money *remained unpaid, and [**289** that a lien on the lands they sold was still retained by the Georgia Company. As this failure was on the part of Mr. Wetmore, the New England Company claim the right of subjecting to this loss the shares of Mrs. Gilman, which were derived from certificates issued on the stock of Mr. Wetmore. On the part of Mrs. Gilman it is contended: 1. That this lien did not exist; and, if it did, 2. That it affects her only as a member of the company.

The commissioners determined in favor of the lien, because they considered the New England Company as holding only an equitable estate.

The deeds from the Georgia to the New England Company certainly purport to pass, and were intended to pass, the legal title. The only objection we have heard to their having the operation intended by the parties, is, that they were not recorded, and that the legislature of Georgia passed an act which forbid their being recorded.

But by the laws of Georgia, a deed, though not recorded within the time prescribed by law, remains valid between the parties; and, were it even otherwise, it might well be doubted whether this deed would not retain all the validity it possessed when executed, since its being recorded is rendered impossible by act of law. Could it even be admitted that the deeds passed only an equitable estate, it might well be doubted whether the Georgia Company, as plaintiffs in equity, could, under all the circumstances of this case, stand on better ground than if their deed had operated as they intended it should operate.

*But the court considers the title at [**290** law as passing by the deeds to the New England Company, and remaining with them, although those deeds were not recorded. If this opinion be correct, even admitting the law of England respecting the lien of vendors for the purchase money after the execution of a deed to be the law of Georgia, a point which we do not mean to decide, we think it perfectly clear that no lien was retained, and none intended to be retained, in this case.

It must have been well known to the Georgia Company that the purchase was made for the purpose of reselling the lands; and, of consequence, that it was of great importance to the purchasers to have a clear unincumbered title: and the event that the property might pass into other hands before the whole purchase money was paid, was not improbable.

In the original agreement, an express stipulation is made that the property shall remain liable for the first payment, but that separate

Wheat. 4.

securities shall be taken for the residue of the purchase money.

The deed itself remains an escrow until the first payment shall be made, and is then to be delivered as the deed of the parties; after which the vendors consent to rely on the several notes of the respective purchasers. This is equivalent to a mortgage of the premises, to secure the first payment, and a consent to rely on the separate notes of the purchasers for the residue of the purchase money. The express contract, that the lien shall be retained to a specified **291*** extent, is equivalent to a waiver of that lien to any greater extent.

The notes, too, for which the vendors stipulated, are to be indorsed by persons approved by themselves. This is a collateral security, on which they relied, and which discharges any implied lien on the land itself for the purchase money.

We think this, on principles of English law, a clear case of exemption from lien.

Could this be doubted, it would not alter the obligation of the New England Company to Mrs. Gilman. If they were in the situation of purchasers with notice, it must be with a very ill grace that they set up against her particular interest, after having induced her to purchase

by the assurance that she came into the company on equal terms. If they were purchasers without notice, the lien is gone.

We are unanimously of opinion that the sum deducted from the claim of the New England Company, by the commissioners, is chargeable on the fund generally, not on the share of Mrs. Gilman particularly.

Some doubt was entertained on the question, whether Mrs. Gilman should recover from the parties to this suit, her proportion of the money received by them, or her proportion after deducting therefrom the sum she would be entitled to receive from those members, who obtained an order from the commissioners, by which they received directly, and not through the agents of the company, the sums to which they were entitled. The majority of the court directs me to say, that in this respect also the ***decree is right**, and that the company, [***292** or their agents, have the right to proceed against those members for what they have received beyond their just proportion of the whole sum awarded to the company.

Decree affirmed with costs.¹

Cited—7 Wheat. 237, 239, 245; 1 McLean, 301; 1 Curt. 351.

1.—This subject of lien for unpaid purchase money is so fully discussed in the opinion of the court below in this case, that the following extract from that opinion, in Mr. Mason's reports, may be useful to the reader:

"The doctrine, that a lien exists on the land for the purchase money, which lies at the foundation of the decision of the commissioners, as well as of the present defense, deserves a very deliberate consideration. It can hardly be doubted that this doctrine was borrowed from the text of the civil law,* and though it may now be considered as settled, as between the vendor and the vendee, and all claiming under the latter with notice of the non-payment of the purchase money, yet its establishment may be referred to a comparatively recent period. Lord Eldon has given us an historical review of all the cases, in *Mackreth v. Symmons*, 15 Ves. 23, from which he deduces the following inferences: First, That, generally speaking, there is such a lien. Second, That in those general cases, in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person, who had notice, that the money was not paid. These two points, he adds, seem to **293*** be clearly settled; and the same conclusion has been adopted by a very learned chancellor of our own country. *Garson v. Green*, 1 Johns. Ch. Rep. 308. The rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract; and therefore it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect, seems, indeed, to be matter of a good deal of delicacy and difficulty; and the difficulty is by no means lessened by the subtle doubts and distinctions of recent authorities. It seems, indeed, to be established, that *prima facie* the purchase money is a lien on the land; and it lies on the purchaser to show that the vendor agreed to waive it (*Hughes v. Kearney*, 1 Sch. & Lef. 132; *Mackreth v. Symmons*, 15 Ves. 329; *Garson v. Green*, 1 Johns. Ch. Rep. 308); and a receipt for the purchase money, indorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the pur-

chase money shall be held to be a waiver of implied lien, has been a vexed question.

There is a pretty strong, if not decisive current of authority, to lead us to the conclusion, that merely taking the bond, or note, or covenant of the vendee himself, for the purchase money, will not repel the lien; for it may be taken to counter-vail the receipt of the payment usually indorsed on the conveyance. *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Nairn v. Prowse*, 6 Ves. 752; *Mackreth v. Symmons*, 15 Ves. 329; *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Garson v. Green*, 1 Johns. Ch. Rep. 308; *Gibbons v. Baddall*, 2 Eq. Cas. Abr. 682; *Coppin v. Coppin*, 2 P. Will. 291. Cases cited in Sugden on Vendors, ch. 12, p. 352, &c. But where a distinct and independent security is taken, either of property or of the responsibility of third persons, it certainly admits of a very different consideration. There the rule may properly apply, that *expressum facit cessare tacitum*; and where the party has carved out his own security, the law will not create another in aid. This was manifestly the opinion of Sir William Grant in a recent case, where he asks: "If the security be totally distinct and independent, will it not then become a case of substitution for the 'lien, instead of a credit given be- [***294** cause of the lien?'" And he then puts the case of a mortgage on another estate for the purchase money, which he holds a discharge of the lien, and asserts, that the same rule must hold with regard to any other pledge for the purchase money. *Nairn v. Prowse*, 6 Ves. 752. And the same doctrine was asserted in a very early case, where a mortgage was taken for a part only of the purchase money, and a note for the residue. *Bond v. Kent*, 2 Vern. 361. Lord Eldon, with his characteristic inclination to doubt, has hesitated upon the extent of this doctrine. He seems to consider, that whether the taking of a distinct security will have the effect of waiving the implied lien, depends altogether upon the circumstances of each case, and that no rule can be laid down universally; and that, therefore, it is impossible for any purchaser to know, without the judgment of a court, in what cases a lien would, and in what cases it would not, exist. His language is: "If, on the other hand, a rule has prevailed (as it seems to me) that it is to depend, not upon the cir-

"Quod vendidi non alter accipientis quam si aut pretium nobis solum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione." Dig. Lib. 18. tit. 1. 1, 19; Domat, lib. 1, tit. 2, s. 3, l. 1. But this lien was lost, by the civil law, not only by taking a separate security from the purchaser, as a surety or pledge, &c., but also, by giving a term of credit to him. For Justinian, after laying down the rule in the

Institutes thus, "Venditæ vero res et traditæ, non alter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo et satisfecerit, veluti ex promissore aut pignore dato," &c., adds, "sed si is qui vendidit fidem emptoris sequitur fuerit, dicendum est statim rem emptoris fieri." Inst. l. 2, t. 1; De Rerum Divis. s. 41; Pothier, De Vente, No. 322, 323; Pothier's Pandects, Tom. 3, p. 107.

Wheat. 4.

573

298*]

*[PRIZE.]

THE ESTRELLA.

HERNANDEZ, Claimant.

The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself; but the fact that the vessel cruising under such commission is employed by such government, may be established by other evidence, without proving the seal.

Where the privateer, cruising under such a commission, was lost, subsequent to the capture in question, the previous existence of the commission on board was allowed to be proved by parol evidence.

Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, in order to bring the case within the proviso of the 2d section of the act of June 8th, 1794, c. 226, and of the act of the 20th April, 1818, c. 83.

The right of adjudicating on all captures and questions of prize, exclusively belongs to the courts of the captors' country; but, it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes, *infra præsidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the cruiser which made the capture; and, if such violation has been committed, is in duty bound to restore, to the original owner, property captured by cruisers illegally equipped in its ports.

No part of the act of the 8th of June, 1794, c. 226, is repealed by the act of the 3d of March, 1817, c. 58; the act of 1794, c. 226, remained in force until the act of the 20th of April, 1818, c. 83, by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject, were repealed.

In the absence of any act of Congress on the subject, the courts of the United States would have

circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expression used on other occasions) of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual; it is obvious that a purchaser taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point." *Mackreth v. Symmons*, 15 Ves. 329, 342; *Austin v. Halsey*, 6 Ves., Jun., 475.

If, indeed, this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But, on a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a surety or an indorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists on the land itself. The only case, 295*] "that looks that way, is *Elliot v. Edwards*, 3 Bos. & Pull. 181; where, as Lord Eldon says, the point was not decided; and it was certainly a case depending upon its own peculiar circumstances, where the surety himself might seem to have stipulated for the lien, by requiring a covenant against an assignment of the premises, without the joint consent of himself and the vendor. Lord Redeale, too, has thrown out an intimation (*Hughes v. Kearney*, 1 Sch. & Lef. 132), that it must appear that the vendor relied on it as security; and he puts the case: "Suppose bills given as part of the purchase money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken not as a security, but as a mode of payment." In

authority, under the general law of nations, [*299] to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or augmentation of the armament, or crew, of the capturing vessel, within the same.

APPEAL from the District Court of Louisiana.

This vessel and her cargo were libeled in the District Court for the Louisiana District, by the alleged former Spanish owner. The libel stated that he was owner of the schooner and cargo, which sailed from Havana, for the coast of Africa, on the 23d of April, 1817; that, on the next day, she was lawlessly and piratically captured, on the high seas, and held as prize, by an armed schooner, called the Constitution, of Venezuela, and forcibly brought within the jurisdiction of the United States, when she was recaptured by the United States ketch, the Surprize, and conducted to New Orleans. That the captors had no lawful commission from any sovereign state to commit hostilities at sea; but that the said schooner and cargo, until their recapture, were forcibly withheld from the libellant, in open violation and contempt of the law of nations. That if they had such commission, the same was issued, or delivered, within the waters and jurisdiction of the United States, with intent that the said vessel, the Constitution, should be employed in the service of Venezuela, to commit hostilities at sea against the subjects of the King of Spain, with whom the United States then were, and now are, at peace, in violation of their laws, and of the laws of nations. The libel further stated, that the Constitution had, previously to her cruising, been fitted out, and armed, *or increased, or augmented in force, [*300] within the jurisdiction and waters of the United States; and, also, that she had been manned

my humble judgment, this is begging the whole question. If, upon the contract of purchase, the money is to be paid in cash, and bills of exchange are afterwards taken in payment, which turn out unproductive, there the receipt of the bills may be considered as a mere mode of payment. But if the original contract is, that the purchase money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond with surety payable at such future day, I do not perceive how it is possible to assert that the acceptances or bond are not relied on as security. It is sufficient, however, that the case was not then before his lordship; and that he admits, that taking a distinct security would be a waiver of the lien. On the other hand, there are several cases in which it is laid down, that if other security be taken, the implied lien on the land is gone. To this effect certainly the case of *Fawell v. Heelis* (Amb. R. 724, S. C.; 2 Dick. 485) is an authority, however it may, on its own circumstances, have been shaken; and the doctrine is explicitly asserted and acted upon in *Nairn v. Prowse*, 6 Ves. Jun. 752. See, also, *Bond v. Kent*, 2 Vern. 381. In our own country, a very venerable judge of equity has recognized the same doctrine. He says: "The doctrine that the vendor of land, not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with [*296] notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost. (*Cole v. Scott*, 2 Wash. Rep. 141. Looking to the principle upon which the original doctrine of lien is established, I have no hesitation to declare, that taking the security of a third person for the purchase money, ought to be held a complete waiver of any lien upon the land; and that, in a case standing upon such a fact, it would

by sundry citizens or residents of the United States, with the intent that she should be employed to commit hostilities, as aforesaid, in violation of the laws aforesaid. For these causes the libellant prayed a restitution to him of the Estrella and cargo.

A claim was interposed by J. F. Lamoureux, prize-master of the Estrella, which stated that the Constitution was duly commissioned by the republic of Venezuela, and authorized to capture all vessels belonging to its enemies, under which authority she had captured the Estrella, which, with her cargo, belonged to the enemies of the said republic. That, before he could receive his prize commission, the Constitution upset, in a gale, and her commission and papers, with the greater part of the crew, were lost. The claimant further represented that, as he was carrying the Estrella into port, to have her condemned before a court of competent jurisdiction, she was captured by the United States ketch, Surprise, and conducted to New Orleans; and, therefore, claimed, that the Estrella and cargo might be adjudged to be restored to him.

It appears, from the transcript of the proceedings in this case, that the Estrella was also libeled on the part of the United States, although it is not stated for what cause such libel was filed, but the same was dismissed; from which decree there was no appeal.

301*] *It appeared in evidence that the Constitution had a commission from the government of Venezuela, at the time the capture was made, which was issued and delivered at Carthagena; but that the same was lost by the sinking of the privateer, immediately after the capture. There was some contradictory testimony as to her having increased her armament in the United States, and it was proved that she had

augmented the number of her crew in the port of New Orleans.

On the libel filed by the Spanish owner, decree was made that the claim of Lamoureux, the prize-master, be dismissed, with costs, and that the Estrella and cargo be delivered up and restored to the libellant; from which sentence the cause was brought, by appeal, to this court.

Mr. C. J. Ingersoll, for the appellant and captor, argued that the law of nations gave to the courts of the captor's country the exclusive cognizance of questions of prizes made under its authority; and that the only exceptions to this general rule were to be found in the acts of Congress for preserving our neutral relations. In the present case, there was no sufficient evidence that the armament of the capturing vessel had been increased within the United States, so as to give our courts jurisdiction to restore the captured property, upon this ground; and that the 2d section of the act of the 8th of June, 1794, c. 226, which prohibited the enlistment of men within our territory, was impliedly repealed by the act of March 3d, 1817, c. 58, which contained *no such prohibition, and which [*302 was the law in force at the time this case occurred. But even if it were otherwise, the only proof of an increase of the crew was the hearsay of interested witnesses; and supposing their testimony to establish the fact, still the *onus probandi* was upon the claimant, to show that the persons so enlisted were not citizens of Venezuela, transiently within the United States, and so coming within the proviso of the 2d section of the act of 1794, c. 226. The existence of a commission, regularly issued by the government of Venezuela, within its own territory, which was on board the privateer previous to the capture, was sufficiently proved; and the court has already determined that the

be very difficult to bring my mind to a different conclusion. At all events, it is *prima facie* evidence of a waiver, and the *onus* is on the vendor to prove, by the most cogent and irresistible circumstances, that it ought not to have that effect.

Such was the result of my judgment upon an examination of the authorities, when a very recent case before the master of the rolls first came to my knowledge. I have perused it with great attention, and it has not, in any degree, shaken my opinion. The case there was of acceptances of the vendee, and of his partner in trade, taken for the payment of the purchase money. It was admitted that there was no case of a security given by a third person, in which the lien had been held to exist. But the master of the rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held, in conformity to the opinion of Lord Redesdale, that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor to pay the money of the drawer to the payee; and that the acceptor was to be considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands. *Grant v. Mills*, 2 Ves. & Beames' Rep. 308. With this conclusion of the master of the rolls, I confess myself not satisfied, and desire to reserve myself for the case, when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported in point of fact by the practice of the commercial world. The distinction, however, on which it proceeds, admits, by a very strong implication, that the security of a third person would repel the lien. If, indeed, the point were new, there would be much reason to contend that a 297*) distinct security *of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels. *Cowell v. Simpson*, 16 Ves., Jun., 276. In applying the doctrine to Wheat, 4.

the facts of the present case, I confess that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable that so obvious a consideration should not have been within the view of the parties; and, viewing it, it is very difficult to suppose they could mean to create such an incumbrance. A distinct and independent security was taken by negotiable notes, payable at a future day. There is no pretense that the notes were a mere mode of payment, for the indorsers were, by the theory of the law, and, in fact, conditional sureties for the payment; and in this respect the case is distinguishable from that of receiving bills of exchange, where, by the theory of the law, the acceptor is not a surety, but merely pays the money of the drawer in pursuance of his order. *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 Ves. & Beames' Rep. 308. The securities themselves were, from their negotiable nature, capable of being turned immediately into cash, and in their transfer from hand to hand, they could never have been supposed to draw after them, in favor of the holder, a lien on the land for their payment. But I pass over these, and some other peculiar circumstances of this case, and put it upon the broad and general doctrine, that here was the security of a third person, taken as such, and that extinguished any implied lien for the purchase money." 1 Mason's Rep. 212.

same testimony which would be sufficient to prove that a cruising vessel is in the service of an acknowledged state, is sufficient to prove that it is in the service of a newly-created government, like that of Venezuela.¹

Mr. Sergeant, contra, argued, upon the facts, that the right of the original Spanish owner to restitution was established by satisfactory proof both of the increase of the armament and crew of the privateer within the United States. He insisted, that the act of 1794, c. 226, was not repealed by that of 1817, c. 58; and that, even if it were, the right to restitution depended upon the general law of nations, and treaties.² The **303*** claimant having proved the facts of *an increase of the crew in New Orleans, the *onus probandi* of showing that the persons enlisted were citizens of Venezuela, transiently within the United States, was thrown upon the captors. The commission under which the capture was professedly made, being that of a new government, not yet acknowledged by the United States, its commission ought to have been produced, and the seal proved; and if actually lost with the privateer, an exemplified copy ought to have been obtained duly authenticated by the proper officers of that government. All the circumstances of the case combined to show that this was not a capture in the regular exercise of the rights of war; but a piratical seizure, in breach of our neutrality, aggravated by an intention to violate the revenue laws, which was evinced by the fact of the vessel having been found hovering on the coast of Louisiana, instead of being conducted to the ports of Venezuela for adjudication.

LIVINGSTON, *J*, delivered the opinion of the court:

The first allegation of the Spanish owner is, that the Constitution had no lawful commission from any sovereign state to commit hostilities at sea; and he contends that the commission in the present case, if any there was, being that of a government not acknowledged by the United States, ought to have been produced, and its seal proved; or that if the vessel carrying it had been lost, yet an exemplification of it ought to have been obtained from the proper department **304*** of the state which issued it. *The court is satisfied with the proof which has been made, of the Constitution having had a commission at the time of making the capture, and that such commission was granted by the government of Venezuela; and also, that the same was lost with the privateer herself, a very short time after the prize crew took possession of the *Estrella*. The fact of the sinking of the Constitution is not disputed; and that she had, at the time she went down, a commission on board, is also fully made out, which commission there is no reason to believe was any other than the one which the collector of New Orleans says was on board when she arrived in that port from Carthagena. This was some time in the month of October, in the year 1816. Mr. Chew then saw the commission, and describes it as a very regular one from the Venezuelan republic, signed, as others were, by

Bolivar. Although the court, in another case, has said that the seal of a government unacknowledged cannot be permitted to prove itself; it has, in the same case, said that the fact of a vessel being so employed may be established without proving the seal.³ But if the constitution had a commission on board, it is next alleged that the same was issued or delivered within the waters of the United States, with intent that she should be employed in the service of Venezuela, to commit hostilities, at sea, against the subjects of the King of Spain, with whom the United States were at peace. This allegation is not supported by any evidence; on the *contrary, the same witnesses who de- **305** clare that the Constitution was a commissioned vessel, and whose testimony has already been adverted to, establish, beyond controversy, that the same was obtained abroad, and not issued or delivered within the United States.

The libel next alleges that the Constitution, previous to her last cruise, had been fitted out and armed, or that her force had been increased or augmented, within the jurisdiction and waters of the United States, and also that she had there been manned by sundry citizens or residents of the United States with the same intent.

Whatever doubt there may be as to the augmentation of the armament of the Constitution within the United States, the court is satisfied that a very considerable addition was made to her crew, at New Orleans, after her arrival at that port; one of the custom-house officers declares that, at that time, she had only from twenty to twenty-five men. Another of these officers, who went on board on her first arrival, states the number of her crew at about twenty; and a witness by the name of Guzman, totally unconnected with this transaction, mentions by name two persons who entered on board while she was lying there. Several of the original crew of the *Estrella* have also been examined to this point, who state, that after the capture, they had many conversations with the officers and seamen who composed the prize crew, by whom they were informed that the Constitution, when she left Carthagena, had but few hands on board; that at New *Orleans she **306** shipped almost the whole of her crew, which, at the time of the *Estrella*'s capture, amounted to sixty or seventy men. This species of testimony has been objected to as being hearsay, and proceeding from a source entitled to no great credit; although there may be something in this objection, it is no reason for rejecting the evidence altogether. If the testimony be hearsay, it must be recollected that the declarations proceeded from persons very much interested in giving a different representation of the transaction; and as to the witnesses themselves, although they formed a part of the *Estrella*'s crew, and may have felt some little interest in the question, they were the only persons who could give any account of the armament or crew of the Constitution at the time of her making the capture. It may be also remarked that the testimony of these men is in this respect corroborated by that of other witnesses, who are liable to no objection, and that their declarations, if untrue, might have been disproved by the claimant, by showing where and when the crew of the Con-

1.—The United States v. Palmer, 3 Wheat. 610, 635.

2.—1 Wheat. 244, note c; 2 Sir L. Jenkins's Works, 727. lb. 780.

376

3.—The United States v. Palmer, 3 Wheat. 635.

Wheat. 4.

stitution had been entered. But if any of the crew of the Constitution were enlisted or entered within the jurisdiction of the United States, they may, it is said, have been citizens or subjects of the republic of Venezuela, who were transiently in the United States at the time of her arrival, and had, therefore, a right, within one of the provisos of the second section of the act of Congress, of the 7th of June, 1794, c. 228, to enlist or enter themselves on board of her; and it is insisted, that the libellant should have shown that they were not persons of this description. *The court is not of this opinion. On the libellant, in the first instance, lay the *onus* of showing that the crew of the Constitution had been increased within the United States; having done this, it became incumbent on the captors, if they wanted to establish their innocence, to show, as was in their power, if the fact was so, that they had done nothing contrary to law, by bringing their case within the proviso that has been mentioned.

The allegation, then, in the libel being made out, that the Constitution, being a privateer commissioned by the republic of Venezuela, was manned within the United States, previous to the cruise on which she captured the Estrella, by sundry citizens or residents of the United States; it remains to see whether the libellant has not made out a case for restitution.

It has been attempted, but without success, to distinguish this case in principle from several which have already been decided in this court. We have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied; nor has the court ever felt any disposition to intrench on this rule; but, on the contrary, whenever an occasion has occurred, as in the case of *The Invincible*,¹ it has been governed by it. Not only is it a rule well established by the customary and conventional law [308*] of nations, but it is *founded in good sense, and is the only one which is salutary and safe in practice. It secures to a belligerent the independence to which every sovereign state is entitled, and which would be somewhat abridged, were he to condescend so far as to permit those who bear his commission to appear before the tribunals of any other country, and submit to their interpretation, or control, the orders and instructions under which they have acted. It ensures, also, not only to the belligerent himself, but to the world at large, a great degree of caution and responsibility, on the part of the agents whom he appoints; who not only give security to him for their good behavior, but will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the courts of their own nation, and under the very eye of the sovereign under whose sanction they are committing hostilities. In this way, also, is a foundation laid for a claim by other nations, of an indemnity against the belligerent, for the injuries which their subjects may sustain, by the operation of any unjust or improper rule, which he may think proper to prescribe for those who act under his authority. But general, and firmly established as this

rule is, it is not more so than some of the exceptions which have grown out of it. A neutral nation which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law which may *arise [309 in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought, or voluntarily comes, *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right—and its safety, good faith, and honor demand of it—to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him by vessels which have been thus illegally fitted out. In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard, or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.

The United States, instead of opening their ports to all the contending parties, when at peace themselves (as may be done, if not prevented by antecedent treaties), have always thought it the wisest and safest course to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments. *To enforce a general and strict observ- [310 ance of this neutrality, on the part of our own citizens, and of others who reside among us, a law passed, as early as the year 1794, making it penal, among other things, for anyone, within the jurisdiction of the United States, to enlist in the service of any foreign prince or state, as a soldier, marine, or seaman on board of any vessel of war, letter of marque, or privateer. This law, it is supposed, was not in force at the time when the crew of the Constitution was increased at New Orleans, having been repealed, as is alleged, by the act of the 3d of March, 1817, c. 58. But this act contains no repealing clause of this or any other section of the former law; and having made no provision on the subject of enlistment, it must have been the intention of the legislature to leave in full force all those parts of the first law which had undergone no alteration, in the one which was then passing, and we therefore find no repeal of the act in question, until the 20th of April, 1818, when all the provisions respecting our neutral relations were embraced by one act, and all former laws on the same subject were repealed. But whether the act of 1794, c. 228, were in force or not, would make no difference; for it did not, in terms, contain, nor did any of the

1.—1 Wheat. 238.

others, which have, from time to time, been passed, contain a provision for the restitution of property captured on the ocean, by vessels which might be thus illegally fitted out, or manned in our ports. It is true, they recognize a right in the courts of the United States to make restitution, when these laws have been 311*] disregarded, and impart *to the courts a power to punish those who are concerned in such violations. But in the absence of every act of Congress in relation to this matter, the court would feel no difficulty in pronouncing the conduct here complained of, an abuse of the neutrality of the United States; and although in such case the offender could not be punished, the former owner would, nevertheless, be entitled to restitution. Nor is our opinion confined to the single act of an illegal enlistment of men, which is the only fact proved in this case; for we have no hesitation in saying, that for any of the other violations of our neutrality alleged in the libel, if they had been proved, the Spanish owner would have been equally entitled to restitution.

Sentence affirmed with costs.

Cited—4 Wheat. 502; 4 Ben. 325.

[PRACTICE.]

MILLER (for the use of the United States)

v.

NICHOLLS.

Where a cause is brought to this court, by writ of error, or appeal, from the highest court of law or equity of a state, under the 25th section of the judiciary act of 1789, c. 20, upon the ground that the validity of a statute of the United States was drawn in question, and that the decision of the state court was against its validity, &c., or that the validity of a statute of the state was drawn in question, as repugnant to the constitution of the United States, and the decision was in favor of its validity; it must appear, from the record, that the act of Congress, or the constitutionality of the state law, was drawn into question.

But it is not required that the record should, in 312*] terms, state a misconstruction *of the act of Congress, or that it was drawn into question. It is sufficient to give this court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case.

ERROR to the Supreme Court of the State of Pennsylvania.

The case agreed in the court below, stated that William Nicholls, collector, &c., being indebted to the United States of America, on the 9th of June, 1798, executed a mortgage to Henry Miller, for the use of the United States, in the sum of \$59,444, conditioned for the payment of \$29,271, payable, \$9,757 on or before the 1st of January, 1799, \$9,757 on or before the 9th of June, 1799; and \$9,757 on or before the 9th of September, 1799. A *scire facias* was issued upon the said mortgage, returnable to September term of the said Supreme Court of Pennsylvania, in the year 1800, and judgment thereupon entered up, in the said Supreme Court, on the 6th of March, 1802, and thereupon a *levari facias* issued, and was levied upon the property of the said William Nicholls, and the same being sold to the highest bidder, for the sum of \$14,530, the same was brought into

court, and is now deposited in the hands of the prothonotary of said court, subject to the orders of the same court. That, on the 22d of December, 1797, the accounts of the said William Nicholls with the commonwealth of Pennsylvania were settled by the comptroller and register-general of the commonwealth. (Prout account and settlement.) That an appeal from said settlement was filed in the office of *the prothonotary of the said [*313 Supreme Court on the 6th day of March, 1798, and judgment thereupon entered in favor of the commonwealth against the said William Nicholls, in the said Supreme Court, on the 6th of September, 1798, for the sum of \$9,987.15.

Upon the preceding statement, the following question is submitted to the consideration of the court:

Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December, 1797, was, and is, a lien, from the date thereof, upon the real estate of the said William Nicholls, and which has since been sold as aforesaid.

A. J. DALLAS, for the United States.

J. B. M'KEAN, for the commonwealth of Pennsylvania.

December 2d, 1803.

The Supreme Court of Pennsylvania, on the 21st of March, 1805, on motion of Mr. M'Kean, Attorney-General of the said commonwealth, made a rule on the plaintiff in error, to show cause why the amount of the debt due to the said commonwealth should not be taken out of court. And on the 22d of March, 1805, Alexander James Dallas, the attorney of the United States, for the District of Pennsylvania, came into court and suggested, "that the commonwealth of Pennsylvania ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the suit, because the said *attorney, on be- [*314 half of the United States saith, that as well by virtue of the said execution as of divers acts of Congress, and particularly of an act of Congress entitled 'an act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys,' approved the 3d of March, 1797, the said United States are entitled to have and receive the money aforesaid, and not the said commonwealth of Pennsylvania. A. J. DALLAS."

The record then proceeds as follows: "And now, to wit, this 18th day of September, 1805, the motion of the Attorney-General, to take the money out of court, was granted by the unanimous opinion of the court."

The proceedings were afterwards brought before this court by writ of error.

Mr. Sergeant, for the defendant in error, moved to dismiss the writ of error in this cause, for want of jurisdiction, under the judiciary act of the 24th of September, 1789, c. 20, s. 25: it nowhere appearing upon the face of the record that any question arose respecting the validity of any treaty or statute of the United States, or of any statute of the state, upon the ground of its repugnancy to the constitution or laws of the United States.¹

1.—Martin v. Hunter's lessee, 1 Wheat. 304; Ingle v. Cullidge, 2 Wheat. 363.

The Attorney-General, contra.

315*] *MARSHALL, *Ch. J.*, delivered the opinion of the court: The question decided in the Supreme Court for the state of Pennsylvania respect only the construction of a law of that state. It does not appear, from the record, that either the constitutionality of the law of Pennsylvania, or any act of Congress was drawn into question.

It would not be required that the record should, in terms, state a misconstruction of an act of Congress, or that an act of Congress was drawn into question. It would have been sufficient to give this court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case. That is not shown by this record. The act of Congress which is supposed to have been disregarded, and which, probably, was disregarded by the state court, is that which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the Supreme Court of Pennsylvania. But that fact does not appear. No other question is presented than the correctness of the decision of the state court, according to the laws of Pennsylvania, and that is a question over which this court can take no jurisdiction.

The writ of error must be dismissed.

Writ of error dismissed.

Cited—12 Wheat. 124; 2 Pet. 251, 409; 3 Pet. 302; 4 Pet. 429; 5 Pet. 257; 6 Pet. 48; 10 Pet. 394, 396; 12 Pet. 134; 16 Pet. 301; 11 How. 549; 12 How. 109; 18 How. 515; 1 Cliff. 433.

316*] *[CONSTITUTIONAL LAW.]

M'CULLOCH

v.

THE STATE OF MARYLAND ET AL.

[Congress has power to incorporate a bank.

The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

There is nothing in the constitution of the United States, similar to the articles of confederation, which exclude incidental or implied powers.

If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

NOTE.—As to the power of Congress to charter a United States Bank, see 2 Story on the constitution, secs. 1,259 to 1,271, and the notes thereto, especially Hamilton's argument at pages 143, *et seq.*; 1 Kent's Comm. 248 to 255; *Osborne v. Bank of U. S.* 9 Wheat. 738.

Wheat. 4.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The act of the 10th April, 1816, c. 44, to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The state, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

*The states have no power, by taxation, or [317 otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government.

This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state may hold in this institution, in common with other property of the same description throughout the state.

ERROR to the Court of Appeals of the state of Maryland.

This was an action of debt brought by the defendant in error, John James, who sued as well for himself as for the state of Maryland, in the County Court of Baltimore county, in the said state, against the plaintiff in error, M'Culloch, to recover certain penalties under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the Court of Appeals of the state of Maryland, the highest court of law of said state, and the cause was brought, by writ of error, to this court:

It is admitted by the parties in this cause, by their counsel, that there was passed on the 10th day of April, 1816, by the Congress of the United States, an act, entitled, "An act to incorporate the subscribers to the Bank of the United States;" and that there was passed, on the 11th day of February, 1818, by the general Assembly of Maryland, an act, entitled, "An act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature," *which said acts are [318 made part of this statement, and it is agreed may be read from the statute books in which they are respectively printed. It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of Congress aforesaid, did organize themselves, and go into full operation in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did on the

day of eighteen hundred and seventeen, establish a branch of the said bank, or an office of discount and deposit in the city of Baltimore, in the state of Maryland, which has from that time until the first day of May, eighteen hundred and eighteen, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank notes and discounting promissory

notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said president, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch or office of discount and deposit at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union. It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch or office of **319*** discount and *deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank notes were not, nor was either of them, so issued on stamped paper in the manner prescribed by the act of assembly aforesaid. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch or office of discount and deposit have not, nor has either of them, paid in advance, or otherwise, the sum of fifteen thousand dollars, to the treasurer of the Western Shore for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the governor and council of the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the court for their decision in this case, is as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of Congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in *which are hereby agreed to be mutually released), if the court should be of opinion that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for twenty-five hundred dollars, and costs of suit. But if the court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs to the defendant.

It is agreed that either party may appeal from the decision of the County Court, to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had if a jury had been sworn and empaneled in this cause, and a special verdict had been found, or these facts had appeared

and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon.

Copy of the act of the legislature of the state of Maryland, referred to in the preceding statement:

An act to impose a tax on all banks or branches thereof in the state of Maryland, not chartered by the legislature.

Be it enacted by the General Assembly of Maryland, That if any bank has established, or shall, without authority from the state first had and obtained, establish any branch, office of discount and *deposit, or office of pay [***321** and receipt, in any part of this state, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the treasurer of the Western Shore, under the direction of the governor and council, to be paid for upon delivery. Provided always, That any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the treasurer of the Western Shore, for the use of the state, the sum of fifteen thousand dollars.

And be it enacted, That the president, cashier, each of the directors and officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of five hundred dollars for each and every offense, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding one hundred *dollars; every penalty aforesaid [***322** to be recovered by indictment, or action of debt, in the county court of the county where the offense shall be committed, one-half to the informer, and the other half to the use of the state.

And be it enacted, That this act shall be in full force and effect from and after the first day of May next.

Mr. Webster, for the plaintiff in error.¹ 1. Stated, that the question whether Congress constitutionally possesses the power to incorporate a bank, might be raised upon this record; and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped

1.—This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party.

that it was not now to be considered as an open question. It is a question of the utmost magnitude, deeply interesting to the government itself, as well as to individuals. The mere discussion of such a question may most essentially affect the value of a vast amount of private property. We are bound to suppose that the defendant in error is well aware of these consequences, and would not have intimated an intention to agitate such a question, but with a real design to make it a topic of serious discussion, and with a view of demanding upon it the **323*** solemn judgment of this court. *This question arose early after the adoption of the constitution, and was discussed, and settled, as far as legislative decision could settle it, in the first Congress. The arguments drawn from the constitution in favor of this power, were stated, and exhausted, in that discussion. They were exhibited, with characteristic perspicuity and force, by the first Secretary of the Treasury, in his report to the President of the United States. The first Congress created and incorporated a bank.¹ Nearly each succeeding Congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government. Individuals, it is true, have doubted, or thought otherwise; but it cannot be shown that either branch of the legislature has, at any time, expressed an opinion against the existence of the power. The executive government has acted upon it; and the courts of law have acted upon it. Many of those who doubted or denied the existence of the power, when first attempted to be exercised, have yielded to the first decision, and acquiesced in it, as a settled question. When all branches of the government have thus been acting on the existence of this power nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. Congress, by the constitution, is invested with certain powers; and, as to the objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the **324*** constitution, *empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So it has power to raise a revenue, and to apply it in the support of the government, and defense of the country. It may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of Congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was in the contemplation of the framers of the constitution. It was not

their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and *fitted to the ob- **[*325]** ject; such as are best and most useful in relation to the end proposed. If this be not so, and if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the states. It is not for this court to decide whether a bank, or such a bank as this, be the best possible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them in the two houses of Congress. Here, the only question is, whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government as to be fairly within the discretion of Congress, when selecting means and instruments to execute its powers and perform its duties. A bank is not less the proper subject for the choice of Congress, nor the less constitutional, because it requires to be executed by granting a charter of incorporation. It is not, of itself, unconstitutional in Congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; and, as *means, take their character generally **[*326]** from their end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. The state governments create corporations to execute powers confided to their trust, without any specific authority in the state constitutions for that purpose. There is the same reason that Congress should exercise its discretion as to the means by which it must execute the powers conferred upon it. Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed. Among other means, it has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.

2. The second question is, whether, if the bank be constitutionally created, the state governments have power to tax it. The people of the United States have seen fit to divide

1.—Act of February 5th, 1791, c. 84.

sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, **327*** therefore, declares, that the "constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

The only inquiry, therefore, in this case is, whether the law of the state of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it. If it be not, then it is void; if it be, then it may be valid. Upon the supposition that the bank is constitutionally created, this is the only question; and this question seems answered as soon as it is stated. If the states may tax the bank, to what extent shall they tax it, and where shall they stop? An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the states may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state governments for its existence. This consequence is inevitable. The object in laying this tax may have been revenue to the state. In the next case, the object may be to expel the bank from the state; **328*** but "how is this object to be ascertained, or who is to judge of the motives of legislative acts? The government of the United States has itself a great pecuniary interest in this corporation. Can the states tax this property? Under the confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that "no impositions, duties, or restrictions, should be laid by any state on the property of the United States." Is it supposed that property of the United States is now subject to the power of the state governments, in a greater degree than under the confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and must have, property locally existing in all the states; and may the states impose on this property, whether real or personal, such taxes as they please? Can they tax proceedings in the federal courts? If so, they can expel those judicatures from the states. As Maryland has undertaken to impose a stamp tax on the notes of this bank, what hinders her from imposing a stamp tax also on permits, clearances, regis-

ters, and all other documents connected with imposts and navigation? If by one she can suspend the operations of the bank, by the other she can equally well shut up the custom-house. The law of Maryland, in question, makes a requisition. The sum called for is not assessed on property, nor deducted from profits or income. It is a direct imposition on the power, privilege, or franchise of the corporation. The act purports, also, to restrain "the circulation of the paper of the [**329** bank to bills of certain descriptions. It narrows and abridges the powers of the bank in a manner which, it would seem, even Congress could not do. This law of Maryland cannot be sustained but upon principles and reasoning which would subject every important measure of the national government to the revision and control of the state legislatures. By the charter, the bank is authorized to issue bills of any denomination above five dollars. The act of Maryland purports to restrain and limit their powers in this respect. The charter, as well as the laws of the United States, makes it the duty of all collectors and receivers to receive the notes of the bank in payment of all debts due the government. The act of Maryland makes it penal, both on the person paying and the person receiving such bills, until stamped by the authority of Maryland. This is a direct interference with the revenue. The legislature of Maryland might, with as much propriety, tax treasury notes. This is either an attempt to expel the bank from the state, or it is an attempt to raise a revenue for state purposes by an imposition on property and franchises holden under the national government, and created by that government for purposes connected with its own administration. In either view there cannot be a clearer case of interference. The bank cannot exist, nor can any bank established by Congress exist, if this right to tax it exists in the state governments. One or the other must be surrendered; and a surrender on the part of the government of the United States would be a giving "up of [**330** those fundamental and essential powers without which the government cannot be maintained. A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government that Congress should be able to exercise its constitutional powers at its own discretion, without being subject to the control of state legislation. The question is not whether a bank be necessary, or useful, but whether Congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the state governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of Congress establishing the bank be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare that Congress can only exercise its constitutional powers subject to the controlling discretion, and under the sufferance of the state governments.

Mr. Hopkinson, for the defendants in error, proposed three questions for the consideration of the court. 1. Had Congress a constitutional power to incorporate the bank of the United States? 2. Granting this power to Congress, has the bank, of its own authority, a right to establish its branches in the several states? 3. Can the bank, and its branches thus established, claim to be exempt from the ordinary ^{331*} and equal taxation of property, as assessed in the states in which they are placed?

1. The first question has, for many years, divided the opinions of the first men of our country. He did not mean to controvert the arguments by which the bank was maintained on its original establishment. The power may now be denied, in perfect consistency with those arguments. It is agreed, that no such power is expressly granted by the constitution. It has been obtained by implication; by reasoning from the 8th section of the 1st article of the constitution; and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution. If the bank be not "necessary and proper" for this purpose, it has no foundation in our constitution, and can have no support in this court. But it strikes us at once, that a power, growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circumstances which change; in a state of things which may exist at one period and not at another. The argument might have been perfectly good to show the necessity of a bank for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then. That some of the powers of the constitution are of this fluctuating character, existing, or not, according to extraneous circumstances, has been fully recognized by this court at the present term, in the case of *Sturges v. Crowninshield*.¹ Necessity was the ^{332*} plea and justification of the first bank of the United States. If the same necessity existed when the second was established, it will afford the same justification; otherwise, it will stand without justification, as no other is pretended. We cannot, in making this inquiry, take a more fair and liberal test than the report of General Hamilton, the father and defender of this power. The uses and advantages he states, as making up the necessity required by the constitution, are three: 1. The augmentation of the active and productive capital of the country; by making gold and silver the basis of a paper circulation. 2. Affording greater facility to the government, in procuring pecuniary aids; especially in sudden emergencies. This, he says, is an indisputable advantage of public banks. 3. The facility of the payment of taxes, in two ways—by loaning to the citizen, and enabling him to be punctual; and by increasing the quantity of circulating medium, and quickening circulation by bank bills, easily transmitted from place to place. If we admit that these advantages, or conveniences, amount to the necessity required by the constitution, for the creation and exercise of

powers not expressly given; yet it is obvious they may be derived from any public banks, and do not call for a bank of the United States, unless there should be no other public banks, or not a sufficiency of them for these operations. In 1791, when this argument was held to be valid and effectual, there were but three banks in the United States, with limited capitals, and contracted spheres of operation. Very different is the case now, when we have a banking capital to a vast amount, vested in ³³³ banks of good credit, and so spread over the country, as to be convenient and competent for all the purposes enumerated in the argument. General Hamilton, conscious that his reasoning must fail if the state banks were adequate for his objects, proceeds to show they were not. Mr. Hopkinson particularly examined all the objections urged by General Hamilton to the agency of the state banks then in existence, in the operations required for the revenue; and endeavored to show that they had no application to the present number, extent, and situation of the state banks; relying only on those of a sound and unquestioned credit and permanency. He also contended, that the experience of five years, since the expiration of the old charter of the bank of the United States, has fully shown the competency of the state banks to all the purposes and uses alleged as reasons for erecting that bank in 1791. The loans to the government by the state banks, in the emergencies spoken of; the accommodation to individuals, to enable them to pay their duties and taxes; the creation of a circulating currency; and the facility of transmitting money from place to place, have all been effected, as largely and beneficially by the state banks as they could have been done by a bank incorporated by Congress. The change in the country, in relation to banks, and an experience that was depended upon, concur in proving that whatever might have been the truth and force of the bank argument in 1791, they were wholly wanting in 1816.

*2. If this bank of the United States ³³⁴ has been lawfully created and incorporated, we next inquire, whether it may, of its own authority, establish its branches in the several states, without the direction of Congress, or the assent of the states. It is true that the charter contains this power, but this avails nothing, if not warranted by the constitution. This power to establish branches, by the directors of the bank, must be maintained and justified by the same necessity which supports the bank itself, or it cannot exist. The power derived from a given necessity, must be co-extensive with it, and no more. We will inquire, 1. Does this necessity exist in favor of the branches? 2. Who should be the judge of the necessity, and direct the manner and extent of the remedy to be applied? Branches are not necessary for any of the enumerated advantages. Not for pecuniary aids to the government; since the ability to afford them must be regulated by the strength of the capital of the parent bank, and cannot be increased by scattering and spreading that capital in the branches. Nor are they necessary to create a circulating medium; for they create nothing; but issue paper on the faith and responsibility of the parent bank, who could issue the same quantity

1.—*Ante*, p. 122.

on the same foundation; the distribution of the notes of the parent bank can as well be done, and, in fact, is done, by the state banks. Where, then, is that necessity to be found for the branches, whatever may be allowed to the bank itself? It is undoubtedly true that these branches are established with a single view to trading, and the profit of the stockholders, and not for the convenience **335*** or use of the government; and, therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. If this is the case, can it be contended that the state rights of territory and taxation are to yield for the gains of a money-trading corporation; to be prostrated at the will of a set of men who have no concern, and no duty, but to increase their profits? Is this the necessity required by the constitution for the creation of undefined powers? It is true that, by the charter, the government may require a branch in any place it may designate, but if this power is given only for the uses or necessities of the government, then the government only should have the power to order it. In truth, the directors have exercised the power, and they hold it without any control from the government of the United States; and, as is now contended, without any control of the state governments. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage! A state will not suffer its own citizens to erect a bank without its authority, but the citizens of another state may do so; for it may happen that the state thus used by the bank for one of its branches, does not hold a single share of the stock. 2. But if these branches are to be supported, on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the *when* and the *where* **336*** the power shall be exercised, which the necessity requires. Assuredly, the same tribunal which judges of the original necessity on which the bank is created, should also judge of any subsequent necessity requiring the extension of the remedy. Congress is that tribunal; the only one in which it may be safely trusted; the only one in which the states to be affected by the measure are all fairly represented. If this power belongs to Congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens; if this doctrine of necessity is without any known limits, but such as those who defend themselves by it, may choose for the time to give it; and if the powers derived from it are assignable by the Congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers. The establishment of a bank in a state, without its assent, without regard to its interests, its policy, or institutions, is a high-

er exercise of authority than the creation of the parent bank, which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states than those wide-spreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of sovereign power should, at ***337** least, have the sanction of the sovereign legislature to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

3. If, however, the states of this Union have surrendered themselves in this manner, by implication, to the Congress of the United States, and to such corporations as the Congress, from time to time, may find it "necessary and proper" to create; if a state may no longer decide whether a trading association, with independent powers and immunities, shall plant itself in its territory, carry on its business, make a currency and trade on its credit, raising capitals for individuals as fictitious as its own; if all this must be granted, the third and great question in this cause presents itself for consideration; that is, shall this association come there with rights of sovereignty, paramount to the sovereignty of the state, and with privileges possessed by no other persons, corporations or property in the state? In other words; can the bank and its branches, thus established, claim to be exempt from the ordinary and equal taxation of property, as assessed in the states in which they are placed? As this overwhelming invasion of state sovereignty is not warranted by any express clause or grant in the constitution, and never was *imagined* by any state that ***338** adopted and ratified that constitution, it will be conceded that it must be found to be necessarily and indissolubly connected with the power to establish the bank, or it must be repelled. The court has always shown a just anxiety to prevent any conflict between the federal and state powers; to construe both so as to avoid an interference if possible, and to preserve that harmony of action in both on which the prosperity and happiness of all depend. If, therefore, the right to incorporate a national bank may exist, and be exercised consistently with the right of the state, to tax the property of such bank within its territory, the court will maintain both rights; although some inconvenience or diminution of advantage may be the consequence. It is not for the directors of the bank to say, you will lessen our profits by permitting us to be taxed; if such taxation will not deprive the government of the uses it derives from the agency and operations of the bank. The necessity of the government is the foundation of the charter; and beyond that necessity it can claim nothing in derogation of state authority. If the power to erect this corporation were expressly given in the constitution, still it would not be construed to be an exclusion of any state right, not absolutely incompatible and repugnant. The states need no reservation or acknowledgment of their right; all remain that

are not expressly prohibited, or necessarily excluded; and this gives our opponents the broadest ground they can ask. The right now assailed by the bank, is the right of taxing property **339*** within the territory of the state. This is the highest attribute of sovereignty, the right to raise revenue; in fact, the right to exist; without which no other right can be held or enjoyed. The general power to tax is not denied to the states, but the bank claims to be exempted from the operation of this power. If this claim is valid, and to be supported by the court, it must be, either, 1. From the nature of the property. 2. Because it is a bank of the United States. 3. From some express provision of the constitution; or, 4. Because the exemption is indispensably necessary to the exercise of some power granted by the constitution.

First. There is nothing in the nature of the property of bank stock that exonerates it from taxation. It has been taxed, in some form, by every state in which a bank has been incorporated; either annually and directly, or by a gross sum paid for the charter. The United States have not only taxed the capital or stock of the state banks, but their business also, by imposing a duty on all notes discounted by them. The bank paid a tax for its capital; and every man who deals with the bank, by borrowing, paid another tax for the portion of the same capital he borrowed. This species of property, then, so far from having enjoyed any exemption from the calls of the revenue, has been particularly burthened; and been thought a fair subject of taxation both by the federal and state governments.

Second. Is it then exempt, as being a bank of the United States? How is it such? In name only. Just as the Bank of Pennsylvania, or **340*** the Bank of Maryland, are banks of those States. The property of the bank, real or personal, does not belong to the United States only as a stockholder, and as any other stockholders. The United States might have the same interest in any other bank, turnpike, or canal company. So far as they hold stock, they have a property in the institution, and no further; so long and no longer. Nor is the direction and management of the bank under the control of the United States. They are represented in the board by the directors appointed by them, as the other stockholders are represented by the directors they elect. A director of the government has no more power or right than any other director. As to the control the government may have over the conduct of the bank, by its patronage and deposits, it is precisely the same it might have over any other bank, to which that patronage would be equally important. Strip it of its name, and we find it to be a mere association of individuals, putting their money into a common stock, to be loaned for profit, and to divide the gains. The government is a partner in the firm, for gain also; for, except a participation of the profits of the business, the government could have every other use of the bank without owning a dollar in it. It is not, then, a bank of the United States, if by that we mean an institution belonging to the government, directed by it, or in which it has a permanent, indissoluble interest. The convenience it affords in the collection and distribution of the revenue, is collected. **Wheat. 4.**

lateral, secondary, and may be transferred at pleasure to any other bank. It forms no part of the construction *or character of this [**341** bank; which, as to all its rights and powers, would be exactly what it now is if the government was to seek and obtain all this convenience from some other source; if the government were to withdraw its patronage, and sell out its stock. How, then, can such an institution claim the immunities of sovereignty; nay, that sovereignty does not possess? for a sovereign, who places his property in the territory of another sovereign, submits it to the demands of the revenue, which are but justly paid, in return for the protection afforded to the property. General Hamilton, in his report on this subject, so far from considering the bank a public institution, connected with, or controlled by the government, holds it to be indispensable that it should not be so. It must be, says he, under private, not public, direction; under the guidance of individual interest, not public policy. Still, he adds, the state may be holder of part of its stock; and, consequently, (what! it becomes public property? not) a sharer of the profits. He traces no other consequence to that circumstance. No rights are founded on it; no part of its utility or necessity arises from it. Can an institution, then, purely private, and which disclaims any public character, be clothed with the power and rights of the government, and demand subordination from the State government, in virtue of the federal authority, which it undertakes to wield at its own will and pleasure? Shall it be private in its direction and interests; public in its rights and privileges; a trading money-lender in its business; an uncontrolled sovereign in its powers? If the whole bank, with all its property and business, *belonged to the United [**342** States, it would not, therefore, be exempted from the taxation of the States. To this purpose, the United States and the several states must be considered as sovereign and independent; and the principle is clear, that a sovereign, putting his property within the territory and jurisdiction of another sovereign, and, of course, under his protection, submits it to the ordinary taxation of the state, and must contribute fairly to the wants of the revenue. In other words, the jurisdiction of the state extends over all its territory, and everything within or upon it, with a few known exceptions. With a view to this principle, the constitution has provided for those cases in which it was deemed necessary and proper to give the United States jurisdiction within a state, in exclusion of the state authority; and even in these cases, it will be seen, it cannot be done without the assent of the state. For a seat of government, for forts, arsenals, dock-yards, &c., the assent of the state to surrender its jurisdiction is required; but the bank asks no consent, and is paramount to all state authority, to all the rights of territory, and demands of the public revenue. We have not been told whether the banking houses of this corporation, and any other real estate it may acquire, for the accommodation of its affairs, are, also, of this privileged order of property. In principle, it must be the same; for the privilege, if it exists, belongs to the corporation, and must cover equally all its property. It is understood that a case was lately

decided by the Supreme Court of Pennsylvania, and from which no appeal has been taken, 343*] on the part of the United States to this court, to show that United States property, as such, has no exemption from state taxation. A fort, belonging to the federal government, near Pittsburg, was sold by public auction; the usual auction duty was claimed, and the payment resisted, on the ground that none could be exacted from the United States. The court decided otherwise. In admitting Louisiana into the Union, and so, it is believed, with all the new states, it is expressly stipulated, "that no taxes shall be imposed on lands, the property of the United States." There can, then, be no pretense that bank property, even belonging to the United States, is, on that account, exonerated from state taxation.

Third. If, then, neither the nature of the property nor the interest the United States may have in the bank, will warrant the exemption claimed, is there anything expressed in the constitution to limit and control the state right of taxation, as now contended for? We find but one limitation to this essential right, of which the states were naturally and justly most jealous. In the 10th section of the 1st article, it is declared, that "no state shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And there is a like prohibition to laying any duty of tonnage. Here, then, is the whole restriction, or limitation, attempted to be imposed by the constitution, on the power of the states to raise revenue, precisely in the same manner, from the same subjects, and to the same extent, that any sovereign and independent 344*] "state may do; and it never was understood by those who made, or those who received the constitution, that any further restriction ever would, or could be imposed. This subject did not escape either the assailants or the defenders of our form of government; and their arguments and commentaries upon the instrument ought not to be disregarded in fixing its construction. It was foreseen, and objected, by its opponents, that, under the general sweeping power given to Congress, "To make all laws which shall be necessary and proper, for carrying into execution the foregoing powers," &c., the states might be exposed to great dangers, and the most humiliating and oppressive encroachments, particularly in this very matter of taxation. By referring to the Federalist, the great champion of the constitution, the objections will be found stated, together with the answers to them. It is again and again replied, and most solemnly asserted, to the people of these United States, that the right of taxation in the states is sacred and inviolable, with "the sole exception of duties on imports and exports;" that "they retain the authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution." With the exception mentioned, the federal and state powers of taxation are declared to be concurrent; and if the United States are justified in taxing state banks, the same equal and con-

current authority will justify the state in taxing the bank of the United States, or any other bank.¹ The author begins (No. [345 34] by saying: "I flatter myself it has been clearly shown, in my last number, that the particular states, under the proposed constitution, would have co-equal authority with the Union, in the article of revenue, except as to duties on imports." Under such assurances from those who made, who recommended, and carried the constitution, and who were supposed best to understand it, was it received and adopted by the people of these United States; and now, after a lapse of nearly thirty years, they are to be informed that all this is a mistake, all these assurances are unwarranted, and that the federal government does possess most productive and important powers of taxation, neither on imports, exports, or tonnage, but strictly internal, which are prohibited to the states. The question then was, whether the United States should have any command of the internal revenue; the pretension now is, that they shall enjoy exclusively the best portion of it. The question was then quieted by the acknowledgment of a co-equal right; it is now to be put to rest by the prostration of the state power. The federal government is to hold a power by implication and ingenious inference from general words in the constitution, which it can hardly be believed would have been suffered in an express grant. If, then, the people were not deceived when they were told that, with the exceptions mentioned, the state right of taxation is sacred and inviolable; and it be also true *that the bank of the [346 United States cannot exist under the exercise of that right, the consequence ought to be, that the bank must not exist; for if it can live only by the destruction of such a right—if it can live only by the exercise of a power which this court solemnly declared to be a "violent assumption of power, unwarranted by any clause in the constitution"—we cannot hesitate to say, let it not live. But in truth this is not the state of the controversy. No such extremes are presented for our choice. We only require that the bank shall not violate state rights, in establishing itself or its branches; that it shall be submitted to the jurisdiction and laws of the state, in the same manner with other corporations and other property; and all this may be done without ruining the institution, or destroying its national uses. Its profits will be diminished by contributing to the revenue of the states; and this is the whole effect that ought, in a fair and liberal spirit of reasoning, to be anticipated. But, at all events, we show, on the part of the state, a clear, general, absolute, and unqualified right of taxation (with the exception stated); and protest against such a right being made to yield to implications and obscure constructions of indefinite clauses in the constitution. Such a right must not be defeated by doubtful pretensions of power, or arguments of convenience or policy to the government; much less to a private corporation. It is not a little alarming to trace the progress of this argument. 1. The power to raise the bank is founded on no provision of the constitution that has the most distant allusion to such

1.—Letters of Publius, or the Federalist, Nos. 31-36.

347*] an *institution; there is not a word in that instrument that would suggest the idea of a bank to the most fertile imagination; but the bank is created by implication and construction, made out by a very subtle course of reasoning; then, by another implication, raised on the former, the bank, this creature of construction, claims the right to enter the territory of a state without its assent; to carry on its business when it pleases, and where it pleases, against the will, and perhaps in contravention of the policy, of the sovereign owner of the soil. Having such great success in the acquirement of implied rights, the experiment is now pushed further; and not contented with having obtained two rights in this extraordinary way, the fortunate adventurer assails the sovereignty of the state, and would strip from it its most vital and essential power. It is thus with the famous fig tree of India, whose branches shoot from the trunk to a considerable distance; then drop upon the earth, where they take root and become trees, from which also other branches shoot, and plant and propagate and extend themselves in the same way, until gradually a vast surface is covered, and everything perishes in the spreading shade.

What have we opposed to these doctrines, so just and reasonable? Distressing inconveniences ingeniously contrived; supposed dangers; fearful distrusters; anticipated violence and injustice from the states, and consequent ruin to the bank. A right to tax is a right to destroy, is the whole amount of the argument, however varied by ingenuity or embellished by eloquence. It is said the states will abuse the power; and its **348*]** exercise will *produce infinite inconvenience and embarrassment to the bank. Now, if this were true, it cannot help our opponents; because, if the states have the power contended for, this court cannot take it from them, under the fear that they may abuse it; nor, indeed, for its actual abuse; and if they have it not, they may not use it, however moderately and discreetly. Nor is there any more force in the argument that the bank property will be subjected to double or treble taxation. Each state will tax only the capital really employed in it; and it is always in the power of the bank to show how its capital is distributed. But it is feared the capital in a state may be taxed in gross; and the individual stockholders also taxed for the same stock. Is this common case of a double taxation of the same article to be a cause of alarm now? Our revenue laws abound with similar cases; they arise out of the very nature of our double government. So says the Federalist; and it is the first time it has been the ground of complaint. Poll taxes are paid to the federal and state governments; licenses to retail spirits; land taxes; and the whole round of internal duties, over which both governments have a concurrent, and, until now, it was supposed, a co-equal right. Were not the state banks taxed by the federal, and also by the state governments; in some by a bonus for the charter; in others directly and annually? The circumstance, that the taxes go to different governments in these cases, is wholly immaterial to those who pay; unless it is that it increases the danger of excess and oppression. It is justly remarked on this sub-
349*] ject, by *the Federalist, that our security

Wheat. 4.

from excessive burdens on any source of revenue, must be found in mutual forbearance and discretion in the use of the power; this is the only security, and the authority of this court can add nothing to it. When that fails, there is an end to the confederation, which is founded on a reasonable and honorable confidence in each other. It has been most impressively advanced, that the states, under pretense of taxing, may prohibit and expel the banks; that in the full exercise of this power, they may tax munitions of war: ships about to sail and armies on their march; nay, the spirit of the court is to be aroused by the fear that judicial proceedings will also come under this all-destroying power. Loans may be delayed for stamps and the country ruined for the want of the money. But whenever the states shall be in a disposition to uproot the general government, they will take more direct and speedy means; and until they have this disposition, they will not use these. What power may not be abused; and whom or what shall we trust, if we guard ourselves with this extreme caution? The common and daily intercourse between man and man; all our relations in society, depend upon a reasonable confidence in each other. It is peculiarly the basis of our confederation, which lives not a moment after we shall cease to trust each other. If the two governments are to regard each other as enemies, seeking opportunities of injury and distress, they will not long continue friends. This sort of timid reasoning about the powers of the government, has not escaped the authors so often alluded *to; who, in their 81st [***350** number, treat it very properly. Surely the argument is as strong against giving to the United States the power to incorporate a bank with branches. What may be more easily, or more extensively abused; and what more powerful engine can we imagine to be brought into operation against the revenues and rights of the states? If the federal government must have a bank for the purposes of its revenue, all collision will be avoided by establishing the parent bank in its own district, where it holds an exclusive jurisdiction; and planting its branches in such states as shall assent to it; and using state banks where such assent cannot be obtained. Speaking practically, and by our experience, it may be safely asserted, that all the uses of the bank to the government might be thus obtained. Nothing would be wanting but profits and large dividends to the stockholders, which are the real object in this contest. Whatever may be the right of the United States to establish a bank, it cannot be better than that of the states. Their lawful power to incorporate such institutions has never yet been questioned; whatever may be in reserve for them, when it may be found "necessary and proper" for the interest of the national bank to crush the state institutions, and curtail the state authority. Granting, that these rights are equal in the two governments, and that the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States, and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been *expressly and [***351** exclusively transferred to the United States, the sovereign power of taxation (except on

foreign commerce) being, in the language of the Federalist, co-equal in the two governments, it follows, as a direct and necessary consequence, that having equal powers to erect banks, and equal powers of taxation on property of that description, being neither imports, exports or tonnage, whatever jurisdiction the federal government may exercise in this respect, over a bank created by a state, any state may exercise over a bank created by the United States. Now, the federal government has assumed the right of taxing the state banks, precisely in the manner in which the state of Maryland has proceeded against the bank of the United States; and as this right has never been resisted or questioned, it may be taken to be admitted by both parties; and must be equal and common to both parties, or the fundamental principles of our confederation have been strangely mistaken, or are to be violently overthrown. It has also been suggested that the bank may claim a protection from this tax, under that clause of the constitution which prohibits the states from passing laws, which shall impair the obligation of contracts. The charter is said to be the contract between the government and the stockholders; and the interests of the latter will be injured by the tax which reduces their profits. Many answers offer themselves to this argument. In the first place, the United States cannot, either by a direct law or by a contract with a third party, take away any right from the states not granted **352*** by the constitution; they *cannot do collaterally and by implication what cannot be done directly. Their contracts must conform to the constitution, and not the constitution to their contracts. If, therefore, the states have, in some other way, parted with this right of taxation, they cannot be deprived of it by a contract between other parties. Under this doctrine, the United States might contract away every right of every state; and any attempt to resist it would be called a violation of the obligations of a contract. Again, the United States have no more right to violate contract than the states, and surely they never imagined they were doing so, when they taxed so liberally the stock of the state banks. Again, it might as well be said that a tax on real estate, imposed after a sale of it, and not then perhaps contemplated, or new duties imposed on merchandise after it is ordered, violates the contract between the vendor and the purchaser, and diminishes the value of the property. In fact, all contracts in relation to property, subject to taxation, are presumed to have in view the probability or possibility that they will be taxed; and the happening of the event never was imagined to interfere with the contract, or its lawful obligations.

The *Attorney-General*, for the plaintiff in error, argued, 1. That the power of Congress to create a bank ought not now to be questioned, after its exercise ever since the establishment of the constitution, sanctioned by every department of the government: by the legislature, in the charter of the bank, and other laws connected with the incorporation; by the **353*** *executive, in its assent to those laws; and by the judiciary, in carrying them into effect. After such a lapse of time, and so many concurrent acts of the public authorities, this ex-

ercise of power must be considered as ratified by the voice of the people, and sanctioned by precedent. In the exercise of criminal judicature, the question of constitutionality could not have been overlooked by the courts, who have so often inflicted punishment for acts which would be no crimes, if these laws were repugnant to the fundamental law.

2. The power to establish such a corporation is implied, and involved in the grant of specific powers in the constitution, because the end involves the means necessary to carry it into effect. A power without the means to use it is a nullity. But we are not driven to seek for this power in implication; because the constitution, after enumerating certain specific powers, expressly gives to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." If, therefore, the act of Congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to Congress by the constitution. We contend that it was necessary and proper to carry into execution several of the enumerated powers, such as the power of levying and collecting taxes throughout this widely extended empire; of paying *the public debts, both [**354** in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several states; of raising and supporting armies and a navy, and of carrying on war. That banks, dispersed throughout the country, are appropriate means of carrying into execution all these powers, cannot be denied. Our history furnishes abundant experience of the utility of a national bank as an instrument of finance. It will be found in the aid derived to the public cause from the bank of North America, established by Congress, during the war of the revolution; in the great utility of the former bank of the United States; and in the necessity of resorting to the instrumentality of the banks incorporated by the states, during the interval between the expiration of the former charter of the United States Bank in 1811, and the establishment of the present bank in 1816; a period of war, the calamities of which were greatly aggravated by the want of this convenient instrument of finance. Nor is it required that the power of establishing such a moneyed corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution so strict and literal, would render every law which could be passed by Congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted tending to the same object, though *not equally [**355** well adapted to attain it. As the inevitable consequence of giving this very restricted sense to the word "necessary," would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to

the framers of the constitution, this interpretation must be rejected. Another not less inadmissible consequence of this construction is, that it is fatal to the permanency of the constitutional powers; it makes them dependent for their being on extrinsic circumstances, which, as these are perpetually shifting and changing, must produce correspondent changes in the essence of the powers on which they depend. But surely the constitutionality of any act of Congress cannot depend upon such circumstances. They are the subject of legislative discretion, not of judicial cognizance. Nor does this position conflict with the doctrine of the court in *Sturges v. Crowninshield*.¹ The court has not said, in that case, that the powers of Congress are shifting powers, which may or may not be constitutionally exercised, according to extrinsic or temporary circumstances; but it has merely determined, that the power of the state legislatures over the subject of bankruptcies is subordinate to that of Congress on the same subject, and cannot be exercised so as to conflict with the uniform laws of bankruptcy throughout the Union which Congress may establish. The power, in this instance, resides permanently in Congress, whether it chooses to exercise it or not; but its exercise on the part 356* of the states is precarious, and dependent, in certain respects, upon its actual exercise by Congress. The convention well knew that it was utterly vain and nugatory to give to Congress certain specific powers, without the means of enforcing those powers. The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end. "Necessary and proper" are, then, equivalent to *needful and adapted*. Such is the popular sense in which the word *necessary* is sometimes used. That use of it is confirmed by the best authorities among lexicographers. Among other definitions of the word "necessary," Johnson gives "needful;" and he defines "need," the root of the latter, by the words "want, occasion." Is a law, then, *wanted*; is there *occasion* for it, in order to carry into execution any of the enumerated powers of the national government, Congress has the power of passing it. To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to Congress. This is the only interpretation which can give effect to this vital clause of the constitution; and, being consistent with the rules of the language, is not to be rejected because there is another interpretation equally consistent with the same rules, but wholly inadequate to convey what must have been the intention of the convention. Among the multitude of means to carry into execution the powers expressly given to the national government, Congress is to select, from time to time, such as are most fit for the purpose. It would have been impos- 357* sible to enumerate them all in the constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether Congress has made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in

order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end. It cannot be denied that this is the character of the bank of the United States. But it is said, that the government might use private bankers, or the banks incorporated by the states, to carry on their fiscal operations. This, however, presents a mere question of political expediency, which, it is repeated, is exclusively for legislative consideration; which has been determined by the legislative wisdom, and cannot be reviewed by the court. It is objected that this act creates a corporation; which, being an exercise of a fundamental power of sovereignty, can only be claimed by Congress, under their grant of specific powers. But to have enumerated the power of establishing corporations among the specific powers of Congress, would have been to change the whole plan of the constitution, to destroy its simplicity, and load it with all the complex details of a code of private jurisprudence. The power of establishing corporations is not one of the ends of government; it is only a class of means for accomplishing its ends. An enumeration of this particular class [*358] of means, omitting all others, would have been a useless anomaly in the constitution. It is admitted that this is an act of sovereignty, and so is any other law. If the authority of establishing corporations be a sovereign power, the United States are sovereign, as to all the powers specifically given to their government, and as to all others necessary and proper to carry into effect those specified. If the power of chartering a corporation be necessary and proper for this purpose, Congress has it to an extent as ample as any other sovereign legislature. Any government of limited sovereignty can create corporations only with reference to the limited powers that government possesses. The inquiry then reverts, whether the power of incorporating a banking company be a necessary and proper means of executing the specific powers of the national government. The immense powers incontestably given, show that there was a disposition, on the part of the people, to give ample means to carry those powers into effect. A state can create a corporation, in virtue of its sovereignty, without any specific authority for that purpose, conferred in the state constitutions. The United States are sovereign as to certain specific objects, and may, therefore, erect a corporation for the purpose of effecting those objects. If the incorporating power had been expressly granted as an end, it would have conferred a power not intended; if granted as a means, it would have conferred nothing more than was before given by necessary implication. Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the implied powers of the constitution [*359] may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the abuse

1.—*Ante*, p. 122.

of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government; and that whatever may be the magnitude of the danger from this quarter, it is not equal to that of annihilating the powers of the government, to which the opposite doctrine would inevitably tend.

3. If, then, the establishment of the parent bank itself be constitutional, the right to establish the branches of that bank in the different states of the Union follows, as an incident of the principal power. The expediency of this ramification Congress is alone to determine. To confine the operations of the bank to the district of Columbia, where Congress has the exclusive power of legislation, would be as absurd as to confine the courts of the United States to this district. Both institutions are wanted, wherever the administration of justice or of the revenue is wanted. The right, then, to establish these branches, is a necessary part of the means. This right is not delegated by Congress to the parent bank. The act of Congress for the **360** establishment of offices of discount and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. When established, they rest, not on the authority of the parent bank, but on the authority of Congress.

4. The only remaining question is, whether the act of the state of Maryland, for taxing the bank thus incorporated, be repugnant to the constitution of the United States? We insist that any such tax, by authority of a state, would be unconstitutional, and that this act is so, from its peculiar provisions. But it is objected, that, by the 10th amendment of the constitution, all powers not expressly delegated to the United States, nor prohibited to the states, are reserved to the latter. It is said, that this being neither delegated to the one nor prohibited to the other, must be reserved. And it is also said, that the only prohibition on the power of state taxation which does exist, excludes this case, and thereby leaves it to the original power of the states. The only prohibition is, as to laying any imposts or duties on imports and exports, or tonnage duty, and this not being a tax of that character, is said not to be within the terms of the prohibition; and, consequently, it remains under the authority of the states. But, we answer, that this does not contain the whole sum of constitutional restrictions on the authority of the states. There is another clause in the constitution which has the effect of a prohibition on the exercise of their authority in numerous cases. The 6th article of the constitution of the United States declares, that the laws made in pursuance of it, "shall be the supreme law of the land, anything in the **361** constitution or laws of any state to the contrary notwithstanding." By this declaration, the states are prohibited from passing any acts which shall be repugnant to a law of the United States. The court has already instructed us in the doctrine, that there are certain powers, which, from their nature, are exclusively vested

in Congress.¹ So we contend here, that the only ground on which the constitutionality of the bank is maintainable, excludes all interference with the exercise of the power by the states. This ground is, that the bank, as ordained by Congress, is an instrument to carry into execution its specified powers; and in order to enable this instrument to operate effectually, it must be under the direction of a single head. It cannot be interfered with, or controlled in any manner, by the states, without putting at hazard the accomplishment of the end, of which it is but a means. But the asserted power to tax any of the institutions of the United States, presents directly the question of the supremacy of their laws over the state laws. If this power really exists in the states, its natural and direct tendency is to annihilate any power which belongs to Congress, whether express or implied. All the powers of the national government are to be executed in the states, and throughout the states; and if the state legislatures can tax the instruments by which those powers are executed, they may entirely defeat the execution of the powers. If they may tax an institution of finance, they may tax the proceedings in the courts of the United States. If they may ***tax** to one degree, they may tax to **[*362]** any degree; and nothing but their own discretion can impose a limit upon this exercise of their authority. They may tax both the bank and the courts, so as to expel them from the states. But, surely, the framers of the constitution did not intend that the exercise of all the powers of the national government should depend upon the discretion of the state governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. It is a direct collision of powers between the two governments. Congress says, there shall be a branch of the bank in the state of Maryland. That state says, there shall not. Which power is supreme? Besides, the charter, which is a contract between the United States and the corporation, is violated by this act of Maryland. A new condition is annexed by a sovereignty which was no party to the contract. The franchise, or corporate capacity, is taxed by a legislature, between whom and the object of taxation there is no political connection.

Mr. Jones, for the defendants in error, contended: 1. That this was to be considered as an open question, inasmuch as it had never before been submitted to judicial determination. The practice of the government, however inveterate, could never be considered as sanctioning a manifest usurpation; still less could the practice, under a constitution of a date so recent, be put in competition with the cotemporaneous exposition of its illustrious authors, as recorded for our instruction in the "Letters of Publius," ***or** the Federalist. The interpretation **[*363]** of the constitution, which was contended for by the state of Maryland, would be justified from that text book, containing a commentary, such as no other age or nation furnishes, upon its public law.

2. It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the

1.—*Vide Sturges v. Crowninshield, ante, p. 122.*

respective states. To suppose that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it are reserved to the states. We admit that the 10th amendment to the constitution is merely declaratory; that it was adopted *ex abundanti cautela*; and that with it nothing more is reserved than would have been reserved without it. But it is contended, on the other side, that not only the direct powers, but all incidental powers, partake of the supreme power, which is sovereign. This is an inherent sophism in the opposite argument, which depends on the conversion and ambiguity of terms. What is meant by sovereign power? It is modified by the terms of the grant under which it was given. They do not import sovereign power generally, but sovereign power limited to particular cases; and the question again recurs, whether sovereign power was given in this particular case. Is it true, that by conferring sovereign powers on a limited, delegated government, sovereign means are also granted? Is there no restriction **364*** *as to the means of exercising a general power? Sovereignty was vested in the former confederation as fully as in the present national government. There was nothing which forbade the old confederation from taxing the people, except that three modes of raising revenue were pointed out, and they could resort to no other. All the powers given to Congress under that system, except taxation, operated as directly on the people as the powers given to the present government. The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished. "To levy and collect taxes," "to borrow money," "to pay the public debts," "to raise and support armies," "to provide and maintain a navy," are not the ends for which this or any other just government is established. If a banking corporation can be said to be involved in either of these means, it must be as an instrument to collect taxes, to borrow money, and to pay the public debts. Is it such an instrument? It may, indeed, facilitate the operation of other financial institutions; but in its proper and natural character, it is a commercial institution, a partnership incorporated for the purpose of carrying on the trade of banking. But we contend that the government of the United States must confine themselves, in the collection and expenditure of revenue, to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means. But what natural connection is there between *the collection of taxes and the incorporation of a company of bankers? Can it possibly be said, that because Congress is invested with the power of raising and supporting armies, that it may give a charter of monopoly to a trading corporation as a bounty for enlisting men? Or that, under its more analogous power of regulating commerce, it may establish an East or a West India company, with the exclusive privilege of trading with those parts of the world? Can it es-

Wheat. 4.

tablish a corporation of framers of the revenue, or burden the internal industry of the states with vexatious monopolies of their staple productions? There is an obvious distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity. For example: the power of coining money implies the power of establishing a mint. The power of laying and collecting taxes implies the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation, branching out into every district of the country, and inundating it with a flood of paper money. To derive such a tremendous authority from implication, would be to change the subordinate into fundamental powers; to make the implied powers greater than those which are expressly granted; and to change the whole scheme and theory of the government. It is well known that many of the powers which are expressly *granted to the national government in [**366** the constitution, were most reluctantly conceded by the people, who were lulled into confidence by the assurances of its advocates, that it contained no latent ambiguity, but was to be limited to the literal terms of the grant: and in order to quiet all alarm, the 10th article of amendments was added, declaring "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It would seem that human language could not furnish words less liable to misconstruction. But it is contended that the powers expressly granted to the national government in the constitution are enlarged to an indefinite extent by the sweeping clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers. Now, we insist that this clause shows that the intention of the convention was, to define the powers of the government with the utmost precision and accuracy. The creation of a sovereign legislature implies an authority to pass laws to execute its given powers. This clause is nothing more than a declaration of the authority of Congress to make laws, to execute the powers expressly granted to it and the other departments of the government. But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language more absolutely excluding a general and unlimited discretion than *these. [**367** It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient, fit, adapted, proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper which are not necessary; because the end may be attained without them. The word "necessary" is said to be a synonym of "needful." But both these words are defined "indispensably requisite;" and most certainly this is the sense in which

the word "necessary" is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision. The only question, then, on this branch of the argument, will be, whether the establishment of a banking corporation be indispensably requisite to execute any of the express powers of the government? So far as the interest of the United States is concerned as partners of this company of bankers, or so far as the corporation may be regarded as an executive officer of the government, acquiring real and personal property in trust for the use of the government, it may be asked, what right the United States have to acquire property of any kind, except that purchased by the consent of the legislature of the state in which such property may be, for the erection of forts, magazines, &c.; and ships or **368*** munitions *of war, constructed or purchased by the United States, and the public treasure? Their right of acquiring property is absolutely limited to the subjects specified, which were the only means, of the nature of wealth or property, with which the people thought it necessary to invest them. The people never intended they should become bankers or traders of any description. They meant to leave to the states the power of regulating the trade of banking, and every other species of internal industry; subject merely to the power of Congress to regulate foreign commerce, and the commerce between the different states, with which it is not pretended that this asserted power is connected. The trade of banking within the particular states would then either be left to regulate itself, and carried on as a branch of private trade, as it is in many countries, or banking companies would be incorporated by the state legislatures to carry it on, as has been the usage of this country. But in either case, Congress would have nothing to do with the subject. The power of creating corporations is a distinct sovereign power, applicable to a great variety of objects, and not being expressly granted to Congress for this, or any other object, cannot be assumed by implication. If it might be assumed for this purpose, it might also be exercised to create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by this dangerous doctrine of implied powers. Or it might be exercised to **369*** establish great trading monopolies, *or to lock up the property of the country in mortmain, by some strained connection between the exercise of such powers and those expressly given to the government.

8. Supposing the establishment of such a banking corporation, to be implied as one of the means necessary and proper to execute the powers expressly granted to the national government, it is contended by the counsel opposed to us, that its property is exempted from taxation by the state governments, because they cannot interfere with the exercise of any of the powers, express or implied, with which Congress is invested. But the radical vice of this argument

is, that the taxing power of the states, as it would exist, independent of the constitution, is in no respect limited or controlled by that supreme law, except in the single case of imposts and tonnage duties, which the states cannot lay, unless for the purpose of executing their inspection laws. But their power of taxation is absolutely unlimited in every other respect. Their power to tax the property of this corporation cannot be denied, without at the same time denying their right to tax any property of the United States. The property of the bank cannot be more highly privileged than that of the government. But they are not forbidden from taxing the property of the government, and therefore cannot be constructively prohibited from taxing that of the bank. Being prohibited from taxing exports and imports, and tonnage, and left free from any other prohibition, in this respect they may tax everything else but exports, imports, and tonnage. The authority of *"the Federalist" is express, [**370** that the taxing power of Congress does not exclude that of the states over any other objects except these. If, then, the exercise of the taxing power of Congress does not exclude that of the states, why should the exercise of any other power by Congress exclude the power of taxation by the states? If an express power will not exclude it, shall an implied power have that effect? If a power of the same kind will not exclude it, shall a power of a different kind? The unlimited power of taxation results from state sovereignty. It is expressly taken away only in the particular instances mentioned. Shall others be added by implication? Will it be pretended that there are two species of sovereignty in our government? Sovereign power is absolute as to the objects to which it may be applied. But the sovereign power of taxation in the states may be applied to all other objects, except imposts and tonnage. Its exercise cannot, therefore, be limited and controlled by the exercise of another sovereign power in Congress. The right of both sovereignties are co-equal and co-extensive. The trade of banking may be taxed by the state of Maryland; the United States may incorporate a company to carry on the trade of banking, which may establish a branch in Maryland. The exercise of the one sovereign power cannot be controlled by the exercise of the other. It can no more be controlled in this case than if it were the power of taxation in Congress, which was interfered with by the power of taxation in the state, both being exerted concurrently on the same object. In both *cases, mutual confidence, dis- [**371** cretion and forbearance, can alone qualify the exercise of the conflicting powers, and prevent the destruction of either. This is an anomaly, and perhaps an imperfection in our system of government. But neither Congress nor this court can correct it. That system was established by reciprocal concessions and compromises between the state and federal governments. Its harmony can only be maintained in the same spirit. Even admitting that the property of the United States (such as they have a right to hold), their forts and dock-yards, their ships and military stores, their archives and treasures, public institutions of war, or revenue or justice, are exempt by necessary implication from state taxation; does it therefore follow that this cor-

poration, which is a partnership of bankers, is also exempt? They are not collectors of the revenue, any more than any state bank or foreign bankers, whose agency the government may find it convenient to employ as depositaries of its funds. They may be employed to remit those funds from one place to another, or to procure loans, or to buy and sell stock; but it is in a commercial, and not an administrative character, that they are thus employed. The corporate character with which these persons are clothed, does not exempt them from state taxation. It is the nature of their employment as agents or officers of the government, if anything, which must create the exemption. But the same employment of the state bank or private bankers would equally entitle them to the same exemption. Nor can the exemption of the stock of **372*** this *corporation from state taxation be claimed on the ground of the proprietary interest which the United States have in it as stockholders. Their interest is undistinguishably blended with the general capital stock; if they will mix their funds with those of bankers, or engage as partners in any other branch of commerce, their sovereign character and dignity are lost in the mercantile character which they have assumed; and their property thus employed becomes subject to local taxation, like other capital employed in trade.

Mr. Martin, Attorney-General of Maryland, 1. Read several extracts from the *Federalist*, and the debates of the Virginia and New York conventions, to show that the cotemporary exposition of the constitution by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the counsel for the plaintiff in error. That it was then maintained by the enemies of the constitution, that it contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence. This apprehension was treated as a dream of distempered jealousy. The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the 10th amendment was added to the constitution. This, however, could be considered as nothing more than declaratory of the sense of the people, as **373*** to the extent of the powers *conferred on the new government. We are now called upon to apply that theory of interpretation which was then rejected by the friends of the new constitution, and we are asked to engraft upon it powers of vast extent, which were disclaimed by them, and which, if they had been fairly avowed at the time, would have prevented its adoption. Before we do this, they must, at least, be proved to exist, upon a candid examination of this instrument, as if it were now for the first time submitted to interpretation. Although we cannot, perhaps, be allowed to say that the states have been "deceived in their grant," yet we may justly claim something like a rigorous demonstration of this power, which nowhere appears upon the face of the constitution, but which is supposed to be tacitly inculcated in its general object and spirit. That the scheme of the framers of the constitution intended to leave nothing to implication, will be ev-
Wheat. 4. U. S., Book 4.

ident from the consideration that many of the powers expressly given are only means to accomplish other powers expressly given. For example: The power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a navy, to prosecute the war then declared. So, also, as money is the sinew of war, the powers of laying and collecting taxes, and of borrowing money, are involved in that of declaring war. Yet all these powers are specifically enumerated. If, then, the convention has specified some powers, which, being only means to accomplish the ends of government, might have been taken *by implication; by what just rule of ***374** construction are other sovereign powers, equally vast and important, to be assumed by implication? We insist, that the only safe rule is the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed, in the 10th amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. The power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states, or to the people. It is not expressly delegated, either as an end or a means of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated. We still insist, that the authority of establishing corporations is one of the great sovereign powers of government. It may well exist in the state governments, without being expressly conferred in the state constitutions; because those governments have all the usual powers which belong to every political society, unless expressly forbidden, by the letter of the state constitutions, from exercising them. The power of establishing corporations has been constantly exercised by the State governments, and no portion of it has been ceded by them to the government of the United States.

2. But, admitting that Congress has a right to incorporate a banking company, as one of the means *necessary and proper to ex- ***375** ecute the specific powers of the national government, we insist that the respective states have the right to tax the property of that corporation, within their territory; that the United States cannot, by such an act of incorporation, withdraw any part of the property within the state from the grasp of taxation. It is not necessary for us to contend that any part of the public property of the United States, its munitions of war, its ships, and treasure, are subject to state taxation. But if the United States hold shares in the stock of a private banking company, or any other trading company, their property is not exempt from taxation, in common with the other capital stock of the company; still less can it communicate to the shares belonging to private stockholders an immunity from local taxation. The right of taxation by the state is co-extensive with all private property within the state. The interest of the United States in this bank is private

property, though belonging to public persons. It is held by the government, as an undivided interest with private stockholders. It is employed in the same trade, subject to the same fluctuations of value, and liable to the same contingencies of profit and loss. The shares belonging to the United States, or of any other stockholders, are not subjected to direct taxation by the law of Maryland. The tax imposed, is a stamp tax upon the notes issued by a banking house within the state of Maryland. Because the United States happen to be partially interested, either as dormant or active partners, in that house, is no reason why the state should refrain from laying a tax which they have, **376*** otherwise, "a constitutional right to impose, any more than if they were to become interested in any other house of trade, which should issue its notes, or bills of exchange, liable to a stamp duty, by a law of the state. But it is said that a right to tax, in this case, implies a right to destroy; that it is impossible to draw the line of discrimination between a tax fairly laid for the purposes of revenue and one imposed for the purpose of prohibition. We answer, that the same objection would equally apply to the right of Congress to tax the state banks; since the same difficulty of discriminating occurs in the exercise of that right. The whole of this subject of taxation is full of difficulties, which the convention found it impossible to solve in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the state and the national government. This being found impracticable, or inconvenient, the state governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the states a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance. The debates in the state conventions show that the power of state taxation was understood to be absolutely unlimited, except as to imposts and tonnage duties. The states would not have adopted the constitution upon any other understanding. As to the judicial proceedings, and the custom-house papers of the United States, **377*** they are "not property, by their very nature; they are not the subjects of taxation; they are the proper instruments of national sovereignty, essential to the exercise of its powers, and in legal contemplation altogether extra-territorial as to state authority.

Mr. Pinkney, for the plaintiff in error, in reply, stated: 1. That the cause must first be cleared of a question which ought not to have been forced into the argument—whether the act of Congress establishing the bank was consistent with the constitution? This question depended both on authority and on principle. No topics to illustrate it could be drawn from the confederation, since the present constitution was as different from that as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the states, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new constitution was intended

to reform, was legislation upon sovereign states in their corporate capacity. But the constitution acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country is divided. The federal powers are just as sovereign as those of the states. The state sovereignties are not the authors *of the constitution of the United [**378** States. They are preceding in point of time, to the national sovereignty, but they are postponed to it in point of supremacy, by the will of the people. The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end; fitted to promote, and having a natural relation and connection with the objects of that government. The constitution, by which these authorities, and the means of executing them, are given, and the laws made in pursuance of it, are declared to be the supreme law of the land; and they would have been such, without the insertion of this declaratory clause. They must be supreme, or they would be nothing. The constitutionality of the establishment of the bank, as one of the means necessary to carry into effect the authorities vested in the national government, is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive, and judicial. A legislative construction, in a doubtful case, persevered in for a course of years, ought to be binding upon the court. This, however, is not a question of construction merely, but of political necessity, on which Congress must decide. It is conceded, that a manifest usurpation cannot be maintained in this mode; but, we contend that this is such a doubtful case that Congress may expound the nature and extent of the authority under which it acts, and that this practical interpretation has become incorporated into the constitution. There are two distinguishing points which entitle it to great respect. The first is, that it was a "contemporaneous construction; [**379** the second is, that it was made by the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first Congress, by which the new government was organized. They must have understood their own work. They determined that the constitution gave to Congress the power of incorporating a banking company. It was not required that this power should be expressed in the text of the constitution; it might safely be left to implication. An express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted; we do not claim an authority in this respect, beyond the sphere of the specific powers. The grant of an authority to erect certain corporations, might have been equally dangerous, by omitting to provide for others, which time and experience might show to be equally, and even more necessary. It is a historical fact of great importance in this

discussion, that amendments to the constitution were actually proposed, in order to guard against the establishment of commercial monopolies. But if the general power of incorporating did not exist, why seek to qualify it, or to guard against its abuse? The legislative precedent established in 1791, has been followed up by a series of acts of Congress, all confirming the authority. Political considerations alone might have produced the refusal to renew the charter in 1811; at any rate, we know that they mingled themselves in the debate, and the determination. **380*** In 1815, a bill was passed by the two houses of Congress, incorporating a national bank; to which the President refused his assent, upon political considerations only, waiving the question of constitutionality as being settled by contemporaneous exposition, and repeated subsequent recognitions. In 1816, all branches of the legislature concurred in establishing the corporation, whose chartered rights are now in judgment before the court. None of these measures ever passed *sub silentio*; the proposed incorporation was always discussed, and opposed, and supported, on constitutional grounds, as well as on considerations of political expediency. Congress is, *prima facie*, a competent judge of its own constitutional powers. It is not, as in questions of privilege, the exclusive judge; but it must first decide, and that in a proper judicial character, whether a law is constitutional, before it is passed. It had an opportunity of exercising its judgment in this respect, upon the present subject, not only in the principal acts incorporating the former, and the present bank, but in the various incidental statutes subsequently enacted on the same subject; in all of which, the question of constitutionality was equally open to debate, but in none of which was it agitated.

There are, then, in the present case, the repeated determinations of the three branches of the national legislature, confirmed by the constant acquiescence of the state sovereignties, and of the people, for a considerable length of time. Their strength is fortified by judicial authority. The decisions in the courts, affirm- **381*** ing the constitutionality of these laws, passed, indeed, *sub silentio*; but it was the duty of the judges, especially in criminal cases, to have raised the question; and we are to conclude, from this circumstance, that no doubt was entertained respecting it. And if the question be examined on principle, it will be found not to admit of doubt. Has Congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the constitution, and have no limits but the constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defense provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude. Congress has power to lay and collect taxes

What. 4.

and duties, imposts and excises; to pay the debts, and provide for the common defense and general welfare of the United States; to borrow money on the credit of the nation; to regulate commerce; to establish uniform naturalization and bankrupt laws; to coin money, and regulate the circulating medium, and the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science and the useful arts, by granting patents and copyrights; to constitute tribunals inferior to the Supreme Court, and to define ***and punish offenses against the law of** **[382** nations; to declare and carry on war; to raise and support armies, and to provide and maintain a navy; to discipline and govern the land and naval forces; to call forth the militia to execute the laws, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia; to exercise exclusive legislation in all cases, over the district where the seat of government is established, and over such other portions of territory as may be ceded to the Union for the erection of forts, magazines, &c.; to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and to make all laws which shall be necessary and proper for carrying into execution these powers and all other powers vested in the national government or any of its departments or officers. The laws thus made are declared to be the supreme law of the land; and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Yet it is doubted whether a government invested with such immense powers has authority to erect a corporation within the sphere of its general objects, and in order to accomplish some of those objects. The state powers are much less in point of magnitude, though greater in number; yet it is supposed the states possess the authority of establishing corporations, whilst it is denied to the general government. It is conceded to the state legislatures, though not specifically granted, because it is said to be an incident of state sovereignty; but it ***is refused to Congress, because it is** **[383** not specifically granted, though it may be necessary and proper to execute the powers which are specifically granted. But the authority of legislation in the state government is not unlimited. There are several limitations to their legislative authority. First, from the nature of all government, especially of republican government, in which the residuary powers of sovereignty, not granted specifically, by inevitable implication, are reserved to the people. Secondly, from the express limitations contained in the state constitutions. And, Thirdly, from the express prohibitions to the states contained in the United States constitution. The power of erecting corporations is nowhere expressly granted to the legislatures of the states in their constitutions; it is taken by necessary implication; but it cannot be exercised to accomplish any of the ends which are beyond the sphere of their constitutional authority. The power of erecting corporations is not an end of any government; it is a necessary means of accomplishing the ends of all governments. It is an authority inherent

in, and incident to, all sovereignty. The history of corporations will illustrate this position. They were transplanted from the Roman law into the common law of England, and all the municipal codes of modern Europe. From England they were derived to this country. But, in the civil law, a corporation could be created by a mere voluntary association of individuals.¹ And, in England, the authority of **384*** parliament "is not necessary to create a corporate body. The king may do it, and may communicate his power to a subject;" so little is this regarded as a transcendent power of sovereignty in the British constitution. So, also, in our constitution it ought to be regarded as but a subordinate power, to carry into effect the great objects of government. The state governments cannot establish corporations to carry into effect the national powers given to Congress, nor can Congress create corporations to execute the peculiar duties of the state governments. But so much of the power or faculty of incorporation as concerns national objects has passed away from the state legislatures, and is vested in the national government. An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government—the felicity of the people. All powers are given to the national government, as the people will. The reservation in the 10th amendment to the constitution, of "powers not delegated to the United States," is not confined to powers not expressly delegated. Such an amendment was indeed proposed; but it was perceived that it would strip the government of some of its most essential powers, and it was rejected. Unless a specific means be expressly prohibited to the general government, it has it within the sphere of its specified powers. Many particular means are, of course, involved in the general means necessary to carry into effect the powers expressly granted, and, in that case, the general means become **385*** the end, and the smaller objects the means. It was impossible for the framers of the constitution to specify prospectively all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances in such an unexampled state of political society as ours, forever changing and forever improving. How unwise would it have been to legislate immutably for exigencies which had not then occurred, and which must have been foreseen but dimly and imperfectly. The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure. The statute book of the United States is filled with powers derived from implication. The power to lay and collect taxes will not execute itself. Congress must designate in detail all the means of collection. So, also, the power of establishing post-offices and post-roads involves that of punishing the offense of robbing the mail. But there is no more necessary connection between the punishment of mail robbers and the power to establish post-roads than there is between the institution of a bank and the col-

lection of the revenue and payment of the public debts and expenses. So, light-houses, beacons, buoys and public piers, have all been established under the general power to regulate commerce. But they are not indispensably necessary to commerce. It might linger on without these aids, though exposed to more perils and losses. So, Congress has authority to coin money, and to guard the purity of the circulating medium, by providing for the punishment **386*** of counterfeiting the current coin; but laws are also made for punishing the offense of uttering and passing the coin thus counterfeited. It is the duty of the court to construe the constitutional powers of the national government liberally, and to mould them so as to effectuate its great objects. Whence is derived the power to punish smuggling? It does not collect the impost, but it is a means more effectually to prevent the collection from being diminished in amount, by frauds upon the revenue laws. Powers, as means, may then be implied in many cases. And if so, why not in this case as well as any other? The power of making all needful rules and regulations respecting the territory of the United States, is one of the specified powers of Congress. Under this power, it has never been doubted that Congress had authority to establish corporations in the territorial governments. But this power is derived entirely from implication. It is assumed as an incident to the principal power. If it may be assumed in that case, upon the ground that it is a necessary means of carrying into effect the power expressly granted, why may it not be assumed in the present case, upon a similar ground? It is readily admitted that there must be a relation in the nature and fitness of things, between the means used and the end to be accomplished. But the question is, whether the necessity which will justify a resort to a certain means must be an absolute, indispensable, inevitable necessity? The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a political power; it **387*** is a matter of legislative discretion, and those who exercise it have a wide range of choice in selecting means. In its exercise, the mind must compare means with each other. But absolute necessity excludes all choice; and, therefore, it cannot be this species of necessity which is required. Congress alone has the fit means of inquiry and decision. The more or less of necessity never can enter as an ingredient into judicial decision. Even absolute necessity cannot be judged of here; still less can practical necessity be determined in a judicial forum. The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people. For this purpose, it must inquire whether the means assumed have a connection, in the nature and fitness of things, with the end to be accomplished. The vast variety of possible means excludes the practicability of judicial determination as to the fitness of a particular means. It is sufficient that it does not appear to be violently and unnaturally forced into the service, or fraudu-

1.—1 Bl. Com. 471.

2.—1 Bl. Com. 474.

lently assumed, in order to usurp a new substantive power of sovereignty. A philological analysis of the terms "necessary and proper" will illustrate the argument. Compare these terms as they are used in that part of the constitution now in question, with the qualified manner in which they are used in the 10th section of the same article. In the latter, it is provided that "no state shall, without the consent of Congress, lay any imposts or duties on **388*** imports *or exports, except what may be absolutely necessary for executing its inspection laws." In the clause in question, Congress is invested with the power "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers," &c. There is here, then, no qualification of the necessity. It need not be absolute. It may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject. This, like many other words, has a primitive sense, and another figurative and more relaxed; it may be qualified by the addition of adverbs of diminution or enlargement, such as *very*, *indispensably*, *more*, *less*, or *absolutely necessary*; which last is the sense in which it is used in the 10th section of this article of the constitution. But that it is not always used in this strict and rigorous sense, may be proved by tracing its definition and etymology in every human language.

If, then, all the powers of the national government are sovereign and supreme; if the power of incorporation is incidental, and involved in the others; if the degree of political necessity which will justify a resort to a particular means, to carry into execution the other powers of the government, can never be a criterion of judicial determination, but must be left to legislative discretion; it only remains to inquire, whether a bank has a natural and obvious connection with other express or implied powers, so as to become a necessary and proper means of carrying them into execution. A **389*** bank "might be established as a branch of the public administration without incorporation. The government might issue paper upon the credit of the public faith, pledged for its redemption, or upon the credit of its property and funds. Let the office where this paper is issued be made a place of deposit for the money of individuals, and authorize its officers to discount, and a bank is created. It only wants the forms of incorporation. But, surely, it will not be pretended, that clothing it with these forms would make such an establishment unconstitutional. In the bank which is actually established and incorporated, the United States are joint stockholders, and appoint joint directors; the Secretary of the Treasury has a supervising authority over its affairs; it is bound, upon his requisition, to transfer the funds of the government wherever they may be wanted; it performs all the duties of commissioners of the loan-office; it is bound to loan the government a certain amount of money on demand; its notes are receivable in payment for public debts and duties; it is intimately connected, according to the usage of the whole world, with the power of borrowing money, and with all the financial operations of the gov-

Wheat. 4.

ernment. It has, also, a close connection with the power of regulating foreign commerce, and that between the different States. It provides a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated. It is true, there are state banks by which a circulating medium to a certain extent is provided. But that only diminishes the quantum of necessity, *which [**390** is no criterion by which to test the constitutionality of a measure. It is also connected with the power of making all needful regulations for the government of the territory, "and other property of the United States." If they may establish a corporation to regulate their territory, they may establish one to regulate their property. Their treasure is their property and may be invested in this mode. It is put in partnership; but not for the purpose of carrying on the trade of banking, as one of the ends for which the government was established, but only as an instrument or means for executing its sovereign powers. This instrument could not be rendered effectual for this purpose but by mixing the property of individuals with that of the public. The bank could not otherwise acquire a credit for its notes. Universal experience shows, that, if altogether a government bank, it could not acquire, or would soon lose, the confidence of the community.

2. As to the branches, they are identical with the parent bank. The power to establish them is that species of subordinate power, wrapped up in the principal power, which Congress may place at its discretion.

3. The last, and greatest, and only difficult question in the cause, is that which respects the assumed right of the states to tax this bank, and its branches, thus established by Congress. This is a question, comparatively of no importance to the individual states, but of vital importance to the Union. Deny this exemption to the bank as an instrument of government, and what is the consequence? There is no express provision *in the constitution [**391** which exempts any of the national institutions or property from state taxation. It is only by implication that the army, and navy, and treasure, and judicature of the Union are exempt from state taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of Congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the states, as that contended for on the other side, is manifestly repugnant to the power of Congress; since a power to establish implies a power to continue and preserve. There is a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, this institution. A power to build up what another may pull down at pleasure is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operations of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion cannot be controlled by the

national councils. Whenever the local councils of Maryland will it, the bank must be expelled from that state. A right to tax without limit or control, is essentially a power to destroy. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. If this power to tax the **392*** national property and institutions *exists in the state of Maryland, it is unbounded in extent. There can be no check upon it, either by Congress or the people of the other states. Is there, then, any intelligible, fixed, defined boundary of this taxing power? If any, it must be found in this court. If it does not exist here, it is a nonentity. But the court cannot say what is an abuse, and what is a legitimate use of the power. The legislative intention may be so masked as to defy the scrutinizing eye of the court. How will the court ascertain, *a priori*, that a given amount of tax will crush the bank? It is essentially a question of political economy, and there are always a vast variety of facts bearing upon it. The facts may be mistaken. Some important considerations belonging to the subject may be kept out of sight. They must all vary with times and circumstances. The result, then, must determine whether the tax is destructive. But the bank may linger on for some time, and that result cannot be known until the work of destruction is consummated. A criterion which has been proposed, is to see whether the tax has been laid, impartially, upon the state banks, as well as the bank of the United States. Even this is an unsafe test; for the state governments may wish, and intend, to destroy their own banks. The existence of any national institution ought not to depend upon so frail a security. But this tax is leveled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other. It is a fundamental article of the **393*** state *constitution of Maryland, that taxes shall operate on all the citizens impartially, and uniformly, in proportion to their property, with the exception, however, of taxes laid for political purposes. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the state constitution, as not being laid uniformly on all the citizens, in proportion to their property. So that the legislature cannot disavow this to be its object, without, at the same time, confessing a manifest violation of the state constitution. Compare this act of Maryland with that of Kentucky, which is yet to come before the court, and the absolute necessity of repressing such attempts in their infancy, will be evident. Admit the constitutionality of the Maryland tax, and that of Kentucky follows inevitably. How can it be said that the office of discount and deposit in Kentucky cannot bear a tax of sixty thousand dollars per annum, payable monthly? Probably it could not; but judicial certainty is essential; and the court has no means of arriving at that certainty. There is, then, here, an absolute repugnancy of power to power; we are not bound to show that the particular exercise of the power in the present case is absolutely repugnant. It

is sufficient that the same power may be thus exercised.

There certainly may be some exceptions out of the taxing power of the states, other than those created by the taxing power of Congress; because, if there were no implied exceptions, then the navy, and other *exclusive [**394** property of the United States, would be liable to state taxation. If some of the powers of Congress, other than its taxing power, necessarily involve incompatibility with the taxing power of the states, this may be incompatible. This is incompatible; for a power to impose a tax *ad libitum* upon the notes of the bank, is a power to repeal the law by which the bank was created. The bank cannot be useful, it cannot act at all, unless it issues notes. If the present tax does not disable the bank from issuing its notes, another may; and it is the authority itself which is questioned as being entirely repugnant to the power which established, and preserves the bank. Two powers thus hostile and incompatible cannot co-exist. There must be, in this case, an implied exception to the general taxing power of the states, because it is a tax upon the legislative faculty of Congress, upon the national property, upon the national institutions. Because the taxing powers of the two governments are concurrent in some respects, it does not follow that there may not be limitations on the taxing power of the states, other than those which are imposed by the taxing power of Congress. Judicial proceedings are practically a subject of taxation in many countries, and in some of the states of this Union. The states are not expressly prohibited in the constitution from taxing the judicial proceedings of the United States. Yet such a prohibition must be implied, or the administration of justice in the national courts might be obstructed by a prohibitory tax. But such a tax is no more a tax on the legislative faculty of Congress than this. The branch *bank in Maryland is as [**395** much an institution of the sovereign power of the Union as the Circuit Court of Maryland. One is established in virtue of an express power; the other by an implied authority; but both are equal, and equally supreme. All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual states, in every respect, and for every purpose, including that of taxation. This immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction. The immunity of foreign public vessels from the local jurisdiction, whether state or national, was established in the case of *The Exchange*,¹ not upon positive municipal law, nor upon conventional law; but it was implied, from the usage of nations, and the necessity of the case. If, in favor of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations, for the security of our own national government? So, also, the jurisdiction of a foreign power, holding a temporary possession of a portion of national terri-

1.—7 Cranch, 116.

tory, is nowhere provided for in the constitution; but is derived from inevitable implication.¹ These analogies show that there may be exemptions from state jurisdiction, not detailed in the constitution, but arising out of general considerations. If Congress has power to do a **396*** particular act, *no state can impede, retard, or burthen it. Can there be a stronger ground to infer a cessation of state jurisdiction?

The bank of the United States is as much an instrument of the government for fiscal purposes as the courts are its instruments for judicial purposes. They both proceed from the supreme power, and equally claim its protection. Though every state in the Union may impose a stamp tax, yet no state can lay a stamp tax upon the judicial proceedings or custom-house papers of the United States. But there is no such express exception to the general taxing power of the states contained in the constitution. It arises from the general nature of the government, and from the principle of the supremacy of the national powers, and the laws made to execute them, over the state authorities and state laws.

It is objected, however, that the act of Congress, incorporating the bank, withdraws property from taxation by the state, which would be otherwise liable to state taxation. We answer that it is immaterial, if it does thus withdraw certain property from the grasp of state taxation, if Congress had authority to establish the bank, since the power of Congress is supreme. But, in fact, it withdraws nothing from the mass of taxable property in Maryland, which that state could tax. The whole capital of the bank belonging to private stockholders, is drawn from every state in the Union, and the stock belonging to the United States, previously constituted a part of the public treasure. Neither the stock belonging to citizens of other states, nor the privileged treasure **397*** of the United States mixed up with this private property, were previously liable to taxation in Maryland; and as to the stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all the other private property in the state. The establishment of the bank, so far from withdrawing anything from taxation by the state, brings something into Maryland which that state may tax. It produces revenue to the citizens of Maryland, which may be taxed equally and uniformly with all their other private property. The materials of which the ships of war, belonging to the United States, are constructed, were previously liable to state taxation. But the instant they are converted into public property, for the public defense, they cease to be subject to state taxation. So here the treasure of the United States, and that of individuals, citizens of Maryland, and of other states, are undistinguishably confounded in the capital stock of this great national institution, which, it has been before shown, could be made useful as an instrument of finance in no other mode than by thus blending together the property of the government and of private merchants. This partnership is, therefore, one of

necessity on the part of the United States. Either this tax operates upon the franchise of the bank, or upon its property. If upon the former, then it comes directly in conflict with the exercise of a great sovereign authority of Congress; if upon the latter, then it is a tax upon the property of the United States; since the law does not, and *cannot, in im- ***398** posing a stamp tax, distinguish their interest from that of private stockholders.

But it is said that Congress possesses and exercises the unlimited authority of taxing the state banks; and, therefore, the states ought to have an equal right to tax the bank of the United States. The answer to this objection is, that, in taxing the state banks, the states in Congress exercise their power of taxation. Congress exercises the power of the people. The whole acts on the whole. But the state tax is a part acting on the whole. Even if the two cases were the same, it would rather exempt the state banks from federal taxation than subject the bank of the United States to taxation by a particular state. But the state banks are not machines essential to execute the powers of the state sovereignties, and, therefore, this is out of the question. The people of the United States, and the sovereignties of the several states, have no control over the taxing power of a particular state. But they have a control over the taxing power of the United States, in the responsibility of the members of the House of Representatives to the people of the state which sends them, and of the senators to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other states of the Union. The people of other states are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to the people of that state. The national *government can withdraw ***399** nothing from the taxing power of the states which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the states are in perpetual conflict with the interests of the Union; which shows the danger of adding power to the partial views and local prejudices of the states. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property; and it must, consequently, be a tax on the faculty, or franchise. It is, then, a tax on the legislative faculty of the Union, on the charter of the bank. It imposes a stamp duty upon the notes of the bank, and thus stops the very source of its circulation and life. It is as much a direct interference with the legislative faculty of Congress as would be a tax on patents, or copyrights, or custom-house papers, or judicial proceedings.

Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety, and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them must be taken by implication; since the sovereign powers of the Union are supreme, and, wherever

1.—The United States v. Rice, *ante*, p. 246.
Wheat. 4.

they come in direct conflict and repugnancy with those of the state governments, the latter must give way; since it has been proved that this is the case as to the institution of the bank, and the general power of taxation by the states; since this power, unlimited and unchecked, **400*** as it necessarily must be, by the *very nature of the subject, is absolutely inconsistent with, and repugnant to, the right of the United States to establish a national bank; if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, **401*** or remain a source of *hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, [has Congress power to incorporate a bank?] 7

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately

established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present constitution. *The bill for incorporating [**402** the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

*It would be difficult to sustain this [**403** proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government

Wheat 3.

proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmation, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is, **emphatically*, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though the state may be willing to control its operation, it is willing to allow others to control it. The nation, on those subjects

on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

[The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to



its government. It can never be pretended **408*** that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation **409*** of a corporation, *if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. It is not denied that the powers given to the government imply the ordinary means of execution. That, for example of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dic-

tates of reason, be allowed *to select [**410** the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which *maintains that a power appertaining [**411** to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws necessary and proper to carry into execution the foregoing powers, and all other powers vested in the government."**412**

Wheat at. 4

shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubt, might be entertained whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing [413*] each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means [414*] calculated to produce the end, and not

as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning [415*] of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. [416*] If we apply this principle of construction to any of the powers

of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.] The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend that the legislature might not super-add, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

• So, with respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility because it is expressly given in some cases. Congress is empowered "to provide for the punishment *of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, [418*] and the absolute *impracticability of maintaining it without rendering the government incompetent to its great objects,

might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would re-instate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of *Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straightened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that without it Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

420*] *3d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting **421***] *the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case what- **422***] ever, ^{and} would have found a place Wheat. 4.

among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing the importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions *against it had been confirmed by every **423**] circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

*After this declaration, it can scarce- **424**] ly be necessary to say that the existence of state banks can have no possible influence on the question. No trace is to be found in the

constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious; the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the **425*** bank itself *may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

[It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolute-**426*** ly repugnant to another, as entirely *repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express

provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. (These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.)

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument seldom, if ever, surpassed, have been displayed.

*The power of Congress to create, and [**427** of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the state of Maryland is, not that the states may directly resist a law of Congress, but that they may exercise their *acknowledged powers upon [**428** it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bring a few considerations on the nature and effect of this orig-

Wheat. 4.

inal right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the 420* states. They are given by all, *for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable *to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are

given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised *by the respective states, [*431 consistently with a fair construction of the constitution.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided the most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

*If we apply the principle for which [*432 the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between prop 433* erty and *other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, *The Federalist* has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fullness and clearness. It is, "that an indefinite power of taxation in the latter (the government 434*) of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for state objects,

upon the pretense of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of *The Federalist* are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they *mean to [435] prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others as well as themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, [*436] and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which is not supreme, when in opposition to those laws.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States. The subject is most deliberate consideration. The result is a

conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Court of Appeals of the state of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the act of the legislature of Maryland is contrary to the constitution of the United States, and void; and, therefore, that the said Court of Appeals of the state of Maryland erred in affirming the judgment of the Baltimore County Court, in which judgment was rendered against James W. McCulloch; but that the said Court of Appeals of Maryland ought to have reversed the said judgment of the said Baltimore County Court, and ought to have given judgment for the said appellant, McCulloch. It is, therefore, adjudged and ordered, that the said judgment of the said Court of Appeals of the state of Maryland in this case, be, and the same hereby is, reversed and annulled. And this court, proceeding to render such judgment as the said Court of Appeals should have rendered; it is further adjudged and ordered, that the judgment of the said Baltimore County Court be reversed and annulled, and that judgment be entered in the said Baltimore County Court for the said James W. McCulloch.

Cited—9 Wheat. 780, 859, 868; 12 Wheat. 449, 457; 2 Pet. 466, 467, 469, 479; 4 Pet. 543; 6 Pet. 537, 545, 720; 12 Pet. 721, 723; 14 Pet. 537; 16 Pet. 419; 3 How. 178; 5 How. 563, 619; 6 How. 548; 7 How. 407, 532, 531, 538; 16 How. 398, 403; 18 How. 376, 445; 19 How. 542; 22 How. 243; 2 Black. 632, 634; 3 Wall. 590, 591, 597; 6 Wall. 45, 47, 605; 8 Wall. 561, 614, 645, 629, 631; 9 Wall. 589, 599; 11 Wall. 123, 127, 429, 507; 12 Wall. 224, 427, 512, 587, 539, 542, 538, 570, 573, 575, 612, 626, 631, 642; 16 Wall. 64; 17 Wall. 334; 18 Wall. 34, 38, 43, 45, 47, 48; 20 Wall. 663; 21 Wall. 93; 1 Otto, 33, 373; 2 Otto, 253; 5 Otto, 687; 6 Otto, 437, 602; 7 Otto, 686; 9 Otto, 279, 281; 10 Otto, 497, 543; 12 Otto, 593; 2 Wall. Jr. 74; 1 Abb. U. S. 48, 50, 56, 77, 229, 231, 334; 2 Abb. U. S. 112, 311, 535; Deady, 254; 6 Bank. Reg. 248; 6 Bank. Reg. 28; 7 Bank. Reg. 421, 426; 11 Bank. Reg. 3; 1 Bond, 561; 7 Ben. 272, 486; 5 McLean, 181; 1 Wood & M. 435, 456, 503; Blatchf. Pr. 12; 1 Dill. 320, 321; 14 Blatchf. 250; 3 Cliff. 378, 381, 383, 387, 388, 392, 394.

Wheat 4.

U. S., Book 4.

*[INSTANCE COURT.]

*[438]

THE GENERAL SMITH.

HOLLINS ET AL., Claimants.

The admiralty possesses a general jurisdiction in cases of suits by material men, *in personam*, and *in rem*.

Where, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent upon the party to establish the existence of such lien in the particular case.

Where repairs have been made, or necessities furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may maintain a suit *in rem* in the admiralty, to enforce his right.

But, as to repairs and necessities in the port or state to which the ship belongs, the case is governed altogether by the local law; and no lien is implied unless by that law.

By the common law, material men furnishing repairs to a domestic ship, have no particular lien upon the ship itself for their demand.

A shipwright who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs. But if he parts with the possession (of a domestic ship), or has worked upon it without taking possession, he has no claim upon the ship itself.

The common law being the law of Maryland, on this subject, it was held, that material men could not maintain a suit *in rem* in the District Court of Maryland, for supplies furnished to a domestic ship, although they might have maintained a suit *in personam* in that court.

APPEAL from the Circuit Court of Maryland.

This was a libel filed on the 4th day of October, 1816, in the District Court of Maryland, setting forth that James Ramsay, the libellant, had supplied and furnished for the use, accommodation, and equipment of the ship General Smith, at Baltimore, in the district of Maryland, to equip and prepare her for a voyage on the high seas, various articles of cordage, ship chandlery, and stores, amounting in the whole to the value of \$4,599.75, for no part of which he had received any compensation, payment, or security. That the said ship was then owned by a certain George Stevenson, to whom he had applied for payment of said materials furnished, but without effect. And praying the usual process against the ship, and that she should be sold under the decree of the court, to pay and satisfy the libellant his claim.

A claim was given for the ship by John Hollins and James W. McCulloch, merchants, of Baltimore.

NOTE.—The above case (The General Smith) is a leading one in the admiralty courts. Its doctrine has been constantly acted upon in the courts of the United States. *Peyroux v. Howard*, 7 Pet. 224; *The Steamer St. Lawrence*, 1 Black. 522; *Schooner Marlon*, 1 Story, C. C. 69; *Wick v. Schooner Samuel Strong*, 6 McLean, 587.

The rule of the English common law is the same (*Buxton v. Snee*, 1 Vesey, 151; Knapp's reports of cases before the Privy Council on Appeals, Vol. III. 95), that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself, or its proceeds, in court, under a decree and sale, for the recovery of their demands, with the exception of the shipwright who has possession of the ship. As long as he retains possession, he has a lien for repairs. The distinction is, that if repairs have been made, or necessities furnished, to a foreign ship, or to a ship in the port of a state to which she does not belong, the general

On the hearing of the cause in the court below, it was proved, or admitted by the parties, that the ship was an American ship, and formerly was the property of George P. Stevenson, a merchant of Baltimore, and a citizen of the United States; and that whilst the ship so belonged to Stevenson, the libellant, a ship chandler of Baltimore, furnished for her use various articles of ship chandlery to equip and furnish her, it being her first equipment to perform a voyage to a foreign country, to wit, to Rotterdam and Liverpool, and back to Baltimore. That Stevenson was also the owner of several other vessels, for which the libellant from time to time furnished articles for their equipment for foreign voyages, and that payments were made by Stevenson to the libellant, at different times, on their general account, without application to any particular part of the account. That the ship soon afterwards sailed, &c. That **440*** the ship departed *from Baltimore, on the voyage, without any express assent or permission of the libellant, and also, without objection being made on his part, and without his having attempted to detain her, or enforce any lien which he had against her for the articles furnished. That the ship continued to be the property of said Stevenson, during the said voyage, and after her return, and was not sold or disposed of in any way by him, until the 3d day of October, 1816, when, finding himself embarrassed in his pecuniary affairs, and obliged to stop payment, he executed an assignment to the claimants of his property, including the ship General Smith, in trust for the payment of all bonds for duties due by said Stevenson to the United States, and for the payment and satisfaction of his other creditors, &c.

Another libel was filed on the 11th of November, 1816, against the same ship, by Rebecca Cockrill, administratrix of Thomas Cockrill, deceased, alleging that the said Thomas, in his life-time, at Baltimore, in the said district, did furnish a large amount of iron materials, and bestow much labor and trouble by himself, and those hired and employed by him, in working

up and preparing certain iron materials for building and preparing the said ship for navigating the high seas, all which materials, and work and labor, were in fact applied and used in the construction and fitting said ship, according to a bill of particulars annexed. That the libellant has been informed, and believes, that said ship is owned and claimed by various persons in certain proportions, but in what proportions, and who are the several owners, she *does not know, and cannot, therefore, [***441** state. That neither the said Thomas, in his life-time, nor the libellant, since his decease, have ever received any part of said account, or any security or satisfaction for the same. Concluding with the usual prayer for process, &c.

A claim was given for the same parties, and at the hearing, the same proofs and admissions were made as in the suit of James Ramsey; except that it did not appear that Thomas Cockrill had furnished any other vessels belonging to Stevenson with materials, or that any payments on account had been made by said Stevenson to said Cockrill, or to the libellant as his administratrix.

The District Court ordered the ship to be sold, and decreed that the libellants should be paid out of the proceeds the amount of their demands for materials furnished. In the Circuit Court this decree was affirmed, *pro forma*, by consent, and the cause was brought by appeal to this court.

Mr. Pinkney, for the appellants and claimants, admitted the general jurisdiction of the District Court, as an instance court of admiralty, over suits by material men *in personam* and *in rem*, and over other maritime contracts; but denied that a suit *in rem* could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. In the case of materials furnished or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced by a suit in the Admiralty. *But in the case of a domestic [***442** ship, it was long since settled by the most solemn

marine law, following the civil law, gives the party a lien on the ship itself for its security, and he may maintain a suit *in rem*, in the admiralty, to enforce his right. 3 Kent's Comm. 169, 170; The Ship Fortitude, 3 Sumn. 228; 5 Conn. R. 631; 6 Dana. (Ky.) 27, 28; The Brig Nestor, 1 Sumn. 74, 79; The Schooner Marion, 1 Story, 68; Read v. The Hull of a Brig, 1 Story, 246; Davis v. Child, 3 N. Y. Leg. Obs. 147; Zane v. The Brig President, 4 Wash. C. C. 453; Davis v. A New Brig, Gilp. 473; The Jerusalem, 2 Gall. 345; Stevens v. The Sandwich, Pet. Adm. 253, note; Maguire v. Card, 21 How. 248; The St. Lawrence, 1 Black. 522; The St. Jago de Cuba, 9 Wheat. 409; The Jerusalem, 2 Gall. 345; Woodruff v. The Levi Dearborne, 4 Am. Law J. N. S. 97, 88; Sarchet v. The Davis, Crabbe, 155; The Hull of a New Brig, 3 Law Rep. 69; Nall v. The Illinois, 6 McLean, 413; Carroll v. The Leathers, Newb. 432; Leland v. The Medora, 2 Wood. & M. 92; The Sea Lark, 1 Sprague, 571; Whitlock v. The Thales, 20 How. Pr. (N. Y.) 447; The City of N. Y., 3 Blatchf. 187; 8. C. 12 N. Y. Leg. Obs. 300; The Cabarga, 3 Blatchf. 75; The Gustavia, Blatchf. & H. 189; Full v. The Wash. Irving, 7 Int. Rev. Rec. 109; Buddington v. Stewart, 14 Conn. 404.

A person who furnishes supplies to a foreign vessel has no lien on the vessel therefore, unless he show that such supplies could not have been obtained upon the personal credit of the owner. Pratt v. Reed, 19 How. 359; The Sarah Starr, 1 Sprague, 453; The Sea Lark, 1 Sprague, 571; The James Guy, 5 Int. Rev. Rec. 88.

Vessels belonging to one state when in the ports of another are deemed so far foreign that the lien for necessities attaches. The Hull of a New Brig, 3 Law Rep. 69; The Chusan, 1 Sprague, 39; Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 88; Whitlock v. Thales, 20 How. Pr. (N. Y.) 447; Levering v. Bk. of Columbia, 1 Cranch. C. C. 152, 207.

As to whether the vessel is deemed foreign or not, on this subject, depends on the residence of her owners, not on the port of her enrollment. Hill v. The Golden Gate, Newb. 308; S. C. 5 Am. Leg. Rep. 142; Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38; Tree v. The Indiana, Crabbe, 479; The St. Jago de Cuba, 9 Wheat. 409.

For repairs and necessities furnished in a port or state to which the ship belongs, the case is governed by the local law of the state, and no lien exists except by such law. Boone v. The Hornet, Crabbe, 426; The Eliza Jane, 1 Sprague, 153; The Little Mills, 1 Sprague, 307; 8 Law Rep. N. S. 494; The Brig Nestor, 1 Sumn. 74, 79; The Schooner Marion, 1 Story, 246; Buddington v. Stewart, 14 Conn. 404; Harper v. A New Brig, 1 Gilp. 536.

The legislature of New York has specially provided for the collection of demands against ships and vessels, and when liens attach thereon. Act of New York of 24th April, 1862, chap. 482; 2 N. Y. L. S. 500; Act of New York of May 19, 1879, chap. 334. Other states, as Illinois, Indiana, Pennsylvania, Missouri, and Maine, have passed laws regulating liens, and the collection of debts against boats and vessels.

adjudications of the common law (which is the law of Maryland on this subject), that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner.¹ Had this been a suit *in personam* in the Admiralty, there would have been no doubt that the District Court would have had jurisdiction; but there being, by the local law, no specific lien to be enforced, there could be no ground to maintain a suit *in rem*.

Mr. Winder, contra, insisted, that the question of jurisdiction and lien were intimately and inseparably connected. In England, the lien has been denied to attach, in the case of domestic ships, because the courts of common law, in their unreasonable jealousy of the admiralty jurisdiction, would not permit the only court which could enforce the lien to take cognizance of it. Consequently, the lien has been lost with the jurisdiction. But the universal maritime law, as administered in the European courts of admiralty, recognizes the lien in the case of a domestic as well as a foreign ship;² and commercial policy demands that it should be enforced in both cases.

443*] *STORY, J., delivered the opinion of the court:

No doubt is entertained by this court, that the Admiralty rightfully possesses a general jurisdiction in cases of material men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court. Where, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent upon those who seek the aid of the court to establish the existence of such lien in the particular case. Where repairs have been made, or necessities have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the Admiralty to enforce his right. But in respect to repairs and necessities in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied unless it is recognized by that law. Now, it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that by the common law, which is the law of Maryland, material men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, **444*]** or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself.

Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion that here there was not, by the

principles of law, any lien upon the ship; and, consequently, the decree of the Circuit Court must be reversed.

*Decree reversed.**

Cited—12 Wheat. 613, 635, 636, 639; 7 Pet. 341; 3 How. 573; 5 How. 450, 491; 6 How. 390; 17 How. 599; 17 How. 271; 19 How. 23, 38; 21 How. 251; 1 Black. 529; 7 Wall. 643, 646; 9 Wall. 136; 10 Wall. 200, 211; 13 Wall. 243; 20 Wall. 163, 217, 219; 21 Wall. 571, 579, 582; 1 Abb. U. S. 193; 2 Abb. U. S. 75; Taney, 407, 502; Blatchf. & H. 70, 72, 82, 177, 241, 306; Abb. Adm. 169, 268, 341; 1 Ware, 97, 153; 2 Ware (Da.), 31, 74, 201; Olcott, 231, 288, 399, 394; 1 Sumn. 74, 87; 2 Sumn. 173; 1 Sprague, 39, 185, 442, 446, 447; 1 Biss. 108, 214, 215; Newb. 190, 310; 11 Blatchf. 400-402, 478-479; 1 Sawy. 364, 363, 373; 1 Ben. 141; 4 Ben. 296; 5 Ben. 67; 4 Wash. 454, 456; 2 Wood. & M. 53, 97; 3 Wood. & M. 203; 1 Story, 72; 2 Story, 461, 463; 1 Cliff. 49; Chase Dec. 164; Crabbe, 442; Gilp. 3, 478; 6 McLean, 590; 1 Paine, 626.

[LOCAL LAW.]

M'IVER'S LESSEE v. WALKER ET AL.

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent.

All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey; *consequently, distances must be lengthened or shortened, and courses varied, so as to conform to the natural objects called for.

If a patent refer to a plat annexed, and if in that plat a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as nearly as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent; and although neither the certificate of survey nor the patent calls for that water-course.

ERROR to the Circuit Court for the District of East Tennessee. This was an ejectment brought in that court by the plaintiff in error against the defendants. Upon the first trial of the cause, a judgment was rendered in the Circuit Court in favor of the defendants, and upon that judgment a writ of error was taken out, and the judgment reversed by this court, at February term, 1815; and the cause was sent back to be tried according to certain directions prescribed by this court.

As the opinion given by this court upon the reversal of the first judgment contains a statement of the facts given in evidence upon the first trial, it is deemed proper to insert the opinion in this place. It is as follows: On the trial of this cause, the plaintiff produced two patents for 5,000 acres each, from the state of North Carolina, granting to Stokely Donelson (from whom the plaintiff derived his title), two

3.—*Vide ante*, Vol. I., p. 96, 108, The Aurora, in which case a lien of material men on foreign ships was recognized by this court. The common law is the municipal law of most of the states, as to supplies furnished to domestic ships. But the legislature of New York has by statute given a lien to shipwrights, material men and suppliers of ships, for the amount of their debts, whether the ships are owned within the state or not. Acts of 22d sess., c. 1, and 40th sess., c. 50. This lien, existing by the local law, may consequently be enforced, upon the principle of the above case in the text, by a suit *in rem* in the Admiralty.

1.—Abbott on Ship, p. 2, c. 3, s. 9-13, and the cases there cited; Woodruff et al. v. The Levi Dearborne, 4 Hall's Am. Law Jour. 97.

2.—Stevens v. The Sandwich, 1 Peters' Adm. Dec. 253, note; De Lovio v. Bolt, 2 Gallis. 400, 463, 475.

Wheat. 4.

several tracts of land lying on Crow Creek, the one, No. 12, beginning at a box elder standing on a ridge corner to No. 11, &c., as by the plat hereunto annexed will appear. The plat and certificate of survey were annexed to the grant. The plaintiff proved that there were eleven **446*** other grants of the same date *for 5,000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other from No. 1 to No. 11, inclusive, each calling for land on Crow Creek as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved that the beginning corner of No. 1 stood on the north-west side of Crow Creek, and the line running thence down the creek, called for in the plat and patent, is south forty degrees west. It further appeared that Crow Creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of survey No. 1, in the said chain of surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south thirty-five degrees west by the needle, and south forty degrees west by the true meridian that in the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow Creek. If the lines of the tracts hereinbefore mentioned, Nos. 12 and 13, in the said chain of surveys, be run according **447*** to the course of *the needle and the distances called for, they will not include Crow Creek, or any part of it, and will not include the land in possession of the defendants. If they be run according to the true meridian, or so as to include Crow Creek, they will include the lands in possession of the defendants. Whereupon, the counsel for the plaintiffs moved the court to instruct the jury, 1st. That the lines of the said lands ought to be run according to the true meridian, and not according to the needle. 2d. That the lines ought to be run so as to include Crow Creek and the lands in possession of the defendants.

The court overruled both these motions, and instructed the jury that the said grant must be run according to the course of the needle and the distances called for in the said grants, and that the same could not legally be run so as to include Crow Creek, and that the said grants did not include the lands in possession of the defendants. To this opinion an exception was taken by the plaintiff's counsel. A verdict and judgment were rendered for the defendants, and that judgment is now before this court on a writ of error.

It is undoubtedly the practice of surveyors (and the practice was proved in this cause) to express in their plats and certificates of survey, the courses which are designated by the needle;

and if nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, *and the intention of the ***448** grant is to convey the land according to that actual survey; consequently, if marked trees and marked corners be found, conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable, and more frequent, than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated, and accurately described. Had the survey in this case been actually made, and the lines had called to cross Crow Creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner, or other marked trees, and yet the land must have been so surveyed as to include Crow Creek. The call in the lines of the patent to cross Crow Creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause. That the lands should not be described as lying on both sides of Crow Creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the court in deciding whether there is any other description given in the patent of sufficient strength to control the call for course and distance. The majority of the court is of opinion that there is such a description. The patent ***closes** its description of the land grant- ***449** ed by a reference to the plat which is annexed. The laws of the state require this annexation. In this plat thus annexed to the patent, and thus referred to as describing the land granted, Crow Creek is laid down as passing through the tract. Every person having knowledge of the grant, would also have knowledge of the plat, and would by that plat be instructed that the lands lay on both sides the creek. There would be nothing to lead to a different conclusion but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow Creek were intended to be included in the survey, and intended to be granted by the patent.

It is the opinion of the majority of this court that there is error in the opinion of the Circuit Court for the district of East Tennessee, in this, that the said court instructed the jury that the grant under which the plaintiff claimed could not be legally run so as to include Crow Creek, instead of directing the jury that the said grant must be so run as to include

Crow Creek, and to conform as near as may be to the plat annexed to the said grant; wherefore, it is considered by this court that the said judgment be reversed and annulled, and the **450*** cause be remanded *to the said Circuit Court that a new trial may be had according to law.¹

Upon this cause being remanded to the Circuit Court for a new trial, the plaintiff gave in substance the same evidence which he gave upon the first trial, and proved, or offered to prove, these additional facts: That it was the express and declared intention of the surveyor to locate the land upon Crow Creek. That his field notes called for crossing Crow Creek, and that he supposed the courses inserted in the grants would place the lands upon Crow Creek. Upon the former trial it was proved, and admitted by the parties, that the beginning of lot No. 1 was marked as a corner, but that no survey had ever been made of that lot or of the lots of land in dispute. Upon the last trial the witness gave the same testimony, and further stated that a corner was marked for the beginning of lot No. 1. That the compass was set at this corner, and a chain or two might have been stretched upon the first course of the grant; but of this he was not certain. During the last trial various objections were made by the defendants to the testimony offered by the plaintiff; especially to that which tended to prove that it was the intention of the surveyor to locate the land upon Crow Creek, and that his field notes called for crossing Crow Creek. These objections were sustained by the court, and the testimony declared inadmissible.

Upon the evidence given in the cause, various instructions were prayed by the plaintiff, all of which the court refused to give; but charged **451*** the jury that *if, from the testimony then adduced, they should find that M'Coy, the deputy-surveyor, when he went upon the ground to survey the land, did mark the beginning corner of lot No. 1, upon two poplars, and set his compass a given course, and that the chain carriers stretched one or two chains upon that course, and that M'Coy made his field notes in conformity thereto, and that those field notes were transmitted to James W. Lachey, the surveyor, who made out the plats annexed to the grants, and that he made out the said plats in conformity with the said field notes, and that he marked down Crow Creek by guess upon the plats, that this was so much of a legal and actual survey as to show that the surveyor committed no mistake in what he did upon the ground, notwithstanding it might not be according to what he wished or intended in his own mind; and, in that case, the lessor of the plaintiff would be barred by the courses and distances called for in the grant.

Under this instruction of the court, a verdict was found for the defendants, and judgment rendered accordingly, upon which the cause was again brought to this court by writ of error.

This cause was argued at the last term, by *Mr. Swann* and *Mr. Campbell* for the plaintiff in error, and by *Mr. Williams* for the defendants in error, and was re-argued at the present term, by *Mr. Swann* for the plaintiffs in error,

and by *Mr. Jones* and *Mr. Williams* for the defendants in error.

MARSHALL, *Ch. J.*, delivered the opinion of the court:

*The court has re-examined the opinion **452** which it gave, when this cause was formerly before it, and has not perceived any reason for changing that opinion. Nor do the new facts introduced into the cause in any material degree vary it. If there had been a settled course of decisions in Tennessee upon their local laws, different from the judgment pronounced by this court, we should not hesitate to follow those decisions. But, upon an examination of the cases cited at the bar, we do not perceive that such is the fact. The judgment of the Circuit Court is therefore reversed, and the cause remanded for further proceedings.

JUDGMENT.—This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, it is the opinion of this court that the Circuit Court erred in the instructions given to the jury: it is, therefore, Adjudged and Ordered, that the judgment of the Circuit Court for the District of East Tennessee, in this cause, be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court for farther proceedings to be had therein, according to law.

Cited—3 How. 193, 672; 2 Black, 504; 2 Curt. 574; See 9 Cranch, 173.

*[CHANCERY.]

***453**

ORR v. HODGSON ET UX. ET AL.

Bill for rescinding a contract for the sale of lands, on the ground of defect of title, dismissed with costs.

An alien may take an estate in lands by the act of the parties, as by purchase; but he cannot take by the act of the law, as by descent.

Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs in law; but the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence.

The 8th article of the treaty of peace between the United States and Great Britain, of 1783, completely protected the titles of British subjects to lands in the United States which would have been liable to forfeiture, by escheat, for the defect of alienage. That article was not meant to be confined to confiscations *jure belli*.

The 9th article of the treaty between the United States and Great Britain, of 1794, applies to the title of the parties, whatever it is, and gives it the same legal validity as if the parties were citizens. It is not necessary that they should show an actual possession or seizin, but only that the title was in them at the time the treaty was made.

The 9th article of the treaty of 1794 did not mean to include any other persons than such as were British subjects or citizens of the United States.

APPEAL from the Circuit Court for the District of Columbia.

The appellant filed his bill in equity in the court below, stating, that on the 10th day of January, 1816, he purchased of the defendants, William Hodgson, and Portia, his wife, and John Hopkins, and Cornelia, his wife, a tract

1.—S. C. 9 Cranch, 173.
Wheat. 4.

of land called Archer's Hope, situate in the county of James' City, in the state of Virginia, for the sum of \$5,000, and gave his bond to the **454*** said Hodgson and Hopkins for *the payment of the said purchase money. That, at the time of the purchase, the defendants affirmed to the plaintiff, that they were seized in right of the said Portia and Cornelia, of a good, sure, and indefeasible estate of inheritance, in fee-simple, in the said tract of land, and had full power and lawful authority to convey the same, and, in consequence of such affirmation, the plaintiff made the purchase, and gave his bond, as aforesaid. And further stating that he had since discovered that the defendants had no title to the said lands, but that the title thereto was either vested in the children of the Countess Barziza, or that the Commonwealth of Virginia was entitled to them by escheat. That Colonel Philip Ludwell, a native of the said Commonwealth, being seized in fee of the said lands, had two daughters, Hannah and Lucy, born of the same mother, in Virginia. That, some years before the year 1767 he removed with his family, including his said two daughters, to England, where he died, in the year 1767, having, by his last will, devised all his estates to his said two daughters, and appointed as their guardians, Peter Paradise, John Paradise, of the city of London, and William Dampier. That Hannah, one of the said daughters, married William Lee, a native of Virginia, and died, leaving issue, two daughters, the said defendants, Portia Hodgson and Cornelia Hopkins, who are citizens of Virginia, residing in the District of Columbia. That Lucy Ludwell, the other daughter above mentioned, during her infancy, to wit, in May, 1769, at the city of London, married the said John Paradise, a British **455*** subject, by *whom she had issue, a daughter, by the name of Lucy, born in England about the year 1770. That the said Lucy Paradise, daughter of the said John and Lucy Paradise, on the 4th of April, 1787, at the said city of London, married Count Barziza, a Venetian subject, by whom she had issue, a son, named John, born in the city of Venice, on the 10th of August, 1796. That the said John Paradise, in the year 1787, came to Virginia with his wife, and returned with her to England in 1789, where he died, in 1796, having, by his last will, devised all his personal estate, charged with some pecuniary legacies, to his wife, but making no disposition of his real estate, and leaving no issue, but the Countess Barziza. That the said Countess Barziza died intestate, in Venice, on the 1st of August, 1800, leaving her said sons, John and Philip, her only issue; and that neither her sons nor herself, nor her husband, were ever in the United States. That the said Count Barziza is also dead. That the said Lucy Paradise, after the death of the said John Paradise, her husband, treated the said lands as her own, exercising acts of ownership over the same, and, about the year 1805, returned to Virginia, where she died intestate, in 1814, being in possession of said lands at her decease, and leaving no issue but the two sons of Countess Barziza above mentioned, who, at the time of her death, had not become citizens or subjects of any other state or power than Venice and Austria. That by marriage articles, made before the marriage of John Paradise and

Lucy Ludwell, between the said John Paradise of the first part, the said Peter Paradise, his father, *of the second part, the said Lucy **456** Ludwell of the third part, the said William Dampier of the fourth part, and James Lee and Robert Carry of the fifth part, reciting the said intended marriage, and that the said Peter Paradise had agreed to pay his son £4,000 sterling at the marriage, and that his executors should pay £4,000 sterling more to Lee and Carry upon the trusts thereafter mentioned. And that the said John Paradise, and Lucy, had agreed that all the estates of the said Lucy Ludwell should be settled as thereafter mentioned, but that, by reason of her infancy, no absolute settlement of the same could then be made. It was witnessed, that in consideration of the marriage, and for making provision for the said Lucy Ludwell, and the issue of the said John Paradise, on her body to be begotten, and for the consideration of ten shillings to the said John Paradise, paid by the said Lee and Carry, and for divers other good causes and valuable considerations, him, the said John Paradise thereunto moving, he, the said John Paradise, covenanted with said Lee and Carry, that if the marriage took effect, he would make, or cause to be made, such acts and deeds as would convey all the estates of the said Lucy Ludwell to the said Lee and Carry, upon trust, as to that part of the real property, which was situate in Virginia. 1. To the use of John Paradise for life, remainder to the use of all or any of the children of the marriage, for such estates (not exceeding estates tail) as John Paradise and the said Lucy Ludwell, by deed, during the coverture or as the survivor of them, by deed or will should appoint, and in default *of such **457** appointment, to the use of all the children of the marriage as tenants in common in tail with cross remainders in tail, remainder to the use of such person as the said Lucy Ludwell should appoint, and in default of such appointment, to the use of the survivor of John Paradise and Lucy Ludwell in fee-simple. 2. With power to the husband and wife to make leases not exceeding twenty-one years. 3. With power to the trustees to sell any part of the estate, and apply the proceeds to the purchase of other lands in England, subject to the use of the marriage articles. And as to the personal estate of the said Lucy Ludwell, to the use of John Paradise for life, remainder to Lucy Ludwell for life, remainder to the children of the marriage as the parents should appoint, and in default of such appointment, to the use of all the children of the marriage, share and share alike. But if there should be no children of the marriage, or being such, if all of them should die before the age of twenty-one, or marriage, then to the use of such person as the said Lucy Ludwell should appoint, and in default of such appointment, to the survivor of the said John Paradise and Lucy Ludwell in absolute property. And as to the second of the said sums of £4,000 to the trustees upon trust for the use of John Paradise for life, remainder to Lucy Ludwell for life, remainder to the children of the marriage, in the same manner as the personal estate of the said Lucy Ludwell was settled. Provided, that if there should be no issue of the marriage, then to the use of John Paradise in absolute property. Provided, also, that it should and might be law-

458*] ful *for the trustees, with the consent of the said John Paradise and Lucy Ludwell, or the survivor of them, and after the death of such survivor, of their or his own authority, to lay out the same in lands in England to the use of John Paradise for life, remainder to Lucy Ludwell for life, remainder to the children of the marriage in the same manner as the lands of the said Lucy Ludwell were settled. That after the death of the said Peter Paradise, the said John Paradise, as his executor, paid the last-mentioned £4,000 to the trustees aforesaid, who invested it in the British funds, and by deed dated the 8th of December, 1783, and to which the said John Paradise and Lucy Ludwell were parties, they declared the same subject to the uses of the marriage settlement. The bill further alleged, that the plaintiff, upon discovering the foregoing circumstances, applied to the defendants, and requested them to rescind the contract, and to deliver up the bond to the plaintiff to be cancelled, the same having been obtained by misrepresentation or through mistake without any consideration valuable in law, and at the same time offered to convey back to them any title, interest or estate, which might have been conveyed to him by the defendants. But that the defendants refused, and threatened to bring a suit at common law upon the said bond, and to enforce payment thereof, contrary to equity. Concluding with the usual prayer for a discovery, &c., and for a decree rescinding the sale of lands, and that the defendants should be compelled to deliver up the bond to be cancelled, and for further relief, &c. **459*]** *To which bill the defendant demurred.

The bill was dismissed by the court below with costs, and the cause was brought by appeal to this court.

The cause was argued by *Mr. Jones* for the defendants and respondents, no counsel appearing for the appellant.

Strong, J., delivered the opinion of the court: The whole merits of this cause rest upon the question, whether the defendants, *Portia Hodgson* and *Cornelia Hopkins*, took an estate in fee simple, in one moiety of the land stated in the bill, by descent, as nieces and heirs of *Lucy Paradise*, widow of *John Paradise*, upon her death in 1814. If they did, then the contract for the sale of the land to the plaintiff ought to be fulfilled; if not, then the contract ought to be rescinded.

Two objections are urged against the title. First, that *Lucy Paradise*, at the time of her death, was a British subject, and so not capable of passing the land in question by descent; secondly, if so entitled, yet, upon her death, the land escheated to the commonwealth of Virginia, for want of heirs legally entitled to take the same by descent.

It appears that *Lucy Paradise* took her moiety of the estate in question by devise from her father, *Philip Ludwell*, who was a native of Virginia, where, also, his daughter *Lucy* was born. Some time before the year 1767, he removed with his family, including this daughter **460*]** ter, to England, where he died in *1767. In 1769 this daughter was married in England to *John Paradise* (a British subject), *Wheat. 4.*

by whom she had issue, a daughter, *Lucy*, who was born in England about 1770, and who, afterwards, in 1787, in England, married *Count Barziza*, a Venetian subject, by whom she had two sons, one born in Venice, in February, 1789, and the other in Venice, in August, 1796, both of whom are now living. The Countess *Barziza* died in Venice, in August, 1800, leaving no other issue except her two sons, and neither she nor her husband, nor her sons, were ever in the United States. In the year 1787, *John Paradise* came with his wife to Virginia, and returned with her to England in the year 1789, where he died in 1796. After the death of her husband, *Lucy Paradise* treated the land in controversy as her own, exercising acts of ownership over it; and about the year 1805 returned to Virginia, where she died intestate, in possession of the land, in 1814, leaving no issue but her two grandsons, the children of the Countess *Barziza*, and the defendants *Portia* and *Cornelia*, her nieces, who would be her heirs at law if no such issue were living.

From this summary statement, it is clear that the two sons of the Countess *Barziza* are aliens to the commonwealth of Virginia, and, of course, cannot take the estate in question by descent from their grandmother, unless their disability is removed by the treaty of 1794. For though an alien may take an estate by the act of the parties, as by purchase, yet he can never take by the act of the law, as by descent, for he has no inheritable blood. But the *objection now **461** supposed to exist is, that under these circumstances, although the grandsons cannot, as aliens, take by descent yet they answer in some sort to the description of "heirs," and, therefore, prevent the estate from descending to the nieces who have a legal capacity to take, because, strictly speaking, they are not heirs. The law is certainly otherwise. Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs in law, for they have no inheritable blood, and the estate descends to the next of kin, who have an inheritable blood, in the same manner as if no such alien issue were in existence.¹ In the present case, therefore, the defendants, the nieces of *Lucy Paradise*, are her heirs at law, entitled to take by descent, whatever estate could rightfully pass to her heirs, unless the British treaty of 1794 enlarged the capacity of her grandsons to take by descent, a point which will be hereafter considered. And this brings us to the other question in the cause, whether *Lucy Paradise*, under the circumstances of the case, had such an estate in the land as could by law pass by descent to her heirs.

There is no question that she took an estate in fee-simple by devise from her father; but it is supposed, that although born in Virginia, by her removal to England, with her father, before, and remaining there until long after, the American revolution, she must be considered as electing to remain a *British subject, **462** and thus, as well by operation of law as by the statutes of Virginia on this subject, became an alien to that commonwealth. And if she be-

1.—2 Bl. Com. 249; *Durore v. Jones*, 4 T. R. 300, Com. Dig. Alien, C. 1.

came an alien, then the estate held by her could not pass by descent, but for defect of inheritable blood escheated to the government.¹

Admitting that Lucy Paradise did so become an alien, it is material to inquire what effect the treaty of peace of 1783 had upon her case; and upon the best consideration that we can give to it, we are of opinion that the sixth article of that treaty² completely protected her estate from forfeiture by way of escheat for the defect of alienage. That defect was a disability solely occasioned by the war, and the separation of the colony from the mother country; and under such circumstances, a seizure of the estate by the government, upon an inquest of office, for the supposed forfeiture, would have been a confiscation of the property in the sense in which that term is used in the treaty. When the 6th article of the treaty declared "that no future confiscation should be made" it could not mean to confine the operation of the language to confiscations *jure belli*; for the treaty **463** itself *extinguished the war, and, with it the rights growing out of war; and when it further declared that no person should, on account of the part he had taken in the war, suffer any future loss or damage, either in his person, liberty, or property, it must have meant to protect him from all future losses of property, which, but for the war, would have remained inviolable. The fifth article of the treaty also materially illustrates and confirms this construction. It is there agreed that Congress shall recommend to the state legislatures, to provide for the restitution of all estates of British subjects, &c., which had been confiscated. Yet, why restore such estates, if, *eo instanti*, they were forfeitable on account of alienage? This subject has been heretofore before us, and although no opinion was then pronounced, it was most deliberately considered. We do not now profess to go at large into the reasoning upon which our present opinion is founded. It would require more leisure than is consistent with other imperious duties; and we must, therefore, content ourselves with stating, that the doctrine here asserted is the decided judgment of the court.

If the case were not protected by the treaty of 1783, it might become necessary to consider whether it is aided by the ninth article of the treaty of 1794, which declares, that British subjects, who now hold lands in the United States, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and that as to such lands, and the legal remedies incident thereto, neither they nor their heirs or assigns **464** *shall be regarded as aliens. It does not appear, by the bill in this case, that Lucy Paradise was in the actual possession or seizin of the land at the time of the treaty. Nor is it

necessary, because the treaty applies to the title, whatever it is, and gives it the same legal validity as if the parties were citizens.³ But although it does not directly appear by the bill what the title of Lucy Paradise was at the time of the treaty, yet, as the title is asserted in her, both before and after the treaty, and there is no allegation of any intermediate transfer, it must be presumed in this suit that she never parted with her title. It follows, that in this view also, her title was completely confirmed, free from the taint of alienage; and, that by the express terms of the treaty, it might lawfully pass to her heirs.

And here it becomes material to ascertain whether the treaty of 1794, under the description of heirs, meant to include any other persons than such as were British subjects or American citizens, at the time of the descent cast; and it is our opinion that the intention was not to include any other persons. It cannot be presumed that the treaty stipulated for benefits to any persons who were aliens to both governments. Such a construction would give to this class of cases privileges and immunities far beyond those of the natives of either country; and it would also materially interfere with the public policy common to both. We have, therefore, no hesitation to reject any interpretation which would give to persons, aliens to both *governments, the privileges of **465** both; and in this predicament are the children of the Countess Barziza. The rule, then, of the common law, which gives the estate to the next heirs having inheritable blood, must prevail in this case.

We have not thought it necessary to go into an examination of the articles for a marriage settlement entered into between Lucy Paradise and John Paradise, on their marriage, for two reasons: first, the articles were merely executory, and, being entered into by Mrs. Paradise when under age, and not afterwards ratified by her, they were not binding upon her; second, if they were binding, yet, inasmuch as the only persons in whose favor they could now be executed are aliens incapable of holding the estate to their own use, no court of equity would, upon the general policy of the law, feel itself at liberty to decree in their favor.

*Decree dismissing the bill affirmed with costs.*⁴

Cited—8 Wheat. 489; 9 Wheat. 490; 14 Pet. 412; 18 How. 238; 10 Otto 489.

*[CHANCERY—LOCAL LAW.] **466**

ASTOR v. WELLS ET AL.

Under the registry act of Ohio, which provides, that certain deeds "shall be recorded, in the county in which the lands, tenements, and hereditaments, so conveyed or affected, shall be situate, within one year after the day on which such deed or conveyance was executed; and, unless recorded in the manner and within the time aforesaid, shall be deemed fraudulent against any subsequent bona fide purchaser without knowledge of the existence of such former deed or conveyance;" lands lying

3.—Harden v. Fleher, 1 Wheat. Rep. 300.

4.—Chief Justice Marshall did not sit in this cause.

Wheat. 4.

1.—Com. Dig. Allen. C. 2, Co. Litt. 2, b.

2.—Which provides, "that there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for, or by reason of, the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

in Jefferson county were conveyed by deed; and a new county, called Tuscarawas county, was erected, partly from Jefferson, after the execution, and before the recording of the deed, in which new county the lands were included; and the deed was recorded in Jefferson. Held, that this registry was not sufficient either to preserve its legal priority or to give it the equity resulting from constructive notice to a subsequent purchaser.

Notice of a prior incumbrance to an agent is notice to the principal.

Under the statute of fraudulent conveyances of Ohio, which provides, that "every gift, grant, or conveyance of lands, tenements, hereditaments, &c., made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, &c., shall be deemed utterly void, and of no effect." Held, that a *bona fide* purchaser, without notice, could not be affected by the intent of the grantor to defraud creditors.

A PPEAL from the Circuit Court of Ohio.

The bill in equity filed in this cause states, that Arnold Henry Dorhman, in 1806, became indebted to the United States in the sum of \$6,515.10, for duties upon the importation of certain goods payable at the custom-house in the city of New York. The plaintiff, Henry 467*] Astor, became *bound with Dorhman for the payment of those duties; and, thereupon, Dorhman, to secure Astor, executed and delivered the mortgage deed of the 14th of August, 1806, in the bill mentioned, for the 13th township, in 7th range, then lying in Jefferson county, in the state of Ohio; and Dorhman became further indebted to the plaintiff in the sum of \$2,700, to secure which, upon said township, he afterwards, on the 25th of August, 1807, executed another mortgage deed of the same premises. Both the deeds were recorded in the county of Jefferson, on the 2d of October, 1810, and in Tuscarawas on the 21st of October, 1812, which county was erected in part from Jefferson, after the execution, and before the recording therein of said deeds. On the 26th of August, 1807, the plaintiff released to Dorhman one-fourth of said township, by deed recorded in Tuscarawas county on the 9th of March, 1813. On the 24th of October, 1810, Dorhman gave the defendant Wells a deed of trust of the three-fourths of said township not released, to secure the payment of \$5,000, for which the defendant Wells had become liable for Dorhman, by indorsing his paper at the bank of Steubenville, which was recorded in Tuscarawas, the 13th of January, 1811. On the 12th of February, 1813, the defendant Wells took another deed from Dorhman for the quarter or sections which had been released, which was recorded in Tuscarawas county on the 10th of March, 1813, to secure \$3,000, for farther indorsements by Wells for Dorhman. The bill then charges the defendant Wells with notice of the plaintiff's deeds and 468*] *lien upon said lands, before his deeds, indorsements, or any payments made by him; and that he accepted the deeds, made the indorsements, and payments, if any, with knowledge, &c.; charges a secret understanding, that the released sections, conveyed to Wells by the last-mentioned deed, were to enure to Dorhman or his family; and that neither transaction between Wells and Dorhman was *bona fide*. Dorhman died on the 21st of February, 1813, nine days after his last deed to Wells, who commenced a suit against the heirs of Wheat. 4.

Dorhman on the 27th of August following; and obtained a decree of sale, under which he purchased the premises; all which is charged to be fraudulent. The widow and heirs of Dorhman, by their answer, admit all the deeds, and answer, generally, that they know nothing of the other transactions. The answer of Wells admits the plaintiff's deeds; states his own deeds to be *bona fide*, and denies notice and fraud. Obadiah Jennings, who was examined as a witness in the cause, testified, that he prepared the first deed to Wells, and saw it executed, but says that Dorhman employed him, and he considered himself exclusively employed by Dorhman, and not as the agent or attorney of Wells, in that transaction; that it was probable he had held some conversation with Wells as to his liabilities for Dorhman, and the nature of the security to be given before Dorhman applied to him to draw the deed; and that Wells sent the deed to him in a letter, to carry to be recorded in Tuscarawas county. Dorhman informed him that Astor's agent had brought Astor's deeds and put them on *record; and Dorhman wished to give [*469 Wells the preference, and consulted him how it could be done. The witness examined the record, and knew of Astor's deeds and lien on those lands. He advised Dorhman to give Wells a deed, which, if recorded in Tuscarawas, would give him the preference; but never gave Wells any information respecting Astor's deeds.

Mr. Brush, for the appellant and plaintiff, argued: 1. That the defendant's (Wells') deed was void under the second section of the statute of Ohio, entitled "an act for the prevention of frauds," &c., which declares "that every gift, grant, or conveyance of lands, tenements, hereditaments, &c., made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, &c., shall be deemed utterly void, and of no effect." The bill shows Astor to be a creditor; the answer admits it; and Jennings proves that Dorhman informed him such was the fact. The debt being secured by mortgage upon the lands in controversy only makes the fraud more palpable. Still he was and is a creditor; and it is manifest Dorhman made the deed to Wells to defraud Astor, his creditor. 2. The recording of Astor's deeds in Jefferson county was notice to the defendant, Wells. During all the time given for recording, the lands lay in that county; it was therefore the proper place for recording those deeds, and the *recording afterwards must have rela- [*470 tion to the time when and the place where they ought to have been recorded; considering the township as part of the county for that purpose. And the recording ought to be considered as *nunc pro tunc*, yet not so as to affect any deed made and recorded prior to the making this record; and as to all subsequent, no inconvenience or injustice could be complained of, inasmuch as every purchaser would be bound to search those records for all deeds there recorded prior to the division. Using such diligence as he was bound to use, knowing the lands orig-

1.—Rev. Laws of Ohio, 321.

2.—Heath v. Rose, 12 Johns. Rep. 140; 1 Johns. Cas. 85; Vin. Abr. tit. Relation, 288.

inally lay in that county, he would have discovered Astor's deed there recorded, before any deed made to him; and ought, therefore, to be charged with notice. To what time does the act of assembly relate, when it says the deed shall be "recorded in the county in which such lands shall be situate?"¹ To the time of making and delivery of the deed, or to the time of recording? The latter would make the deed take effect from the recording, not from the delivery, as is the law. The case of *Taylor v. M'Donald's heirs* is not analogous, as there the lands did not lie in the county where the deed was recorded; and the question was upon the effect of the deed at law. 3. By accepting the deed prepared by Jennings, the defendant, Wells, has made Jennings his agent by legal implication; and notice to him is notice to his principal. Jennings acted in the transaction; advised Dorhman how to give Wells the preference; *prepared the deed; saw it executed, and at the request of Wells carried it to be recorded; and had some previous conversation with Wells as to his liabilities for Dorhman, and the nature of the security to be given. In *Lenore v. Lenore*,² the defendant "denied notice of the first articles and settlement till six months after the marriage; and denied that Norton was employed as her solicitor, though she put confidence in him, because he was concerned for her husband, and recommended by him, who assured her he (Norton) would make a handsome provision for her; and Norton assured her he had taken care to secure her an annuity of £150 a year, and did not then, or any time before, give her any notice of any former settlement." Although the defendant here has not been as candid as the defendant was in that case, yet by his artful taciturnity and scanty pleading upon the most important subject, much is to be inferred against him. In the case of *Jennings v. Moore*,³ Blincorne acted the very part Jennings has in this transaction, so far as the conduct of either is material to affect the purchaser; and so far as there is any difference, it would seem the case at bar presents much the strongest ground of equity, to set aside the subsequent incumbrancer or purchaser. Moore had completed his purchase by paying the money; Wells had not. Blincorne was a *bona fide* creditor, and had an interest in the estate of Whitlatch, the vendor, and his object was to secure an honest debt; but Wells' purchase, and *472* the sale to him, was made to *defraud and defeat a bona fide creditor. Moore was charged upon the naked fact of acceptance; but in this case, strong circumstances and inferences, beside that, implicate Wells. He most undoubtedly knew the handwriting of Jennings, his friend, and was bound to inquiry; but Jennings was careful not to mention it to him in any way. So was Blincorne, and so Norton; and the care which all have taken for the purchaser implicates him with their agency, if he will accept, they having notice, and contriving to conceal from him, is the ground of *mala fides*, and the foundation for the charge of notice against the purchaser. *Brotherton v.*

*Hatt*⁴ maintains the same principle, and is called by Lord Hardwicke "a clear authority." The same scriveners were witnesses, and engrossed all the securities, and were *quasi* agents for all the lenders. Not that the fact of agency was otherwise established than by the fact of accepting or receiving the securities, engrossed by the same scriveners, who had notice; the concealment of which by them, if the law could tolerate it, would make frauds practicable, without the means of detection. In the latter case above cited, it does not appear that Mrs. Hatt, the third mortgagee, had any better knowledge who the scriveners were than Wells in this case. If such had been the fact, that she knew who engrossed the deed for her, and such fact deemed important, it would have been noticed in the report. And it is not mentioned as a fact, or material, in the case of *Lenore v. Lenore*, where *the case is cit-[*473 ed, with approbation by the Lord Chancellor; but in all these cases they seem to have gone much upon the ground of the fraud of those third persons, and the danger of sanctioning such fraud, by deciding *stricti juris*, upon the mere ground of the laches of the first purchaser in not recording his deed within the time prescribed, or not before the second deed. And although these cases profess to go upon the ground of an agency, yet it is manifest such agency was presumed in each, and that the decision rested virtually upon the fraud which was established against persons not concerned in interest, thereby fixing the sting of disability upon the temptation to commit fraud, by whatever motive prompted or encouraged. 4. The defendant, Wells, has not shown the time of his payment, nor denied notice at or before the same, and is, therefore, chargeable with notice before his purchase was completed.⁵ After notice Wells ought to have compelled Dorhman to make payment, by applying the other quarter township, instead of indorsing more, and securing that also, thereby taking all hope from Astor. His conscience was affected before the first arrangement was completed, while he had time and opportunity to save himself, and he was bound to that course. 5. The defendant has not denied notice indirectly by implication, or notice to one whom the law will consider his agent. His answer is stiff and formal, especially with respect to the first deed to him; careful *not to say how that [*474 matter was managed; and, considering all the circumstances of this case, it must be considered as a declaration that he had no actual knowledge of Astor's deeds; not having received positive information that such were in existence. 6. Can the defendant, Wells, maintain a title, or claim the benefit of an interest, derived to him through the fraud of Dorhman and Jennings? If he can, the doctrine and principle of many cases are overturned, and we have a new law upon the subject of frauds. What is said in *Lenore v. Lenore*,⁶ is quite applicable. But in a late decision, this doctrine is fully recognized in a case like the present, though with fewer circumstances of fraud to

1.—Rev. Laws of Ohio, 318.

2.—Ambl. 438.

3.—2 Vern. 606.

4.—2 Vern. 574.

5.—*Tourville v. Nalsh*, 3 Peere Wms. 307; *Story v. Lord Windsor*, 2 Atk. 639.

6.—Ambl. 447.

justify its application.¹ The cases cited to the third point are considered as applicable here; the *malæ fides* of the actors in those cases where the ground of considering them agents by relation; the purchaser accepting his deed from polluted hands, makes their acts and knowledge his own. Sir Samuel Romilly (*arguendo*), in *Huguenin v. Basely*,² says, "though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case far the strongest that has yet occurred upon this ground alone, from its infinite importance to [475*] community." "And the chancellor thereupon lays down the doctrine as well established, "that interests gained by the fraud of other persons cannot be maintained." It would be infinitely mischievous if they could, and as there said, "would be almost impossible ever to reach a case of fraud." The genus, or kind of fraud, seems not to be so much regarded as that such is the character of the transaction.

Mr. Doddridge, contra. 1. The registry act, and whatever other statutory regulations each sovereign society may adopt for the transfer of titles to real property, are matters of positive institution; the English registry act and statute of enrollments, however, have furnished precedents which in one way or another have been followed up in each state; and the decisions upon them have been so uniform as to have become quite familiar. The attempt here to impeach a deed innocently obtained, on the ground that it was fraudulently intended by the grantor, is quite novel, and as dangerous as it is novel. It proceeds on the ground that the clause in the state law is to be expounded in the disjunctive, and that "or" is not to be expounded so as to mean "and." The first objection to this interpretation is, that it supposes the word "made" can be satisfied by the act of a vendor alone; and the word "obtained," in like manner, by the single act of the vendee, which is impossible. No deed can be made without the assent of two persons, at least. Deeds take effect upon delivery; which is never effected without the concurrence of the person who receives. The second objection is, [476*] that it puts *to hazard the interest of every purchaser; as every purchaser must depend for his security, not upon his own innocence, but upon the continual integrity of the vendor; who, if at any time, and for any reason, he can be brought to confess his own fraudulent intentions, in answer to a bill against him and his vendee, can ruin the latter. A third and decisive objection is, that the statute of frauds, if it is susceptible of the complainant's interpretation, repeals the registry act, which is not pretended. The registry act then in force in Ohio, provided, that all deeds executed out of the state "should be recorded in the county in which the lands, tenements, and hereditaments, so conveyed or affected, shall be situate, within one year after the day on which

such deed or conveyance was executed; and unless recorded in the manner, and within the time aforesaid, shall be deemed fraudulent against any subsequent *bona fide* purchaser, without knowledge of the existence of such former deed of conveyance." Now, if the act of Dorhman, in giving his first deed to Wells, is fraudulent, as being made with intent to postpone Astor to him, and for that reason is void, then the registry act is effectually done away; because no man, under any circumstances, can make a second sale by concealing a former one, without being guilty of as much fraud as Dorhman at the least. His case was a hard one; he had two creditors, one of whom must suffer, and his wishes were to prefer one of them. He sought no benefit by this act to himself, nor can his conduct be as censurable as if he were selling to put money into his own pocket. If the plaintiff be right, *the [477 parties to a first and second sale stand as at the common law. 2. The doctrine of constructive notice is entirely exploded. The term never did convey the true meaning of the courts. There is something almost absurd in the idea of proceeding upon a question of fraud by construction. The cases upon this subject, only proceed upon two principles: first, actual notice to the party; and, second, to the agent of the party. The notice arising from a suit pending; a registry or any public record, is not a matter of construction. The *lis pendens*, the register or record, furnish such irresistible evidence of notice in fact, that the party is not at liberty to urge the contrary; and the relief is granted on the ground of notice in fact. Nor is this an arbitrary rule. All men are parties to the public proceedings of the courts of justice, and presumed to be present at them; and, also, parties to every legal registry, or other public record; what the laws require to be done, and is done according to those laws, they are, in like manner, parties to, and are supposed to be acquainted with; and because the laws have provided those public documents for the security of every man, it is his fault if he sees them not, and, therefore, he is adjudged to have seen them in fact. But this reason can have no application to the proceedings of a court not of competent jurisdiction, nor to registries and records not made according to law. In respect to proceedings in courts of incompetent jurisdiction, or irregular records, they are only notice, if, in fact, they have been heard or seen by the party, so as to *put him upon inquiry.³ [478 It is believed that no decisions have been had upon this statute; but the statutes of Kentucky and of Pennsylvania are like that of Ohio; and in the case of *Taylor v. M'Donald's heirs*,⁴ the court in Kentucky decide that a record made, not in the proper county, is not of itself notice. The court say, "the law requires the deed shall be recorded, not only within the limited time, in order to be valid against a subsequent purchaser without notice, but also in the county where the land lies. This provision is obviously intended to enable persons to trace the legal title with the industry and attention essential to a compliance with the act." That case is stronger than is necessary for our purpose; be-

1.—Hildreth v. Sands, 2 Johns. Ch. Rep. 35, and the cases there cited.

2.—14 Ves. 238.

Wheat. 4.

3.—Sugd. Vend. 470, and the cases there cited.

4.—2 Bibb. 420.

cause in that, the deed was recorded in time, but in the wrong county; and in ours, the party has failed in respect of both time and place. The case of *Heister's lessee v. Furtner*,¹ is an authority to the same effect; and also that a record made within the time, and within the proper county, is void, if made upon less proof than the law requires. An illegal registry, then, is not proof of notice. Nor does the doctrine of relation apply. All the cases cited on the subject of relation prove, that the act by which a transaction is completed has relation to the beginning; as, for instance, the presentation of a copyhold to the surrender; but that this relation is a legal fiction, operating between the parties only, and without any effect upon third persons or their rights. But the use made of this fiction, whereby an illegal registry is made so to relate, either to the date of the execution or proper time of registering a deed, as to affect the estate of a third person, is an invention of such modern date, as to have acquired, as yet, very little authority in this country. If the obvious policy of the law, and the authority of the decisions referred to, are satisfactory, then the case of Wells is the very strongest that can be imagined. Suppose he had gone to the registry to look for the record of any conveyance of the lands in question, who could suppose he would examine the entries upon it after the date of the separation of the counties, for a conveyance of lands in Tuscarawas? 8. It is said that Wells does not show himself to be a complete purchaser without notice, because he had not made full payment. The law is admitted to be as stated in respect of a purchase and sale; but the reason given for it has no application here. The reason is, that when the second purchaser receives notice of the first he should stay his hand—refuse a deed, or withhold payment; and because this is in his power, it is his moral duty to do it. But in the case of Wells it was otherwise: he was already accountable to the bank for the whole amount. This point has been determined in a case of precisely the same nature as to a bank indorsement.² The rule, that notice to an agent is notice to his principal, and, consequently, his fraud affects his principal as much as if committed by himself, is not disputed. But ^{480*} the rule is explained and qualified, *in order to give security to the party affected by it. The agent must be employed by the party—in the same transaction. Notice to the agent is not sufficient, unless acquired by him in the course of the transaction in which he is employed; notice otherwise acquired will not affect his principal. A general agency is not sufficient: it must be in the particular case; and the employment must be to purchase, or to make or treat of terms—not merely to draw a deed. If the agent is employed by one of the parties, notice to him shall affect that party only; where both employ him, his fraud shall attach to both.³ And it is only necessary to deny the agency, and all circumstances from which fraud may be inferred, where those matters

are charged in the bill.⁴ The propriety of the application of the general rule as to agents, in the cases of *Brotherton v. Hatt*,⁵ *Jennings v. Moore*,⁶ *Leneve v. Leneve*,⁷ has been questioned. In each of these cases, the fact of agency is charged with all the circumstances of the transaction, from which that fact could be inferred. As those three cases contain nearly the whole law upon the subject of notice to an agent, it is only necessary to show that neither of them furnish a precedent to affect Wells. In *Leneve v. Leneve*, the agent was defendant, and he denied his agency, and admitted notice. The other only denied notice to herself; and the ground of decision is, that she admits enough in her answer to make Norton her ⁴⁸¹ agent. In *Jennings v. Moore*, one person was treating of a purchase for himself, and during the transaction received notice; and perfected the contract in the name of a third person, who accepted of it without notice. The authority of this decision has been doubted, but with very little reason. In *Brotherton v. Hatt*, the agents were scriveners. They kept an office, and their profession was to drive bargains, effect loans, and perfect securities. The court adjudged them to be agents, and that notice to them was notice to their principals; not because one of the parties had consulted them, and procured them merely to write a deed which another accepted. By the term "scrivener," something more is meant than a conveyancer. The reason for the decision is, that all the loans were effected by them at their office, and all the securities also; and from the nature of their employment, the court decided them to be the agents of each party in effecting the loans and the securities: but whether the court decided these facts upon proper testimony or not, is immaterial. The principle is, that notice to him who is employed by both parties, to effect a loan, and prepare a security, is notice to both parties. The relation of agent and principal cannot exist without the consent of the principal. In every case cited, and in all others, the fraud is charged, as it happened, either to the principal or his agent, and in the latter case the agent is made a defendant. Agency or not, is a fact which, if stated and denied, must, like every other fact, be proved. In our case, all that is charged is denied, and no part of it is proved.

⁴⁸² **Mr. Brush*, in reply, insisted, that ⁴⁸² the construction of the act of fraudulent conveyances, contended for on the part of the defendants, could not be supported. It was undoubtedly competent for the legislature to say, such instruments should be void for fraud, whether the donee or grantee be party in the fraud or not, and they have so said. Taking the entire section together, it is sensible only as it reads; but by altering "or" to "and," a new meaning is interpolated. The rule upon the subject is, that such construction shall be given as will give effect to every word, if possible, that none may have been employed to no purpose. The construction, moreover, is arbitrary; contrary to a very plain text; substituting one word for another, in a law which is neither

1.—2 Binney, 10.

2.—Lyle v. Ducomb, 5 Binney, 585.

3.—Lowther v. Carlton, 2 Atk. 180; Warwick v. Warwick, 3 Atk. 291, 294.

4.—Newman v. Wallace, 2 Bro. Ch. 143.

5.—2 Vernon, 574.

6.—Ib. 609.

7.—2 Amb. 496.

ambiguous nor doubtful; not for the purpose of suppressing fraud, and advancing the remedies, but for the purpose of restraining the operation of a remedial act. A deed void for fraud is not protected by the registry act, which relates only to purchasers, and never was intended to affect creditors. It has never received such a construction in the state, or elsewhere, nor will the language warrant it. Speaking of the deed of a prior purchaser, it says, "unless recorded in the manner, and within the time aforesaid, shall be deemed fraudulent against any subsequent *bona fide* purchaser, without knowledge of the existence of such former deed of conveyance." There cannot be a subsequent purchaser, unless there had been a former one. Besides, the registry act was passed in 1805. The statute of frauds and perjuries, protecting creditors against the frauds of their debtors, in **483*** 1810, five years afterwards; "and must be considered as repealing so much of the former act as comes within its provisions. If it did affect creditors in any way, *quoad hoc* it is repealed; leaving it to operate as between purchasers, upon a first and second sale, the first not a creditor. Another pretension set up for Wells is, that he also is, or was, a creditor, and that Dorchman might prefer which he would. If this be so, that provision in favor of creditors in the statute of frauds is defeated, as it would be in the power of a debtor to evade it at pleasure. If it be law, which we feel no disposition to controvert, that in some cases, a debtor may give one creditor a preference over another, yet this privilege no longer remained with Dorchman. He had exercised it. He had made his election to give Astor the preference, by conveying the lands to him, as it was competent for him to do, most assuredly, when it does not appear that, at that time, he owed anyone else. This privilege must be exercised fairly, by giving that which is his own, not that which belongs to another, and which he may happen to hold in trust for that other. There is no law which authorizes a trustee thus to give away the trust estate, by advancing or preferring one creditor to another. But Wells, at that time, did not stand in the relation of creditor to Dorchman. He had indorsed, but it does not appear he had paid any money, or that there would have been any necessity for him to pay, if, after express notice, he had not extended his indorsements, and involved the whole of Dorchman's estate, as if with the design which Dorchman had already manifested, of cutting **484*** Astor off "altogether. As is said in *Tourville v. Naish*,¹ he should have filed his bill *quia timet* against Dorchman, and pursued his remedy upon the other quarter township, released by Astor, and whatever other property could be found. There is nothing in the case which shows that Dorchman had received the whole \$5,000, before notice to Wells, nor what part he had received. It lies upon Wells to make this appear clearly, for if any part remained unpaid, it might have been stopped, and the payment enjoined. It is said, "if the plaintiff be right, parties to a first and second sale stand as at common law." But this is not a case merely between purchasers at a first and second sale. To this point the plaintiff is con-

sidered a creditor; and it stands as a case between a creditor and purchaser of the debtor. At common law, such a conveyance would be avoided. The statute of Elizabeth is in aid of the common law, extending the remedy to subsequent creditors, superadding the sanction of penalties. It declares "deeds made in fraud of creditors void." And although it inflicts penalties, still, in England, it is viewed as remedial, "made against frauds, for the public good, and to be taken by equity." Even if the doctrine of constructive notice were admitted to be no longer a rule of equity, still this admission would only raise a dispute upon an abstract proposition, whether the notice we rely on be actual or constructive. It is, therefore, a disagreement as to the name. *Under [**485** what denomination have the law writers classed it? is the question. If actual, then we say Wells had actual notice. If constructive, then he had only constructive notice. We have only to show Wells had such notice as the law charges him with, to avoid the danger of sanctioning fraud, and to close the avenues of injustice, and fraudulent speculation. According to the opposite argument, a suit pending, or a register of a deed, are notice in fact. They are facts of record, and notice to all persons in the same community; but we must be permitted to disbelieve that every person has seen them in fact, and, therefore, knows what they contain. Yet every person is bound by this knowledge, because they are made public, and accessible to all; constructive knowledge or notice, being by the law charged upon the party, because he might have known; the law having done its part by making such public record, and declaring all persons bound by it, whether they know it or not. It is a well-established principle, that the defendant must unequivocally deny all notice, even though it be not charged, and every fact and circumstance from which it can be inferred, in order to be considered a *bona fide* purchaser.³ This the defendant, Wells, has not done. The case of *Taylor v. M'Donald's heirs*⁴ is not analogous, as there the lands never were included in the county where the deed was recorded; and the question was upon the effect of the deed at law.

*JOHNSON, J., delivered the opinion [**486** of the court: The questions in this case are partly of law, partly of fact. The bill charges the defendant with express notice of the complainant's previous mortgage, and with holding the land purchased under a secret trust for the legal representatives of Dorchman, the mortgagee. Both these facts the answer denies; and as there is no evidence to sustain them, they must be put out of the case.

The bill then proposes to affect the defendant, Wells, with constructive notice; and if it fails there, then to set aside the deed to Wells as absolutely void under the express provision of a law of the state of Ohio.

Obadiah Jennings, who drew the mortgage

2.—5 Co. Rep. a, Gooch's case, 1 Foul. Eq. 270, 282.

3.—Frost v. Beekman, 1 Johns. Ch. Rep. 302; Frost v. Beekman, 1b. 566; Murray v. Finster, 2 Johns. Ch. Rep. 155.

4.—2 Bibb, 420.

1.—3 Poore Wms. 307. Wheat. 4.

from Dorhman to Wells, was fully apprised of the existence of Astor's mortgage, and acted in concert with Dorhman expressly to defeat Astor's prior lien, and give precedence to Wells. The advantage of which they proposed to avail themselves for this purpose, was a supposed mistake committed by Astor as to the legal office for recording his deed. The land was originally comprised within the limits of Jefferson county. But before the recording of the deed, the county of Tuscarawas was taken off from Jefferson, and the land lay in that part of Jefferson which thus became Tuscarawas county. The law of Ohio requires that the recording shall take place in the county in which the land lies.

The first question is, was this a legal recording under the laws of Ohio, so as to preserve the priority which dates gave to Astor? The **487*** office of Jefferson county was the legal office at the time of executing the deed: did it continue to be so at the time of recording it? This can only be decided by considering the object of the law. It was to give notice to subsequent purchasers—to place at their command the means of investigation, to which, if they did not resort, they had only to blame their own indolence or folly. But no one in search of such information respecting lands situate in Tuscarawas county would be expected to search the records of Jefferson subsequent to the date of the separation. He would naturally refer to the records of the new county to its origin, and from that time pursue his inquiries among the records of the county in which it was originally comprised. And, therefore, we are of opinion that the recording of Astor's deed was not sufficient either to preserve its legal priority or give it the equity resulting from constructive notice.

But it is contended that Jennings was the mutual agent of both mortgageor and mortgagee in the creation of Wells' mortgage, and, therefore, the notice to Jennings was notice to Wells. Here, again, the complainant's case is unsupported by the evidence. On the law there could be no doubt, if the facts were such as the complainant contends. But it is positively denied both by Wells and Jennings; and if Jennings was the agent of Dorhman only, his knowledge could produce no other effect on the rights of Wells than if it had been concealed in the breast of Dorhman. And this leads to the final question in the case. As the deed really was "made" to defraud Astor, does that circumstance alone, under the laws **488*** of Ohio, destroy its validity, without reference to the knowledge or connivance of the mortgagee. And this again must be decided by referring to the object of the law. The words of the statute would literally embrace the case. But who are the objects of the law? Not creditors only, but subsequent purchasers. And to give it such a construction as would expose a *bona fide* purchaser without notice to imposition, in order to protect creditors, could never comport with the intent of the law.

Upon the whole, we are of opinion that there is no error in the decree below, and that the same be affirmed with costs.

Decree affirmed with costs.

Cited—2 Mason, 290.

[LOCAL LAW.]

M'ARTHUR v. BROWDER.

The rule which prevails in Kentucky and Ohio, as to land titles, is that, at law, the patent is the foundation of title, and neither party can bring his entry before the court. But a junior patentee, claiming under an elder entry may, in chancery, support his equitable title.

A description which will identify the lands is all that is necessary to the validity of a grant: but the law requires that an entry should be made with such certainty that subsequent purchasers may be enabled to locate the adjacent residuum.

An entry for 1,000 acres of land in Ohio, on Deer Creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line on each side of the creek 400 poles, thence up the creek 400 poles in a direct line, thence from each side of the given line with the upper line at right angles with the side line for quantity;" held, to be a valid entry.

Distinction between amending and withdrawing an entry.

APPEAL from the Circuit Court of Ohio.

The bill in equity filed in this cause by the appellant, M'Arthur, states that George Mathews, on the 19th of September, 1799, made the following entry with the surveyor of the Virginia army lands:

"No. 3717; 1799, September 19th, George Mathews, assignee, enters 1,000 acres of land, on part of a military warrant, No. 4795, on Deer Creek, beginning where the upper line of Ralph Morgan's entry, No. 3665, crosses the creek, running with Morgan's line on each side of the creek 200 poles; thence up the creek 400 poles on a direct line, thence from each side of the given line with the upper line at right angles with the side lines for quantity."

That afterwards the entry of Ralph Morgan was withdrawn; and that in consequence George Mathews made the following entry: "No. 3717; 1801, October 26th. George Mathews, assignee, enters 1,000 acres of land on part of a military warrant, No. 4795, on Deer Creek, beginning at two elms on the southwest bank of the creek, upper corner to Henry Mossies' survey, No. 3925, running south 45 west 120 poles, north 65 west 172 poles, north 17 west 320 poles, north 76 east 485 poles, thence south 1 west 292 poles, thence to the beginning." The bill charges, that the last entry was not intended as a new one; but only as an amendment or explanation of the first. This last entry was surveyed the 7th of *Octo- [**490** ber, 1807. And upon an assignment to the complainant, the land embraced in the survey was patented to the plaintiff, the 16th of July, 1806.

The title of Browder, the respondent, is stated in the bill as follows:

That on the 20th of July, 1798, Nathaniel Randolph made the following entry: "No. 3310; July 20, 1798. Nathaniel Randolph, assignee, enters 300 acres of land on three military warrants, Nos. 4165, 4250, and 4664, on the lower side of Deer Creek, beginning at a walnut and two elms, cornered 5 poles from the bank of the creek, running south 61 west 200 poles to two white oaks, and two hickories, thence north 7 west 234 poles, thence north 61 east 200 poles, thence to the beginning." That the last entry was surveyed for Randolph, and the oldest patent obtained by him, which he

Wheat. 4.

conveyed to Browder, who has recovered upon an ejectment.

By the answer and exhibits, it appears that Randolph's survey was made the 1st of August, 1798; that a patent was granted to Randolph, the 29th of September, 1800, who conveyed to the respondent. The respondent, Browder, having brought an action of ejectment, recovered the possession of the land in question; and the appellant, M'Arthur, filed this bill in equity, praying for an injunction; a conveyance of so much of the land claimed by the respondent as interferes with his claim; and for general relief. The bill was dismissed by the Circuit Court, and the cause brought by appeal to this court.

This cause was argued by *Mr. Scott* and *Mr. 491** *Brush* for the appellant, and by the *Attorney-General* and *Mr. Doddridge* for the respondent.

MARSHALL, Ch. J., delivered the opinion of the court:

In this case, the appellee claims under the elder grant founded on the elder entry. Consequently, if his entry be valid, the bill of the appellant cannot be sustained. But the entry is so defective in description that it was necessarily abandoned; and the appellee relies on his patent; anterior to the emanation of which, the appellant contends that the land was appropriated by his entry. The validity of this entry, also, is denied. But before we examine the objections made to it, we must consider those which have been urged against the jurisdiction of this court as a court of equity.

The rule which prevails both in Kentucky and Ohio is, that, at law, the patent is the foundation of title, and that neither party can bring his entry before the court. In consequence of this rule, it has been also well settled that the junior patentee, claiming under an elder entry, may, in chancery, support his equitable title, and obtain a decree for a conveyance of so much of the land as, under his entry, he may be entitled to. But the general principle is supposed to be inapplicable to this case, because the words of the entry are introduced into the grant; and if they were too vague to appropriate the land when used in the entry, they must be too vague to appropriate it when used in the grant, which is a *492** question triable at law, and which was tried in the ejectment brought by the appellee for the land.

Were the fact precisely as stated, it could not support the argument which is founded on it. When lands are granted, a description which will identify them is all that is necessary to the validity of the grant. But identity is not all that is necessary to the validity of an entry. The law requires that locations should be made with such certainty that subsequent purchasers may be enabled to locate the adjacent residuum. All grants are founded on surveys. They recite the surveys, and all that is required in an ejectment is to prove that the land claimed is that which was surveyed. But more is required in a contest respecting an entry. Nothing is more common than for courts to declare an entry void for uncertainty, notwithstanding the clearest proof

that the land claimed, and that located, are the same.

There is, then, nothing in the resemblance between the words of the grant and of the entry to distinguish this from other cases, in which the party claiming under the first good entry comes into chancery to obtain a conveyance of lands held under a senior patent. We proceed, then, to examine the entry under which the appellant claims. That entry is made for 1,000 acres of land on Deer Creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line on each side of the creek 200 poles, thence up the creek 400 poles on a direct line, thence from each side of the *given line, with [*493 the upper line at right angles with the side lines, for quantity."

That entries, which contain such descriptive words as clearly to designate the place where the land lies, shall, with respect to their more particular locative calls, be supported; if they can on fair construction be supported, is a principle which pervades the whole of that curious and intricate fabric which has been erected by the decisions on land titles in Kentucky, and has been taken as a model for those in the military district of Ohio. If a subsequent locator, brought to the spot where the lands lie, with the location in his hand, might, by the application of the rules which the courts have established, know how to place the entry so as to enable himself to locate the adjacent residuum, the entry must be sustained.

In this case it is admitted that the beginning is described with sufficient certainty. The place where the upper line of Ralph Morgan's entry crosses Deer Creek is ascertained. From that beginning the entry calls to run "with Ralph Morgan's line on each side of the creek 200 poles." It is said to be entirely uncertain whether this line is to be 200 poles on each side of the creek, so as to amount to 400 poles, or to be only a line of 200 poles altogether. Did this ambiguity really exist in the words themselves, it is entirely removed by the other parts of the location. The entry is made for 1,000 acres of land, and cannot, on any construction, be made to exceed 500 acres, unless the base line be 400 poles. We have then a given line of 400 poles. The entry then proceeds, "thence up the [*494 creek 400 poles on a direct line." The plain meaning of these words is, that the land lies up the creek, so that a direct line of 400 poles will reach its upper boundary. If the location stopped here, adding only "for quantity," the decisions of Kentucky would establish it as a good entry for a square formed on the upper side of the base line of 400 poles, which would contain 1,000 acres of land. But the entry proceeds, "thence from each side of the given line, with the upper line at right angles with the side lines, for quantity." This part of the description has been said to produce uncertainty, because two lines are given, and a subsequent locator could not tell to which reference was made.

If it would make any difference whether the base line or the line up the creek was taken as the given line, this might produce some difficulty; but if the entry must cover precisely the same ground, whether the one or the other be taken as the given line, it can make none.

Let the base line be considered as the given line. It is plain that the words *from each side* must mean *from each end*, because the land is to lie up the creek; whereas, if you proceed from each side, it would lie partly down the creek. The line, too, which is to give the quantity with the side lines is the upper line, and that is removed from the base line the distance necessary to include the quantity of land required. As this quantity is to be inclosed from the whole entry taken together, within lines which form a square, the entry must be understood to require that the side lines should be drawn from the ends of the base line, 495*] *and the inaccuracy of the expression could not mislead.

But the entry is understood to refer as the given line to that which is last mentioned; that is, to the line of 400 poles, which is perpendicular to the base. You are then carried up the creek 400 poles in a direct line from the base line. From each side of this line you are carried "with the upper line at right angles with the side lines," until you get 1,000 acres. This construction gives full effect to every word of the entry, and gives a square which will contain 1,000 acres. It is, we think, the natural construction. The entry would be so understood by every subsequent locator. On any construction, then, which can be given to the words, the entry must not only have the same form, but must cover precisely the same land.

If, then, the original entry had never been amended, there could be no doubt of the right of the party claiming under it. This leads to the inquiry, whether the amendment affects this right.

The distinction between amending and withdrawing an entry is well established, and completely understood. An amended entry retains its original character, so far as it is unchanged by the amendment. So far as it is changed, it is a new entry. The survey in this case, is understood to conform precisely to the amended entry; and it contains a part of the land comprehended in the original entry. So far as respects the land within the appellee's patent, which is comprehended by the original entry, the amended entry, and the survey, we think 496*] the *appellant was entitled to a decree, and, consequently, the Circuit Court erred in dismissing his bill. The decree is to be reversed, and the cause remanded to the Circuit Court, with directions to enter a decree conforming to this opinion.

DECREE.—This cause came on to be heard on the transcript of the record of the court of the United States for the seventh circuit, and district of Ohio, and was argued by counsel. On consideration whereof, this court is of opinion that the plaintiff in the Circuit Court had a good title in equity to so much of the land contained in the defendant's patent as is comprehended in the original entry made by George Matthews, in September, 1799, and also in his amended entry, and in his survey; and that the decree of the said Circuit Court, dismissing the bill, is erroneous, and ought to be reversed, and it is, accordingly, reversed; and this court doth farther direct and order, that the said cause be remanded to the said Circuit Court, with directions to enter a decree, directing the defendant

to convey to the plaintiff so much of the land contained in his patent as is comprehended in the original entry, and also in the amended entry and survey, on which the grant of the plaintiff was founded.

Cited—14 Pet. 412; 13 Wall. 86.

*[PRIZE.]

[*497

THE NEUSTRA SENORA DE LA CARIDAD. BAGES ET AL., Claimants.

A cruiser, equipped at the port of Carthagena, in South America, and commissioned under the authority of the province of Carthagena, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo belonging to the subjects of the king of Spain, and put a prize crew on board; and ordered her to proceed to the said port of Carthagena; the captured vessel was afterwards fallen in with by a private armed vessel of the United States, and the cargo taken out and brought into the United States for adjudication as the property of their enemy. The original Spanish owner, and the prize-master from the Carthagonian cruiser, both claimed the goods. The possession was decreed to be restored to the Carthagonian prize-master.

War having been recognized to exist between Spain and her colonies by the government of the United States, it is the duty of the courts of the United States, where a capture is made by either of the belligerent parties without any violation of our neutrality, and the captured prize is brought innocently within our jurisdiction, to leave things in the same state they find them; or to restore them to the state from which they have been forcibly removed by the act of our own citizens.

The Spanish treaty held not to apply to the above case, as the court could not consider the Carthagonian captors as pirates, and the capture was not made within the jurisdictional limits of the United States; the only two cases in which the treaty enjoins restitution.

APPEAL from the Circuit Court of North Carolina.

This was a prize allegation against certain goods, taken by a private armed vessel of the United States, The Harrison, during the late war with Great Britain, *out of a ship [*498 called The Neustra Senora de la Caridad. A claim was interposed by Salvador Bages, and others, Spanish subjects, domiciled at St. Jago, in the Island of Cuba, alleging that the ship was a Spanish ship, and with the goods, their property, was captured on the high seas, by an armed vessel cruising under the pretended colors of Carthagena, the commander of which produced no commission, nor did the claimants know, or admit, he had one, and who detained the Caridad as prize, and put a prize crew on board. That having separated from the capturing vessel, they were met with and boarded by the privateer Harrison. That the said privateer captured and took possession of the Caridad, and the captors unladed the cargo from on board of her, into the Harrison, and having brought the same into the port of Wilmington, North Carolina, proceeded against it as prize of war.

A cross claim was filed by Pedro Brugman, master and commander of the Carthagonian armed schooner Neustra Senora de la Popa, in behalf of himself, and others, the owners of said privateer, to the goods thus proceeded against

Wheat. 4.

as prize of war by the commander, officers and crew of the Harrison. This claim pleaded that the goods were not at the time of the proceedings, nor at the time of capture by the Harrison, the property of any British subjects, or of any persons domiciled in the dominions of Great Britain, nor of any of the enemies of the United States, but that the same then were, and yet are, the property of the owners, officers and crew of the *La Popa*, from whose lawful possession **499*** the same *had been violently and wrongfully taken, on the high seas, by the Harrison, as before mentioned. That the *La Popa*, having been duly commissioned by the sovereign authority of the independent state of Carthagena, and furnished with letters of marque and reprisal, authorizing her to capture, on the high seas, the property of the enemies of said state, left the port of Carthagena in the month of December, 1814, on a cruise. That on the 21st of January, 1815, while cruising off St. Jago de Cuba, the said privateer *La Popa*, commanded by the claimant, seized and captured the ship *La Caridad*, sailing from Jamaica to Cuba, loaded with dry goods, and belonging, with the cargo, to the enemies of the said independent state of Carthagena, as the papers on board, and the information of the master and crew, convinced the claimant to be the fact. That the claimant put a prize-master and crew on board the captured vessel, and ordered her to proceed to the said port of Carthagena. That the said prize-master and crew retained the possession for four days, and while they were proceeding to Carthagena, the *Caridad* was forcibly taken by the Harrison from their possession, the goods taken out, and brought into the port of Wilmington, as aforesaid.

An order was made by the court below, that the claimant, Pedro Brugman, should be allowed to make further proof, that the commission which he produced, and under which he alleged the original capture to have been made, was issued by the authority acting as the sovereign authority of the United Provinces of New Grenada.

500* *At the hearing it was proved, by the testimony of witnesses, that the *La Popa* belonging to and had been actually fitted out in Carthagena, one of the said United Provinces of New Grenada; that the commission produced by the commander was in the usual form in which letters of marque were issued by the sovereign authority of that province; that the seal affixed to the same was the seal used at the time by those who exercised the sovereign authority of Carthagena to authenticate the commissions by them granted; that the officers of state by whom the same was signed, were at the time, and had been for some time before, respectively, the Governor and the Secretary of War, and the Marine of the said province; that the witnesses were acquainted with the handwriting of the said governor and secretary, the witnesses having often seen them write as well as seen their public and acknowledged writings, and verily believed the same to be their signatures. And the commission was also proved to be genuine, and to have regularly issued, by the certificates and declarations of the officers of state of the Province of Carthagena. The original capture by the *La Popa*, the retaking by the Harrison, and the proprietary interest of the original

Spanish owners of the goods were all fully proved.

The Circuit Court decreed, at May term, 1818, the goods to be restored to the possession of Pedro Brugman; from which sentence an appeal was taken to this court by the claimant, Salvador Bages, for himself and the original Spanish owners.

The cause was submitted without argument.

*JOHNSON, J., delivered the opinion [**501** of the court:

This case arose out of a capture made in the late war. The *La Popa*, a commissioned cruiser of the Province of Carthagena, had made prize of the *Caridad*, a Spanish vessel, in a voyage from Jamaica to Cuba. The American private armed vessel Harrison fell in with the *Caridad*, then in possession of the prize crew of the *La Popa*, and suspecting her cargo to be British, took possession of it, and transhipped it into their own vessel. On the arrival of the Harrison in a port of North Carolina, the cargo was claimed both by the *Caridad* and *La Popa*, and finally restored to the *La Popa*.

This is an appeal from the decision of the Circuit Court of North Carolina, made by the original Spanish owner, and the case has been submitted on the evidence and the grounds taken in the argument below.

There is no doubt that the property was Spanish, nor that the privateer *La Popa* was commissioned as a cruiser, whilst the Province of Carthagena had an organized government; and there is the fullest evidence that her armament and equipment was unaffected by any charge of having been made in violation of our laws.

The only question in the case is, whether an original Spanish owner is entitled to the aid of the courts of this country, to restore to him property of which he has been dispossessed by capture, under a commission derived from the revolted colonies? and this question is considered, by this court, as having *been [**502** fully decided by the principles assumed in the case of *The United States v. Palmer*,¹ at the last term, and by the decisions in the cases of *The Estrella*² and *Divina Pastora*³ at the present term.

War notoriously exists, and is recognized by our government to exist, between Spain and her colonies. This is an appeal to the highest of all tribunals on a question of right. No neutral nation can act against either, without taking part with the other in the war. All that the law of nations requires of us, is strict and impartial neutrality. And no friendly nation ought to demand of the courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them; much more to restore them to that state from which they have been forcibly removed by the act of our own citizens. The treaty with Spain can have no bearing upon the case, as this court cannot recognize such captors as pirates, and the capture was not made within our jurisdiction.

1.—3 Wheat. 610.

2.—*Ante*, p. 296.

3.—*Ante*, p. 52.

tional limits. In those two cases only does the treaty enjoin restitution.

Decree affirmed with costs.

Cited—2 Cliff. 427; 5 Mason, 471; 7 Otto, 617.

503*]

*[COMMON LAW.]

WHEATON v. SEXTON'S LESSEE.

A sale, under a *fi. fa.* duly issued, is legal as respects the purchaser, provided the writ be levied upon the property before the return day, although the sale be made after the return day, and the writ be never actually returned.

A deed, made upon a valuable and adequate consideration, which is actually paid, and the change of property is *bona fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors.

ERROR to the Circuit Court for the District of Columbia.

This was an action of ejectment brought in the court below by the defendant in error, Sexton, against the plaintiff in error, Wheaton, to recover the possession of a parcel of ground in the city of Washington, being lot number 17, in square 254, containing 8,254½ square feet, with the buildings thereon. At the trial, the plaintiff produced and read in evidence to the jury, a deed of bargain and sale of the premises from John P. Van Ness and wife, and C. Stephenson, to Sally Wheaton, the wife of the defendant in ejectment; and a deed from one Watterston to the same, of the same premises; a writ of *fi. fa.* against the goods, chattels, lands and tenements of the defendant, issued from the court below upon a judgment obtained by Sexton, against Wheaton, with a return thereon by the marshal: "December the 30th, 1815, 504*] sold the real property *in square 254 to Francis F. Key, Esq., for three hundred dollars; sales of real property in square 258, countermanded by said Key; sold personal property," &c. The writ was never actually returned, but for the first time produced by the marshal in court at the trial of this cause. The sale took place after the return day mentioned in the writ. The plaintiff also produced and read in evidence a deed from the marshal to the plaintiff in ejectment, dated 30th May, 1816—he having been the highest bidder—by Key, his attorney. The defendant's counsel prayed the court to instruct the jury that the lessor of the plaintiff could not recover. The court refused to give such instruction, but instructed the jury, that if they should be of opinion, from the evidence, that the writ of *fi. fa.* was levied by the marshal, upon the property in question, before the return day of the writ, it was lawful for him to sell the same under and by virtue of said writ, and that the facts respecting the said sale might be proved by parol. To which instruction the defendant excepted. The defendant, to show the legal title of the premises to be in one E. B. Caldwell, and not in the lessor of the plaintiff, gave in evidence a deed from the defendant in ejectment to said E. B. Caldwell, made and executed on the 23d of December, 1811, conveying

the premises to the said E. B. C., reciting the deeds from Van Ness, &c., and that it was understood at the time of making those deeds that the property should be absolutely for the sole use of said Sally Wheaton, &c.; but it had been apprehended and suggested that the said Joseph Wheaton might *have a [*505 life estate therein to carry into effect the original intent of the conveyances, and for the consideration of five dollars, paid to him by E. B. Caldwell, the said Joseph Wheaton conveys to him all his right, title, and interest, in trust for the use of said Sally Wheaton. Whereupon the court instructed the jury, that if the jury should be of opinion, from the evidence, that the said deed was made by the said J. W. without a valuable consideration therefor, or was made by him with intent to defeat and delay, or defraud his creditor, the said Sexton, of his debt aforesaid, then the said deed was void in law as to the said Sexton; to which the defendant excepted. The jury found a verdict, and the court rendered a judgment for the lessor of the plaintiff. The cause was then brought to this court by writ of error.

The cause was submitted without argument.

JOHNSON, J., delivered the opinion of the court:

The suit below was ejectment, and the defendant in this court recovered under a title derived from a sale by the marshal of this district. The marshal's deed conveys the life estate of Wheaton in the lands in question. And the plaintiff below proved the title in the defendant's wife, under conveyances executed after marriage.

The defense set up was a conveyance executed by Wheaton, to a trustee, for the sole and separate use of his wife, and her heirs, and the deed purports to have been executed in consideration of, and to carry into *effect, [*506 an original intention in the parties—that the conveyances to his wife should enure to the same uses, although the conveyances in law operate otherwise. But there is no other evidence of this fact than what is contained in the deed, and it was executed but two days before the judgment. At the trial, two bills of exception were taken; the first of which brings up the question, whether a sale by the marshal, after the return day of the writ, was legal. The court charged that it was, provided the levy was made before the return day. And on this point the court can only express its surprise that any doubt could be entertained. The court below were unquestionably right in this instruction. The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return.

The second bill of exceptions brings up the question, whether the deed to Caldwell, in trust for Mrs. Wheaton, was not fraudulent and void as against creditors. In ordinary cases, a voluntary conveyance of a man to the use of his wife, when circumstanced as Wheaton was,

Wheat. 4.

would unquestionably be void. But it is contended that, in this instance, a court of equity would have decreed Wheaton to make the conveyance he did execute, and, therefore, it was not a voluntary conveyance. That there are **507*** cases in which the court would lend its aid to protect the acquisitions of a wife from the creditors of a husband, may well be admitted; but on this case it is enough to observe, that if the husband may, upon his own recital, make out such a case, there would no longer exist any difficulty in evading the rights of creditors. Yet this court is not satisfied that the court below has given an instruction that comports with the law of the case.

The instruction of the court, given on motion of the plaintiff below, is, that the deed was void in law, "if it was made by the said Joseph Wheaton without a valuable consideration therefor, or was made by him with intent to defeat, delay, or defraud his creditors." Had the conjunction *and* been substituted in this instruction for *or*, it would have been entirely unimpeachable; but as it now reads, it must mean, that even had a valuable consideration been paid, if the deed was made with intent to defeat creditors, it was void. We know of no law which avoids a deed where a valuable (by which, to a general intent, must also be understood adequate) consideration is paid, and the change of property be *bona fide*, or such as it professes to be. Of such a contract it cannot be predicated that it is with intent to defeat or defraud creditors, since, although the property itself no longer remains subject to the judgment, a substitute is furnished by which that judgment may be satisfied. Nor is it any impeachment of such a deed that it is made to the use of the family of the maker. The trustee, in that case, becomes the benefactor, and not **508*** the husband. It is **not* a provision made by him for his family, but by another.

Although, from anything that appears in this cause, this court can see no ground on which the jury could have found otherwise than they did, yet if the instruction was erroneous, and to the prejudice of the defendant below, as this court cannot estimate its influence on the minds of the jury, the judgment must be reversed.

Judgment reversed.

Cited—10 Pet. 477; 16 Wall. 365; Bald. 272, 273, 364; 1 McLean, 224, 225; 2 McLean, 60; 2 Wood. & M. 356.

[PRACTICE.]

SERGEANT'S LESSEE v. BIDDLE ET AL.

Depositions, taken according to the proviso in the 30th sec. of the judiciary act of 1789, ch. 20, under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are under no circumstances to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the provisions of the act relative to depositions *de bene esse* being confined to those taken under the enacting part of the section.

THIS cause was argued by *Mr. Martin* and *Mr. C. J. Ingersoll* for the plaintiff, and by *Mr. Hopkinson* and *Mr. Sergeant* for the de-

fendants. The facts are fully stated in the opinion of the court.

WASHINGTON, *J.*, delivered the opinion of the court:

The* only question certified by the **[509] Circuit Court for the District of Delaware to this court is, whether certain depositions taken under a commission issued from that Court to Philadelphia, could, under the circumstances of the case, be given in evidence to the jury.

This question arises out of the following facts: On the 25th of October, 1817, a consent rule was entered in this cause, "for a commission to issue to take depositions on both sides, to be directed to Thomas Bradford, Jun., and William J. Duane, of Philadelphia; interrogatories to be filed on ten days' notice." The agreement of the counsel, under which this rule was entered, was filed in court, on the 11th of November, of the same year.

On the 27th of October, 1817, an *ex-parte* rule was entered, on the motion of the defendants' counsel, "for a commission, to issue to the city of Philadelphia, on the part of the defendants, to be directed to George Vaux and William Smith, or either of them, commissioners on the part of the defendants, on ten days' notice of filing interrogatories, with liberty to the plaintiff's counsel to name a commissioner or commissioners, if they should choose to do so, at any time before issuing the commission."

After the counsel for the lessor of the plaintiff had opened his case, and gone through his evidence, the counsel for the defendants having opened his case, offered to give in evidence to the jury sundry depositions of witnesses taken under a commission to Philadelphia, bearing date the 31st of October, 1817, directed to George Vaux and William Smith, or **either* of them, and to George M. Dal- **[510]** las and Richard Bache, or either of them. This evidence was objected to by the plaintiff's counsel, on the ground that the depositions so taken were to be considered, in point of law, as taken *de bene esse*.

In support of this evidence, the defendants stated, and the opposite counsel admitted, that previous to the execution of this commission, an agreement had been entered into, that the same should be executed by George M. Dallas, one of the commissioners on the part of the plaintiff, and George Vaux, another of the commissioners on the part of the defendants; and that it was further agreed, and so indorsed on the commission, that the said George Vaux might be permitted to take a solemn affirmation, instead of an oath, and that the commissioners, who should act, might be qualified by any alderman of Philadelphia, and their clerk by the commissioners; and which agreements were entered into upon the application of the defendant's counsel. He further gave in evidence, that commissions had heretofore issued to Philadelphia, and other places within 100 miles of the place of trial, from the Circuit Court for that district, upon motions made for that purpose; and that upon motion, commissions had issued to Philadelphia and to other places without the state, from the Supreme Court of the state of Delaware, previous and subsequent to the year 1789. That upon the

return of the commission in this case, publication thereof was ordered by the court; and, lastly, that all the witnesses examined in the **511*** execution of the *said commission resided in Philadelphia, distant 83 miles from the place of holding the court.

It is contended by the plaintiff's counsel, that, as by the 6th section of the act of the 2d of March, 1793, subpoenas for witnesses may run into any other district than that in which the court is holden, provided, that in civil causes, the witnesses do not live at a greater distance than 100 miles from the place of holding the court, the deposition in this case ought not to have been received, unless it had appeared to the court that the witnesses had been duly summoned, and were unable to attend. This argument appears to be founded upon the provision of the 80th section of the judiciary act of 1789, c. 20, to which this case has no relation. That section authorizes the taking of depositions in the specified cases, without the formality of a commission, but declares that the depositions so taken shall be *de bene esse*; and to prevent any conclusion from being drawn against the power of the courts to grant commissions for taking depositions by reason of the above provisions, this section goes on to provide, that nothing in the said section contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure, or delay of justice, which power it is declared they shall severally possess.

The only question then is, whether depositions taken under a *dedimus potestatem*, according to common usage, are, under any circumstances, to be considered as taken *de bene 512** *esse*. And it is the opinion *of this court that they cannot be so considered. What might be the effect of the agreement of the parties, or of an order of the court to the contrary, need not be decided in this case, as the rule, as well as the commission which issued under it, was absolute and unqualified. Whenever a commission issues for taking depositions according to common usage, whether the witness reside beyond the process of the court, or within it, the depositions are absolute, the above section of the act of Congress relating to depositions *de bene esse*, being most obviously confined to those taken under the enacting part of that section. But it is contended by the plaintiff's counsel, that this commission to take depositions of witnesses living within 100 miles from the place at which the court was to sit, although in another district, was improvidently issued, and that the rule under which it issued was erroneously made.

Whether this objection ought, or ought not, to have been made at the time, or during the term when the rule was entered, is a question which does not occur in this case; because it is most obvious from the conduct of the plaintiff's counsel in the court below, that if they did not agree to the rule, the commission was issued with their consent. A consent rule was entered on the 25th of October, differing from the *ex parte* rule, entered two days afterwards, in no other respect, but as to the names of the commissioners. The plaintiff's counsel afterwards joined in the commission, removed every pos-

sible objection as to the commissioners, by naming one on the part of the plaintiff, to act with one of the defendants' *commis- **513** sioners, and filed his cross interrogatories, to be propounded to the witnesses. The commission was executed by the commissioners so named, and the witnesses were regularly examined, as well on the cross interrogatories as on those in chief.

After such unequivocal evidence of consent to the issuing of the commission, it is not competent to the plaintiff's counsel to object, that it issued improvidently, or that the rule was improperly obtained.

It is to be certified to the Circuit Court for the District of Delaware, that the depositions taken under the commission, referred to in the transcript of the record sent to this court, dated the 31st day of October, 1817, ought to be given in evidence to the jury, upon the trial of the cause in which they were taken.

Certificate accordingly.

Cited—4 Wash. 723-725; 3 Wood. & M. 161.

(COMMON LAW.)

BOYD'S LESSEE v. GRAVES ET AL.

An agreement, by parol, between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run and marked on a plat by the surveyor, in their presence, as the boundary, held to be conclusive in an action of ejectment, after a correspondent possession of 20 years by the parties, and those claiming under them respectively.

Such an agreement is not within the statute of frauds, as being a contract for the sale of lands, or any interest in or concerning them.

DUVAL, J., delivered the opinion **514** of the court:

An action of ejectment was brought by Andrew Boyd against the defendants, in the Circuit Court for the District of Kentucky, on the 25th of November, 1814, for 2,000 acres of land in Fayette county, on the waters of Elkhorn Creek. The patent bears date on the 3d of December, 1789, and was granted to Andrew Boyd, pursuant to a survey made the 14th of July, 1774, on a warrant issued under the royal proclamation of 1763. This tract of land is contained within the courses and distances following: beginning at a buckeye and ash corner to John Carter's land, and in a line of William Phillips's land, and with the same south-west 374 poles, crossing a small branch to a hoopwood and sugar tree, and leaving said line S. E. 860 poles, crossing a branch to an elm and a buckeye N. E. 374 poles, crossing a branch to a sugar tree and buckeye, thence N. W. 860 poles to the beginning.

The defendants claimed title under a patent granted to Elijah Craig, on the 7th of November, 1779, for 2,000 acres, on a warrant to John Carter, heir at law of Thomas Carter, in consideration of military services. The warrant was assigned to Craig. The courses and distances are the following: Beginning at three

Wheat. 4.

large hoopwoods growing from one root, corner to William Phillips's land, and with a line thereof S. W. 374 poles, crossing two branches to a buckeye and ash on the bank, S. E. 860 poles, crossing a small creek to a sugar tree and buckeye, N. E. 374 poles, crossing three branches 515*] to an ash, hickory, *mulberry, and hoopwood, N. W. 860 poles to the first station.

These two tracts are adjacent to, and bind on each other. It is obvious that they were intended to present rectangular figures, and to contain equal quantities; but by satisfying the calls, the figures are irregular, and do not contain equal quantities.

The plaintiff in the court below locates his pretensions on the plat returned in the cause, beginning at A, then to K, to L, to D, and to the beginning. And he locates Craig's patent, beginning at A, then to B, to C, to D, and to the beginning. The defendants locate it, beginning at A, then to B, to C, to E, and to the beginning. The land contained in the triangle A E D is the land in dispute.

The defendants, to support their location, offered evidence to prove, that the dividing line between Boyd and Craig being unascertained, the parties, by agreement, had it surveyed, for the purpose of establishing and settling the line between them; that, in the year 1793, it was run, in their presence, from A to E, as distinguished on the plat, and that it was mutually agreed to establish the corner at E, where a boundary was marked, by consent, E C and A B, and that the line from A to E should be the dividing line between them, and that possession had been since held accordingly. They also offered in evidence, a deed from Boyd and wife to William Hanback, bearing date the 14th of December, 1793, for 100 acres, part of the land granted to Boyd, beginning at the corner at E before mentioned, and binding on the line A E, regarding it as the dividing 516*] line between Body and Craig; also a deed from Elijah Craig to John Whitesides, dated 12th of May, 1794, for 7½ acres, part of Craig's patent, bounding also on the line A E as the dividing line between Body and Craig; and that all the other defendants, as purchasers under Craig, held to the said line A E.

The defendants' counsel then moved the court to instruct the jury, that if they found from the evidence that, owing to the uncertainty of the line of said Boyd and Carter's military surveys, that the said Boyd and Elijah Craig, by mutual consent, surveyed and located their respective patents by making the line from A to E, and marking the corner at E, with the intent (at the time), positively expressed, to settle and ascertain the true boundary and dividing line between the tracts respectively claimed by them under their patents, and that the said line has been acquiesced in by the said parties, and possession held and taken accordingly, for more than 20 years before the commencement of this action, that they ought to find for the defendants; which instruction the court gave, and to this opinion of the court, the plaintiff, by his counsel, excepted; and the record of the proceedings was removed, by writ of error, to this court, for their decision.

At the trial in the court below, several other questions were propounded, and decided by the Wheat. 4.

court, and to which exceptions were taken, which it is not material to notice here, because the decision of this court on the question stated will decide the controversy between the parties.

*It appears, that in the year 1793, [*517 more than twenty years before the commencement of this action of ejectment, Boyd and Craig employed a surveyor to run the dividing line between them, and they mutually agreed that it should be thus ascertained and settled. It was, accordingly, run as described, on the plat from A to E, and the corner at E was marked in their presence as the boundary between them. That possession has been held by each, and those claiming under them respectively, from that time to the present; and that each has sold parcels of land, bounding them on the line A E thus agreed on, regarding it as the established line between them. Hence, the question arises, whether the agreement made in 1793, although by parol, accompanied by correspondent possession for more than 20 years, is, or is not, conclusive against the plaintiff's right of recovery in this action.

This court cannot consider the agreement of the parties, although by parol, to settle the dividing line between them by a surveyor, mutually employed, as affected by the statute of frauds, as is contended by the counsel for the plaintiff. It is not a contract for the sale or conveyance of lands. It has no ingredient of such a contract. There is no *quid pro quo*; and the court do not consider it as a conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run on actual survey, beginning at a place admitted and acknowledged by the parties to be a boundary, where the line must begin. The possession subsequently held, and the acts of the parties *evidenced by [*518 their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it; and in the opinion of this court precludes the plaintiff, after such a lapse of time, from denying it to be the dividing line between him and the defendants; and neither ought now to be permitted to disturb the possession of the other, under a pretense that the line was not correctly run.

Judgment affirmed.

[CONSTITUTIONAL LAW.]

THE TRUSTEES OF DARTMOUTH COLLEGE.

v.
WOODWARD.

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The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year 1760, is a contract within the meaning of that clause of the constitution of the United States, art. 1, s. 10, which declares that no state shall make any law impairing the obligation of con-

NOTE.—In the great and celebrated case of Dartmouth College v. Woodward, *supra*, the inhibition upon the states, to impair by law the obligation of contracts, received the most elaborate discus-

tracts. The charter was not dissolved by the revolution.

An act of the state legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void.

Under its charter, Dartmouth College was a private and not a public corporation. That a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.

ERROR to the Superior Court of the state of New Hampshire.

This was an action of trover brought in the State Court, in which the plaintiffs in error de-
519* clared for *two books of records, purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College, from the establishment of the corporation until the 7th day of October, 1816; the original charter, or letters patent, constituting the college; the common seal; and four volumes or books of account, purporting to contain the charges and accounts in favor of the college. The defendant pleaded the general issue, and at the trial the following special verdict was found:

"The said jurors, upon their oath, say, that His Majesty George the Third, King of Great Britain, &c., issued his letters patent, under the public seal of the province, now state, of New Hampshire, bearing date the 18th day of December, in the 10th year of his reign, and in the year of our Lord one thousand seven hundred and sixty-nine, in the words following:

GEORGE the THIRD, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

To all to whom these presents shall come—

GREETING:

Whereas it hath been represented to our trusty and well beloved John Wentworth, Esq., Governor and Commander-in-Chief, in and over our province of New Hampshire, in New England, in America, that the Reverend Eleazar Wheelock, of Lebanon, in the colony of Connecticut, in New England aforesaid, now Doctor in Divinity, did, on or about the year of our Lord one thousand seven hundred and
520* fifty-four, *at his own expense, on his own estate and plantation, set on foot an Indian Charity School, and for several years, through the assistance of well-disposed persons in America, clothed, maintained and educated a number of the children of the Indian natives, with a view to their carrying the gospel in their own language, and spreading the knowledge of the great Redeemer among their savage tribes, and hath actually employed a number of them as missionaries and schoolmasters in the wilderness for that purpose; and by the blessing of God upon the endeavors of said Wheelock, the design became reputable among the Indians, inasmuch that a larger number desired the edu-

cation of their children in said school, and were also disposed to receive missionaries and schoolmasters in the wilderness, more than could be supported by the charitable contributions in these American colonies.

Whereupon, the said Eleazar Wheelock thought it expedient that endeavors should be used to raise contributions from well-disposed persons in England, for the carrying on and extending said undertaking; and for that purpose the said Eleazar Wheelock requested the Rev. Nathaniel Whitaker, now Doctor in Divinity, to go over to England for that purpose, and sent over with him the Rev. Sampson Occom, an Indian minister, who had been educated by the said Wheelock. And to enable the said Whitaker to the more successful performance of said work, on which he was sent, said Wheelock gave him a full power of attorney, by which said Whitaker solicited those worthy and generous contributors to the charity, viz.: *The Right Honorable William, [**521** Earl of Dartmouth, the Honorable Sir Sydney Stafford Smythe, Knight; one of the Barons of His Majesty's Court of Exchequer, John Thornton, of Clapham, in the county of Surrey, Esquire; Samuel Roffey, of Lincoln's Innfields, in the county of Middlesex, Esquire; Charles Hardy, of the parish of Saint Mary-le-Bonne, in said county, Esquire; Daniel West, of Christ's Church, Spitalfields, in the county aforesaid, Esquire; Samuel Savage, of the same place, gentleman; Josiah Roberts, of the parish of Saint Edmund, the King, Lombard Street, London, gentleman, and Robert Keen, of the Parish of Saint Batolph Aldgate, London, gentleman, to receive the several sums of money, which should be contributed, and to be trustees for the contributors to such charity, which they cheerfully agreed to.

Whereupon, the said Whitaker did, by virtue of said power of attorney, constitute and appoint the said Earl of Dartmouth, Sir Sydney Stafford Smythe, John Thornton, Samuel Roffey, Charles Hardy, and Daniel West, Esquires, and Samuel Savage, Josiah Roberts, and Robert Keen, gentlemen, to be trustees of the money which had then been contributed, and which should, by his means, be contributed for said purpose; which trust they have accepted, as by their engrossed declaration of the same, under their hands and seals well executed, fully appears, and the same has also been ratified, by a deed of trust, well executed, by the said Wheelock.

And the said Wheelock further represents, that he has, by power of attorney, for many weighty reasons, *given full power to [**522** the said trustees, to fix upon and determine the place for said school, most subservient to the great end in view; and to enable them understandingly to give the preference, the said Wheelock has laid before the said trustees the several offers which have been generously made in the several governments in America, to en-

don, and the most efficient and instructive application.

The argument of the Supreme Court in this celebrated case contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. "The decision in this case did more than any other single act, proceeding from the authority of the

United States, to throw an impregnable barrier around all rights and franchises derived from the grant of the government; and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country." 1 Kent's Com. 415, 418. See also a consideration of this case in 2 Story on the Constitution, Secs. 1304, 1305.

Wheat. 4.

courage and invite the settlement of said school among them, for their own private emolument, and the increase of learning in their respective places, as well as for the furtherance of the general design in view.

And whereas a large number of the proprietors of lands in the western part of this, our province of New Hampshire, animated and excited thereto, by the generous example of his excellency their governor, and by the liberal contributions of many noblemen and gentlemen in England, and especially by the consideration that such a situation would be as convenient as any for carrying on the great design among the Indians; and also considering, that without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon to be formed in that new country, with a learned and orthodox ministry; they, the said proprietors, have promised large tracts of land, for the uses aforesaid, provided the school shall be settled in the western part of our said province. And they, the said right honorable, honorable and worthy trustees, before mentioned, having maturely considered the reasons and arguments in favor of the several places proposed, *have given the preference to the western part of our said province, lying on Connecticut River, as a situation most convenient for said school.

And the said Wheelock has further represented a necessity of a legal incorporation, in order to the safety and well being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same.

And the said Wheelock has also represented, that for many weighty reasons, it will be expedient, at least in the infancy of said institution, or till it can be accommodated in that new country, and he and his friends be able to remove and settle by and round about it, that the gentlemen, whom he has already nominated in his last will (which he has transmitted to the aforesaid gentlemen of the trust in England), to be trustees in America, should be of the corporation now proposed. And, also, as there are already large collections for said school in the hands of the aforesaid gentlemen of the trust in England, and all reason to believe, from their singular wisdom, piety, and zeal to promote the Redeemer's cause (which has already procured for them the utmost confidence of the kingdom), we may expect they will appoint successors in time to come, who will be men of the same spirit, whereby great good may and will accrue many ways to the institution, and much be done by their example and influence to encourage and facilitate the whole design in view; for which reason, said Wheelock desires that the trustees aforesaid may be vested with all that power therein, which can consist with their distance from the same.

524*] *Know ye, therefore, That we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the bene-

fit of said province, do, of our special grace, certain knowledge, and mere motion, by and with the advice of our counsel for said province by these presents, will, ordain, grant, and constitute, that there be a college erected in our said province, of New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes in this land, in reading, writing, and all parts of learning which shall appear necessary and expedient, for civilizing and christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and any others. And the trustees of said college may and shall be one body corporate and politic, in deed, action, and name, and shall be called, named, and distinguished, by the name of The Trustees of Dartmouth College.

And further, we have willed, given, granted, constituted, and ordained, and by this, our present charter, of our special grace, certain knowledge, and mere motion, with the advice aforesaid, do, for us, our heirs and successors forever, will, give, grant, constitute, and ordain, that there shall be in the said Dartmouth College, from henceforth and forever, a body politic, consisting of trustees of said Dartmouth College. And for the more full and perfect erection of said corporation and body politic, consisting of trustees of Dartmouth College, we, of our special grace, certain *knowledge, and mere motion, do, [525 by these presents, for us, our heirs and successors, make, ordain, constitute, and appoint our trusty and well-beloved John Wentworth, Esq., Governor of our said province, and the Governor of our said province of New Hampshire for the time being, and our trusty and well-beloved Theodore Atkinson, Esq., now president of our council of our said province, George Jaffrey and Daniel Pierce, Esqrs., both of our said council, and Peter Gilman, Esq., now speaker of our house of representatives in said province, and William Pitkin, Esq., one of the assistants of our colony of Connecticut, and our said trusty and well-beloved Eleazar Wheelock, of Lebanon, Doctor in Divinity, Benjamin Pomroy, of Hebron; James Lockwood, of Weathersfield; Timothy Pitkin and John Smalley, of Farmington, and William Patten, of Hartford, all of our said colony of Connecticut, ministers of the gospel (the whole number of said trustees consisting, and hereafter forever to consist, of twelve, and no more), to be trustees of said Dartmouth College, in this, our province of New Hampshire.

And we do further, of our special grace, certain knowledge, and mere motion, for us, our heirs and successors, will, give, grant, and appoint, that the said trustees and their successors shall forever hereafter be, in deed, act, and name, a body corporate and politic, and that they, the said body corporate and politic, shall be known and distinguished, in all deeds, grants, bargains, sales, writings, evidences, or otherwise howsoever, and in all courts forever, hereafter plead and be impleaded by the name of The Trustees of Dartmouth College; and that the said corporation, *by the name [526 aforesaid, shall be able, and in law capable, for the use of said Dartmouth College, to have, get, acquire, purchase, receive, hold, possess, and enjoy, tenements, hereditaments, jurisdictions,

and franchises, for themselves, and their successors, in fee-simple, or otherwise howsoever, and to purchase, receive, or build, any house or houses, or any other buildings, as they shall think needful and convenient, for the use of said Dartmouth College, and in such town in the western part of our said province of New Hampshire as shall, by said trustees, or the major part of them, be agreed on; their said agreement to be evidenced by an instrument in writing, under their hands, ascertaining the same; and also to receive and dispose of any lands, goods, chattels, and other things, of what nature soever, for the use aforesaid: and also to have, accept, and receive any rents, profits, annuities, gifts, legacies, donations, or bequests of any kind whatsoever, for the use aforesaid; so, nevertheless, that the yearly value of the premises do not exceed the sum of six thousand pounds sterling; and therewith, or otherwise, to support and pay, as the said trustees, or the major part of such of them as are regularly convened for the purpose, shall agree, the president, tutors, and other officer and ministers of said Dartmouth College; and also to pay all such missionaries and schoolmasters as shall be authorized, appointed, and employed by them, for civilizing, and christianizing, and instructing the Indian natives of this land, their several allowances; and also their respective annual salaries or allowances, **527*** and all such necessary and *contingent charges, as from time to time shall arise and accrue, relating to the said Dartmouth College; and also, to bargain, sell, let, or assign, lands, tenements, or hereditaments, goods or chattels, and all other things whatsoever, by the name aforesaid, in as full and ample a manner, to all intents and purposes, as a natural person, or other body politic or corporate, is able to do by the laws of our realm of Great Britain, or of said province of New Hampshire.

And further, of our special grace, certain knowledge, and mere motion, to the intent that our said corporation, and body politic, may answer the end of their erection and constitution, and may have perpetual succession and continuance forever, we do, for us, our heirs and successors, will, give, and grant, unto the trustees of Dartmouth College, and to their successors forever, that there shall be, once a year, and every year, a meeting of said trustees, held at said Dartmouth College, at such time as by said trustees, or the major part of them, at any legal meeting of said trustees, shall be agreed on; the first meeting to be called by the said Eleazar Wheelock, as soon as conveniently may be, within one year next after the enrollment of these our letters patent, at such time and place as he shall judge proper. And the said trustees, or the major part of any seven or more of them, shall then determine on the time for holding the annual meeting aforesaid, which may be altered as they shall hereafter find most convenient. And we farther order and direct, that the said Eleazar Wheelock shall notify the time for holding said first meeting, to be called as aforesaid, by **528*** sending a letter *to each of said trustees, and causing an advertisement thereof to be printed in the New Hampshire Gazette, and in some public newspaper printed in the colony of Connecticut. But in case of the death

or incapacity of the said Wheelock, then such meeting to be notified in manner aforesaid, by the governor or commander-in-chief of our said province for the time being. And we do also, for us, our heirs and successors, hereby will, give, and grant, unto the said Trustees of Dartmouth College, aforesaid, and to their successors forever, that when any seven or more of the said trustees, or their successors, are convened and met together, for the service of said Dartmouth College, at any time or times, such seven or more shall be capable to act as fully and amply, to all intents and purposes, as if all the trustees of said College were personally present—and all affairs and actions whatsoever, under the care of said trustees, shall be determined by the majority or greater number of those seven or more trustees so convened and met together.

And we do further will, ordain, and direct, that the president, trustees, professors, tutors, and all such officers as shall be appointed for the public instruction and government of said college, shall, before they undertake the execution of their offices or trusts, or within one year after, take the oaths and subscribe the declaration provided by an act of Parliament made in the first year of King George the First, entitled, "An act for the further security of His Majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being *Protestants, and ***529** for the extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;" that is to say, the President, before the Governor of our said Province for the time being, or by one by him empowered to that service, or by the president of our said council, and the trustees, professors, tutors, and other officers, before the president of said college for the time being, who is hereby empowered to administer the same; an entry of all which shall be made in the records of said college.

And we do, for us, our heirs, and successors, hereby will, give, and grant, full power and authority to the president hereafter by us named, and to his successors, or in case of his failure, to any three or more of the said trustees, to appoint other occasional meetings, from time to time, of the said seven trustees, or any greater number of them, to transact any matter or thing necessary to be done before the next annual meeting, and to order notice to the said seven, or any greater number of them, of the times and places of meeting for the service aforesaid, by a letter under his or their hands, of the same, one month before said meeting. Provided always, that no standing rule or order be made or altered, for the regulation of said college, nor any president or professor be chosen or displaced, nor any other matter or thing transacted or done, which shall continue in force after the then next annual meeting of the said trustees, as aforesaid.

And, further, we do, by these presents, for us, our heirs and successors, create, make, constitute, nominate, and appoint our trusty and well-beloved Eleazar Wheelock, Doctor in Divinity, the founder of said *college, [**530** to be President of said Dartmouth College, and to have the immediate care of the education and government of such students as shall be

admitted into said Dartmouth College for instruction and education; and do will, give, and grant, to him, in said office, full power, authority, and right, to nominate, appoint, constitute, and ordain, by his last will, such suitable and meet person or persons as he shall choose to succeed him in the presidency of said Dartmouth College; and the person so appointed, by his last will, to continue in office, vested with all the powers, privileges, jurisdiction and authority of a President of said Dartmouth College; that is to say, so long and until such appointment by said last will shall be disapproved by the Trustees of said Dartmouth College.

And we do also, for us, our heirs, and successors, will, give, and grant to the said trustees of said Dartmouth College, and to their successors forever, or any seven or more of them convened as aforesaid, that in the case of the ceasing or failure of a president by any means whatsoever, that the said trustees do elect, nominate, and appoint such qualified person as they, or the major part of any seven or more of them, convened for that purpose as above directed, shall think fit, to be president of said Dartmouth College, and to have the care of the education and government of the students as aforesaid; and in case of the ceasing of a president as aforesaid, the senior professor or tutor, being one of the trustees, shall exercise the office of a president, until the trustees shall make choice of, and appoint, a president as **531*** aforesaid; *and such professor or tutor, or any three or more of the trustees, shall immediately appoint a meeting of the body of the trustees for the purpose aforesaid. And also we do will, give, and grant to the said trustees convened as aforesaid, that they elect, nominate, and appoint so many tutors and professors to assist the president in the education and government of the students belonging thereto, as they, the said trustees, shall, from time to time, think needful and serviceable to the interest of said Dartmouth College. And also, that the said trustees or their successors, or the major part of any seven or more of them convened for that purpose as above directed, shall at any time displace and discharge from the service of said Dartmouth College any or all such officers, and elect others in their room and stead as before directed. And also that the said trustees, or their successors, or the major part of any seven of them which shall convene for that purpose as above directed, do, from time to time, as occasion shall require, elect, constitute, and appoint a treasurer, a clerk, an usher, and a steward for the said Dartmouth College, and appoint to them and each of them their respective businesses and trust; and displace and discharge from the service of said college, such treasurer, clerk, usher or steward, and to elect others in their room and stead; which officers so elected, as before directed, we do for us, our heirs and successors, by these presents, constitute and establish in their respective offices, and do give to each and every of them full power and authority to exercise the same in said Dartmouth College, **532*** according to the *directions, and during the pleasure of said trustees, as fully and freely as any like officers in any of our universities, colleges, or seminaries of learning in our Wheat. 4.

realm of Great Britain, lawfully may or ought to do. And also, that the said trustees and their successors, or the major part of any seven or more of them, which shall convene for that purpose as is above directed, as often as one or more of said trustees shall die, or by removal or otherwise shall, according to their judgment, become unfit or incapable to serve the interests of said college, do, as soon as may be after the death, removal, or such unfitness or incapacity of such trustee or trustees, elect and appoint such trustee or trustees as shall supply the place of him or them so dying, or becoming incapable to serve the interests of said college; and every trustee so elected and appointed shall, by virtue of these presents and such election and appointment, be vested with all the powers and privileges which any of the other trustees of said college are hereby vested with. And we do further will, ordain, and direct, that from and after the expiration of two years from the enrollment of these presents, such vacancy or vacancies as may or shall happen, by death or otherwise, in the aforesaid number of trustees, shall be filled up by election as aforesaid, so that when such vacancies shall be filled up unto the complete number of twelve trustees, eight of the aforesaid whole number of the body of trustees shall be resident, and respectable freeholders of our said province of New Hampshire, and seven of said whole number shall be laymen.

*And we do further, of our special **[*533]** grace, certain knowledge, and mere motion, will, give, and grant, unto the said trustees of Dartmouth College, that they, and their successors, or the major part of any seven of them which shall convene for that purpose as is above directed, may make, and they are hereby fully empowered, from time to time, fully and lawfully to make and establish such ordinances, orders, and laws, as may tend to the good and wholesome government of the said college, and all the students and the several officers and ministers thereof, and to the public benefit of the same, not repugnant to the laws and statutes of our realm of Great Britain, or of this our province of New Hampshire, and not excluding any person of any religious denomination whatsoever, from free and equal liberty and advantage of education, or from any of the liberties and privileges or immunities of the said college, on account of his or their speculative sentiments in religion, and of his or their being of a religious profession different from the said trustees of the said Dartmouth College. And such ordinances, orders, and laws, which shall as aforesaid be made, we do for us, our heirs and successors, by these presents ratify, allow of, and confirm, as good and effectual to oblige and bind all the students, and the several officers and ministers of the said college. And we do hereby authorize and empower the said trustees of Dartmouth College, and the president, tutors, and professors, by them elected and appointed as aforesaid, to put such ordinances, orders, and laws, in execution, to all proper intents and purposes.

*And we do further, of our special **[*534]** grace, certain knowledge, and mere motion, will, give, and grant unto the said trustees of said Dartmouth College, for the encouragement of learning, and animating the students of said

college to diligence and industry, and a laudable progress in literature, that they, and their successors, or the major part of any seven or more of them, convened for that purpose as above directed, do, by the president of said college, for the time being, or any other deputed by them, give, and grant any such degree or degrees to any of the students of the said college, or any others by them thought worthy thereof, as are usually granted in either of the universities, or any other college in our realm of Great Britain; and that they sign and seal diplomas or certificates of such graduations, to be kept by the graduates as perpetual memorials and testimonials thereof.

And we do further, of our special grace, certain knowledge, and mere motion, by these presents, for us, our heirs and successors, give and grant unto the trustees of said Dartmouth College, and to their successors, that they and their successors shall have a common seal, under which they may pass all diplomas or certificates of degrees, and all other affairs and business of, and concerning the said college: which shall be engraven in such a form, and with such an inscription as shall be devised by the said trustees, for the time being, or by the major part of any seven or more of them convened for the service of the said college as is above directed.

535*] *And we do further, for us, our heirs and successors, give and grant unto the said trustees of the said Dartmouth College, and their successors, or to the major part of any seven or more of them convened for the service of the said college, full power and authority, from time to time, to nominate and appoint all other officers and ministers, which they shall think convenient and necessary for the service of the said college, not herein particularly named or mentioned; which officers and ministers we do hereby empower to execute their offices and trusts, as fully and freely as any of the officers and ministers in our universities or colleges in our realm of Great Britain lawfully may or ought to do.

And further, that the generous contributors to the support of this design of spreading the knowledge of the only true God and Saviour among the American savages, may, from time to time, be satisfied that their liberalities are faithfully disposed of, in the best manner, for that purpose, and that others may, in future time, be encouraged in the exercise of the like liberality for promoting the same pious design, it shall be the duty of the President of Dartmouth College, and of his successors, annually, or as often as he shall be thereunto desired or required, to transmit to the right honorable, honorable, and worthy gentlemen of the trust in England before mentioned, a faithful account of the improvements and disbursements of the several sums he shall receive from the donations and bequests made in England, through the hands of said trustees, and also advise them of the general plans laid, and prosecuted **536*]** pects exhibited, as well as a faithful *account of all remarkable occurrences, in order, if they shall think expedient, that they may be published. And this to continue so long as they shall perpetuate their board of trust, and there shall be any of the Indian natives remaining to be proper objects of that charity. And,

634

lastly, our express will and pleasure is, and we do, by these presents, for us, our heirs and successors, give and grant unto the said trustees of Dartmouth College, and to their successors forever, that these our letters patent, on the enrollment thereof in the secretary's office of our province of New Hampshire aforesaid, shall be good and effectual in the law, to all intents and purposes, against us, our heirs and successors, without any other license, grant, or confirmation from us, our heirs and successors, hereafter by the said trustees to be had and obtained, notwithstanding the not writing or misrecital, not naming or misnaming the aforesaid offices, franchises, privileges, immunities, or other the premises, or any of them, and notwithstanding a writ of *ad quod damnum* hath not issued forth to inquire of the premises, or any of them, before the enrolling hereof, any statute, act, ordinance, or provision, or any other matter or thing, to the contrary notwithstanding. To have and to hold all and singular the privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted, or which are meant, mentioned, or intended to be herein and hereby given and granted unto them, the said trustees of Dartmouth College, and to their successors forever. In testimony whereof, we have caused these our letters to be made patent, and the public seal of *our said province of New **[537** Hampshire to be hereunto affixed. Witness our trusty and well-beloved John Wentworth, Esquire, Governor and Commander-in-Chief in and over our said province, &c., this thirteenth day of December, in the tenth year of our reign, and in the year of our Lord one thousand seven hundred and sixty-nine.

N. B.—The words "and such professor, or tutor, or any three or more of the trustees, shall immediately appoint a meeting of the body of the trustees, for the purpose aforesaid," between the first and second lines, also the words "or more," between the twenty-seventh and twenty-eighth lines, also the words "or more," between the twenty-eighth and twenty-ninth lines, and also the words "to all intents and purposes," between the thirty-seventh and thirty-eighth lines of this sheet, were respectively interlined before signing and sealing.

And the said jurors, upon their oath, further say, that afterwards, upon the eighteenth day of the same December, the said letters patent were duly enrolled and recorded in the secretary's office of said province, now state, of New Hampshire. And afterwards, and within one year from the issuing of the same letters patent, all the persons named as trustees in the same accepted the said letters patent, and assented thereunto, and the corporation therein and thereby created and erected was duly organized, and has, until the passing of the act of the legislature of the state of New Hampshire, of the 27th of June. A. D. 1816, and ever since (unless prevented by said act and the *doings under the same) continued to **[538** be a corporation.

And the said jurors, upon their oath, further say, that immediately after its erection and organization as aforesaid, the said corporation had, took, acquired, and received, by gift, donation, devise, and otherwise, lands, goods,

Wheat. 4.

chattels, and moneys of great value; and from time to time since have had, taken, received, and acquired, in manner aforesaid, and otherwise, lands, goods, chattels, and moneys of great value; and on the same 27th day of June, A. D. 1816, the said corporation, erected and organized as aforesaid, had, held, and enjoyed, and ever since have had, held, and enjoyed, divers lands, tenements, hereditaments, goods, chattels, and moneys, acquired in manner aforesaid, the yearly income of the same, not exceeding the sum of \$26,666, for the use of said Dartmouth College, as specified in said letters patent.

And the said jurors, upon their oath, further say, that part of the said lands, so acquired and holden by the said trustees as aforesaid, were granted by (and are situate in) the state of Vermont, A. D., 1785, and are of great value; and other part of said lands, so acquired and holden as aforesaid, were granted by (and are situate in) the state of New Hampshire, in the years 1789 and 1807, and are of great value.

And the said jurors, upon their oath, further say, that the said Trustees of Dartmouth College, so constituted as aforesaid, on the same 27th day of June, A. D. 1816, were possessed of the goods and chattels in the declaration of 539* the said trustees specified, *and at the place therein mentioned, as of their own proper goods and chattels, and continued so possessed until, and at the time of the demand and refusal of the same as hereinafter mentioned, unless divested thereof, and their title thereto defeated, and rendered invalid by the provisions of the act of the state of New Hampshire, made and passed on the same 27th day of June, A. D. 1816, and the doings under the same, as hereinafter mentioned and recited.

And the said jurors, upon their oath, further say, that on the 27th day of June, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain act, entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College," in the words following:

An act to amend the charter, and enlarge and improve the Corporation of Dartmouth College.

Whereas knowledge and learning generally diffused through a community, are essential to the preservation of a free government, and extending the opportunities and advantages of education is highly conducive to promote this end and by the constitution it is made the duty of the legislators and magistrates to cherish the interests of literature, and the sciences, and all seminaries established for their advancement—and as the college of the state may, in the opinion of the legislature, be rendered more extensively useful; therefore,

SECT. 1. Be it enacted by the Senate and House of Representatives, in general court convened, That the *corporation, heretofore called and known by the name of the Trustees of Dartmouth College, shall ever hereafter be called and known by the name of the Trustees of Dartmouth University. And the whole number of said trustees shall be twenty-one, a majority of whom shall form a quorum for the transaction of business. And they and their successors in that capacity, as hereby Wheat. 4.

constituted, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the trustees of Dartmouth College—except so far as the same may be varied or limited by the provision of this act. And they shall have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute and elect fellows and members thereof; to appoint such officers as they may deem proper, and determine their duties and compensation, and also to displace them; to delegate the power of supplying vacancies in any of the offices of the university, for any term of time not extending beyond their next meeting; to pass ordinances for the government of the students, with reasonable penalties, not inconsistent with the constitution and laws of this state; to prescribe the course of education, and confer degrees; and to arrange, invest, and employ the funds of the university.

SECT. 2. And be it further enacted, That there shall be a board of overseers, who shall have perpetual succession, and whose number shall be twenty-five, *fifteen of whom [*541 shall constitute a quorum for the transaction of business. The president of the senate, and the speaker of the house of representatives of New Hampshire, the Governor and Lieutenant-Governor of Vermont, for the time being, shall be members of said board, *ex officio*. The board of overseers shall have power to determine the times and places of their meetings, and manner of notifying the same; to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors, and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings. Provided always, that the said negative shall be expressed within sixty days from the time of said overseers being furnished with copies of such acts. Provided, also, that all votes and proceedings of the board of trustees shall be valid and effectual, to all intents and purposes, until such negative of the board of overseers be expressed, according to the provisions of this act.

SECT. 3. Be it further enacted, That there shall be a treasurer of said corporation, who shall be duly sworn, and who, before he enters upon the duties of his office, shall give bonds, with sureties, to the satisfaction of the corporation, for the faithful performance thereof; and also a secretary to each of the boards of trustees and overseers, to be elected by the said boards respectively, who shall keep a just and true record of the proceedings of the board for *which he was chosen. And it shall [*542 furthermore be the duty of the secretary of the board of trustees to furnish, as soon as may be, to the said board of overseers, copies of the records of such votes and proceedings, as by the provisions of this act are made subject to their revision and control.

SECT. 4. Be it further enacted, That the President of Dartmouth University, and his successors in office, shall have the superintend-

ence of the government and instruction of the students, and may preside at all meetings of the trustees, and do and execute all the duties devolving by usage on the president of a university. He shall render annually to the governor of this state an account of the number of students, and of the state of the funds of the university; and likewise copies of all important votes and proceedings of the corporation and overseers, which shall be made out by the secretaries of the respective boards.

SECT. 5. Be it further enacted, That the president and professors of the university shall be nominated by the trustees, and approved by the overseers; and shall be liable to be suspended or removed from office in manner as before provided. And each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

SECT. 6. Be it further enacted, That the governor and council are hereby authorized to fill all vacancies in the board of overseers, whether the same be original vacancies, or are occasioned by the death, resignation or re-⁵⁴³moval of any member. And *the governor and council in like manner shall, by appointments, as soon as may be, complete the present board of trustees to the number of twenty-one, as provided for by this act, and shall have power also to fill all vacancies that may occur previous to, or during the first meeting of the said board of trustees. But the president of said university for the time being, shall, nevertheless, be a member of said board of trustees, *ex officio*. And the governor and council shall have power to inspect the doings and proceedings of the corporation, and of all the officers of the university, whenever they deem it expedient—and they are hereby required to make such inspection, and report the same to the legislature of this state, as often as once in every five years. And the governor is hereby authorized and requested to summon the first meeting of the said trustees and overseers, to be held at Hanover, on the 26th day of August next.

SECT. 7. Be it further enacted, That the president and professors of the university, before entering upon the duties of their offices, shall take the oath to support the constitution of the United States and of this state; certificates of which shall be in the office of the secretary of this state, within sixty days from their entering on their offices respectively.

SECT. 8. Be it further enacted, That perfect freedom of religious opinion shall be enjoyed by all the officers and students of the university; and no officer or student shall be deprived of any honors, privileges, or benefits of the institution, on account of his religious creed or belief. ⁵⁴⁴*) The theological colleges which *may be established in the university shall be founded on the same principles of religious freedom; and any man, or body of men, shall have a right to endow colleges or professorships of any sect of the Protestant Christian religion. And the trustees shall be held and obliged to appoint professors of learning and piety of such sects according to the will of the donors.

Approved, June 27th, 1816.

And the said jurors, upon their oath, further say, that, at the annual meeting of the trustees of Dartmouth College, constituted agreeably to the letters patent aforesaid, and in no other way or manner, holden at said college, on the 28th day of August, A. D. 1816, the said trustees voted and resolved, and caused the said vote and resolve to be entered on their records, that they do not accept the provisions of the said act of the legislature of New Hampshire of the 27th of June, 1816, above recited, but do, by the said vote and resolve, expressly refuse to accept or act under the same.

And the said jurors, upon their oath, further say, that the said trustees of Dartmouth College have never accepted, assented to, or acted under the said act of the 27th of June, A. D. 1816, or any act passed in addition thereto, or in amendment thereof, but have continued to act, and still claim the right of acting, under the said letters patent.

And the said jurors, upon their oath, further say, that, on the seventh day of October, A. D. 1816, and before the commencement of this suit, the said trustees of Dartmouth College demanded of the said *William H. ⁵⁴⁵Woodward the property, goods, and chattels in the said declaration specified, and requested the said William H. Woodward, who then had the same in his hands and possession, to deliver the same to them, which the said William H. Woodward then and there refused to do, and has ever since neglected and refused to do, but converted the same to his own use, if the said trustees of Dartmouth College could, after the passing of the said act of the 27th day of June, lawfully demand the same, and if the said William H. Woodward was not, by law, authorized to retain the same in his possession after such demand.

And the said jurors, upon their oath, further say, that on the 18th day of December, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain other act, entitled, "An act in addition to, and in amendment of, an act entitled 'An act to amend the charter, and enlarge and improve the corporation of Dartmouth College,'" in the words following:

An act in addition to, and in amendment of, an act, entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College."

WHEREAS, the meetings of the trustees and overseers of Dartmouth University, which were summoned agreeably to the provisions of said act, failed of being duly holden, in consequence of a quorum of neither said trustees nor overseers attending at the *time and place ⁵⁴⁶appointed, whereby the proceedings of said corporation have hitherto been, and still are delayed.

SECTION 1. *Be it enacted by the Senate and House of Representatives, in general court convened,* That the governor be, and he is hereby authorized and requested to summon a meeting of the trustees of Dartmouth University, at such time and place as he may deem expedient. And the said trustees, at such meeting, may do and transact any matter or thing, within the limits of their jurisdiction and power, as such trustees, to every intent and purpose, and as fully and completely as if the same were

transacted at any annual or other meeting. And the governor, with advice of council, is authorized to fill all vacancies that have happened, or may happen in the board of said trustees, previous to their next annual meeting. And the governor is hereby authorized to summon a meeting of the overseers of said university, at such time and place as he may consider proper. And provided a less number than a quorum of said board of overseers convene at the time and place appointed for such meeting of their board, they shall have power to adjourn, from time to time, until a quorum shall have convened.

SECTION 2. *And be it further enacted*, That so much of the act, to which this is an addition, as makes necessary any particular number of trustees or overseers of said university, to constitute a quorum for the transaction of business, be, and the same hereby is repealed; and that hereafter nine of said trustees, convened agreeably to the provisions of this act, or 547*] *to those of that to which this is an addition, shall be a quorum for transacting business; and that in the board of trustees six votes at least shall be necessary for the passage of any act or resolution. And provided also, that any smaller number than nine of said trustees, convened at the time and place appointed for any meeting of their board, according to the provisions of this act, or that to which this is an addition, shall have power to adjourn from time to time, until a quorum shall have convened.

SECTION 3. *And be it further enacted*, That each member of said board of trustees, already appointed or chosen, or hereafter to be appointed or chosen, shall, before entering on the duties of his office, make and subscribe an oath for the faithful discharge of the duties aforesaid; which oath shall be returned to, and filed in the office of the Secretary of State, previous to the next regular meeting of said board, after said member enters on the duties of his office, as aforesaid.

Approved, December 18th, 1816.

And the said jurors, upon their oath, further say, that on the 26th day of December, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain other act, entitled, "An act in addition to an act, entitled, an act in addition to, and in amendment of, an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College," in the words following:

548*] **An act in addition to an act, entitled, "an act in addition to, and in amendment of, an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College."*

Be it enacted by the Senate and House of Representatives, in general court convened, That if any person or persons shall assume the office of president, trustee, professor, secretary, treasurer, librarian, or other officer of Dartmouth University; or by any name, or under any pretext, shall, directly or indirectly, take upon himself or themselves the discharge of any of the duties of either of those offices, except it be pursuant to, and in conformity with, the provisions of an act, entitled, "an act to amend the charter and enlarge and improve the corporation of

Dartmouth College," or, of the "act, in addition to and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College," or shall in any way, directly or indirectly, willfully impede or hinder any such officer or officers already existing, or hereafter to be appointed agreeably to the provisions of the acts aforesaid, in the free and entire discharge of the duties of their respective offices, conformably to the provisions of said acts, the person or persons so offending shall for each offense forfeit and pay the sum of five hundred dollars, to be recovered by any person who shall sue therefor, one-half thereof to the use of the prosecutor, and the other half to the use of said university.

And be it further enacted, That the person or persons who sustained the offices of secretary and treasurer *of the trustees of Dart- [549 mouth College, next before the passage of the act, entitled, "an act to amend the charter and enlarge and improve the corporation of Dartmouth College," shall continue to hold and discharge the duties of those offices, as secretary and treasurer of the trustees of Dartmouth University, until another person or persons be appointed, in his or their stead, by the trustees of said university. And that the treasurer of said university, so existing, shall in his office have the care, management, direction, and superintendence of the property of said corporation, whether real or personal, until a quorum of said trustees shall have convened in a regular meeting.

Approved, December 26th, 1816.

And the said jurors, upon their oath, further say, that the said William H. Woodward, before the said 27th day of June, had been duly appointed by the said trustees of Dartmouth College, secretary and treasurer of the said corporation, and was duly qualified to exercise, and did exercise the said offices, and perform the duties of the same; and as such secretary and treasurer, rightfully had, while he so continued secretary and treasurer as aforesaid, the custody and keeping of the several goods, chattels, and property, in said declaration specified.

And the said jurors, upon their oath, further say, that the said William H. Woodward was removed by said trustees of Dartmouth College (if the said trustees could, by law, do the said acts) from said office of secretary, on the 27th day of August, A. D. 1816, and from said office of treasurer, on the 27th day of *Sep- [550 tember then next following, of which said removals he, the said William H. Woodward, had due notice on each of said days last mentioned.

And the said jurors, upon their oath, further say, that the corporation, called the Trustees of Dartmouth University, was duly organized on the fourth day of February, A. D. 1817, pursuant to, and under the said recited acts of the 27th day of June, and of the 18th and 26th days of December, A. D. 1816; and the said William H. Woodward was, on the said fourth day of February, A. D. 1817, duly appointed by the said trustees of Dartmouth University, secretary and treasurer of the said trustees of Dartmouth University, and then and there accepted both said offices.

And the said jurors, upon their oath, further say, that this suit was commenced on the eighth day of February, A. D. 1817.

But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner and form aforesaid found, the said acts of the 27th of June, 18th and 26th of December, A. D. 1816, are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereunto by them, so as to render the plaintiffs incapable of maintaining this action, or whether the same acts are repugnant to the constitution of the United States, and so void, the said jurors are wholly ignorant, and pray the advice of the court upon the premises. And if, upon the said matter, it shall seem to the court here, that the said acts last mentioned are valid in law, and binding on said trustees of Dartmouth College, without **551*** acceptance thereof, and assent thereto, by them, so as to render the plaintiffs incapable of maintaining this action, and are not repugnant to the constitution of the United States, then the said jurors, upon their oath, say, that the said William H. Woodward is not guilty of the premises above laid to his charge, by the declaration aforesaid, as the said William H. Woodward hath above in pleading alleged. But if, upon the whole matter aforesaid, it shall seem to the court here, that the said acts last mentioned are not valid in law, and are not binding on the said trustees of Dartmouth College without acceptance thereof, and assent thereto, by them, so as to render them incapable of maintaining this action, and that the said acts are repugnant to the constitution of the United States and void, then the said jurors, upon their oath, say that the said William H. Woodward is guilty of the premises above laid to his charge, by the declaration aforesaid, and in that case, they assess the damages of them, the said trustees of Dartmouth College, by occasion thereof, at twenty thousand dollars.

Judgment having been afterwards rendered upon the said special verdict by the Superior Court of the state of New Hampshire, being the highest court of law or equity of said state, for the plaintiff below, the cause was brought before this court by writ of error.

Mr. Webster, for the plaintiffs in error. The general question is, whether the acts of the 27th of June, and of the 18th and 26th of December, **552*** 1816, are *valid and binding on the rights of the plaintiffs, without their acceptance or assent.

The substance of the facts recited in the preamble to the charter is, that Dr. Wheelock had founded a CHARITY, on funds owned and procured by himself; that he was, at that time, the sole dispenser and sole administrator, as well as the legal owner of these funds; that he had made his will, devising this property in trust to continue the existence and uses of the school, and appointed trustees; that in this state of things, he had been invited to fix his school permanently in New Hampshire, and to extend the design of it to the education of the youth of that province; that, before he removed his school, or accepted this invitation, which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the

province should please, but to such persons as he named and appointed, viz., the persons whom he had already appointed to be the future trustees of his charity by his will. The charter, or letters patent, then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the "Trustees of Dartmouth College;" to have perpetual existence, as such corporation, and with power to hold and dispose of lands and goods, for the use of the college, with all the ordinary powers of corporations. They are in their discretion to apply the funds and property of the college to the support of the president, tutors, ministers, and other officers of the college, and such missionaries and schoolmasters as they may see fit to employ among *the Indians. There **553** are to be twelve trustees forever, and no more; and they are to have the right of filling vacancies occurring in their own body. The Rev. Mr. Wheelock is declared to be the founder of the college, and is, by the charter, appointed first president, with power to appoint a successor, by his last will. All proper powers of government, superintendence, and visitation, are vested in the trustees. They are to appoint and remove all officers at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders, and laws, for the government of the students. And to the end that the persons who had acted as depositaries of the contributions in England, and who had also been contributors themselves, might be satisfied of the good use of their contributions, the president was annually, or when required, to transmit to them an account of the progress of the institution, and the disbursements of its funds, so long as they should continue to act in that trust. These letters patent are to be good and effectual in law, against the king, his heirs and successors forever, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties and immunities to them and to their successors forever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities, which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain.

*After the institution, thus created **554** and constituted, had existed, uninterruptedly and usefully, nearly fifty years, the legislature of New Hampshire passed the acts in question. The first act makes the twelve trustees under the charter, and nine other individuals to be appointed by the governor and council, a corporation, by a new name; and to this new corporation transfers all the property, rights, powers, liberties, and privileges of the old corporation; with further power to establish NEW COLLEGES AND AN INSTITUTE, and to apply all or any part of the funds to these purposes, subject to the power and control of a board of twenty-five overseers, to be appointed by the governor and council. The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the treasurer of the plaintiffs, to retain and hold their property, against their will.

If these acts are valid, the old corporation is

abolished, and a new one created. The first act does, in fact, if it can have effect, create a new corporation, and transfer to it all the property and franchises of the old. The two corporations are not the same, in anything which essentially belongs to the existence of a corporation. They have different names, and different powers, rights and duties. Their organization is wholly different. The powers of the corporation are not vested in the same, or similar hands. In one, the trustees are twelve, and no more. In the other, they are twenty-one. In one, the power is a single board. In the other, it is divided between two boards. 555*] Although the act professes to *include the old trustees in the new corporation, yet that was without their assent, and against their remonstrance; and no person can be compelled to be a member of such a corporation against his will. It was neither expected nor intended that they should be members of the new corporation. The act itself treats the old corporation as at an end, and going on the ground that all its functions have ceased, it provides for the first meeting and organization of the new corporation. It expressly provides, also, that the new corporation shall have and hold all the property of the old; a provision which would be quite unnecessary upon any other ground than that the old corporation was dissolved. But if it could be contended that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest that they impair and invade the rights, property, and powers of the trustees under the charter, as a corporation, and the legal rights, privileges, and immunities which belong to them, as individual members of the corporation. The twelve trustees were the sole legal owners of all the property acquired under the charter. By the acts others are admitted, against their will, to be joint owners. The twelve individuals who are trustees, where possessed of all the franchises and immunities conferred by the charter. By the acts, nine other trustees, and twenty-five overseers, are admitted against their will, to divide these franchises and immunities with them. If, either as a corporation or as individuals, they have any legal rights, this forcible intrusion of others violates those rights, as manifestly as an 556*] entire and complete ouster *and dispossession. These acts alter the whole constitution of the corporation. They affect the rights of the whole body, as a corporation, and the rights of the individuals who compose it. They revoke corporate powers and franchises. They alienate and transfer the property of the college to others. By the charter, the trustees had a right to fill vacancies in their own number. This is now taken away. They were to consist of twelve, and by express provision, of no more. This is altered. They and their successors, appointed by themselves, were forever to hold the property. The legislature has found successors for them, before their seats are vacant. The powers and privileges which the twelve were to exercise exclusively, are now to be exercised by others. By one of the acts, they are subjected to heavy penalties if they exercise their offices, or any of those powers and privileges granted them by charter, and which they had exercised for fifty years. They are to be punished for not accepting the new grant, and taking

Wheat. 4.

its benefits. This, it must be confessed, is rather a summary mode of settling a question of constitutional right. Not only are new trustees forced into the corporation, but new trusts and uses are created. The college is turned into a university. Power is given to create new colleges, and to authorize any diversion of the funds which may be agreeable to the new boards, sufficient latitude is given by the undefined power of establishing an institute. To these new colleges, and this institute, the funds contributed by the founder, Dr. Wheelock, and by the original donors, the Earl of Dartmouth *and others, are to be applied, in plain [*557 and manifest disregard of the uses to which they were given. The president, one of the old trustees, had a right to his office, salary, and emoluments, subject to the twelve trustees alone. His title to these is now changed, and he is made accountable to new masters. So also all the professors and tutors. If the legislature can at pleasure make these alterations and changes in the rights and privileges of the plaintiffs, it may, with equal propriety, abolish these rights and privileges altogether. The same power which can do any part of this work can accomplish the whole. And, indeed, the argument on which these acts have been hitherto defended goes altogether on the ground that this is such a corporation as the legislature may abolish at pleasure, and that its members have no rights, liberties, franchises, property or privileges, which the legislature may not revoke, annul, alienate or transfer to others whenever it sees fit.

It will be contended by the plaintiffs that these acts are not valid and binding on them without their assent. 1. Because they are against common right, and the constitution of New Hampshire. 2. Because they are repugnant to the constitution of the United States. I am aware of the limits which bound the jurisdiction of the court in this case; and that on this record nothing can be decided, but the single question, whether these acts are repugnant to the constitution of the United States. Yet it may assist in forming an opinion of their true nature and character, to compare them with those fundamental principles, introduced into the state governments *for [*558 the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with great fullness and accuracy.

It is not too much to assert that the legislature of New Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs without their assent, even if there had been, in the constitution of New Hampshire, or of the United States, no special restriction on their power; because these acts are not the exercise of a power properly legislative.¹ Their object and effect is to take away from one, rights, property, and franchises, and to grant them to another. This is not the exercise of a legislative power. To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary. Attainder and confiscation are acts of sovereign power, not acts

1.—*Calder et ux. v. Bull*, 3 Dall. 386.

of legislation. The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is theoretically omnipotent. Yet, in modern times, it has attempted the exercise of this power very rarely. In a celebrated instance, those who asserted this power in parliament, vindicated its exercise only in a case in which it could be shown, 1st. That the charter in question was a charter of political power. 2d. That there was a great and overruling state necessity, justifying the "violation of the charter. 3d. That the charter had been abused, and justly forfeited.¹ The bill affecting this charter did not pass. Its history is well known. The act which afterwards did pass, passed with the assent of the corporation. Even in the worst times, this power of parliament to repeal and rescind charters has not often been exercised. The illegal proceedings in the reign of Charles II. were under color of law. Judgments of forfeiture were obtained in the courts. Such was the case of the *quo warranto* against the city of London, and the proceedings by which the charter of Massachusetts was vacated. The legislature of New Hampshire has no more power over the rights of the plaintiffs than existed, somewhere, in some department of government, before the revolution. The British parliament could not have annulled or revoked this grant as an act of ordinary legislation. If it had done it at all, it could only have been in virtue of that sovereign power, called omnipotent, which does not belong to any legislature in the United States. The legislature of New Hampshire has the same power over this charter, which belonged to the king who granted it, and no more. By the law of England, the power to create corporations is a part of the royal prerogative.² By the revolution, this power may be considered as having devolved on the legislature of the state, and it has accordingly been exercised by the legislature. But the king cannot abolish a corporation, or new model it, or alter its powers, without its assent. This is the acknowledged and well-known doctrine of the common law. "Whatever might have been the notion in former times," says Lord Mansfield, "it is most certain now, that the corporations of the universities are lay corporations; and that the crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage."³ After forfeiture duly found, the king may regrant the franchises; but a grant of franchises already granted, and of which no forfeiture has been found, is void. Corporate franchises can only be forfeited by trial and judgment.⁴ In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases.⁵ It may accept such part of the grant as it chooses, and reject the rest.⁶ In the very nature of things, a charter cannot be

forced upon anybody. No one can be compelled to accept a grant; and without acceptance the grant is necessarily void.⁷ It cannot be pretended that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate, or alter this charter. If, therefore, the legislature has not this power by any specific grant contained in the constitution; nor as included in its ordinary legislative powers; nor by reason of its succession to the prerogatives of the crown in this particular; on what ground would the authority to pass these acts rest, even if there were no special prohibitory clauses in the constitution, and the bill of rights?

But there are prohibitions in the constitution and bill of rights of New Hampshire, introduced for the purpose of limiting the legislative power, and of protecting the rights and property of the citizens. One prohibition is, "that no person shall be deprived of his property, immunities, or privileges, put out of the protection of the law, or deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land." In the opinion, however, which was given in the court below, it is denied that the trustees, under the charter, had any property, immunity, liberty or privilege, in this corporation, within the meaning of this prohibition in the bill of rights. It is said, that it is a public corporation, and public property. That the trustees have no greater interest in it than any other individuals. That it is not private property, which they can sell, or transmit to their heirs; and that, therefore, they have no interest in it. That their office is a public trust like that of the governor, or a judge; and that they have no more concern in the property of the college than the governor in the property of the state, or than the judges in the fines which they impose on the culprits at their bar. That it is nothing to them whether their powers shall be extended or lessened, any more than it is to the courts, whether their jurisdiction shall be enlarged or diminished. It is necessary, therefore, to inquire into the true nature and character of the corporation, which was created by the charter of 1769.

There are divers sorts of corporations; and it may be safely admitted, that the legislature has more power over some than over others.⁸ Some corporations are for government and political arrangement; such for example as cities, counties, and the towns in New England. These may be changed and modified as public convenience may require, due regard being always had to the rights of property. Of such corporations, all who live within the limits are of course obliged to be members, and to submit to the duties which the law imposes on them as such. Other civil corporations are for the advancement of trade and business, such as banks, insurance companies, and the like. These are created, not by general law,

1.—Annual Reg. 1784, p. 160; Parlia. Reg. 1783; Mr. Burke's Speech on Mr. Fox's E. I. Bill: Burke's Works, Vol. III., p. 414, 417, 467, 468, 486.

2.—1 Bl. Com. 472.

3.—3 Burr. 1056.

4.—3 T. R. 244, King v. Passmore.

5.—The King v. Vice-Chancellor of Cambridge, 3 Burr. 1656; 3 T. R. 240, per Lord Kenyon.

6.—*Idem*, 1661, and King v. Passmore, *ubi supra*.

7.—Ellis v. Marshall, 2 Mass. R. 277: 1 Kyd on Corp. 65, 66.

8.—1 Wooddes, 474, 1 Bl. Com. 467.

but usually by grant. Their constitution is special. It is such as the legislature sees fit to give, and the grantees to accept.

The corporation in question is not a civil, although it is a lay corporation. It is an eleemosynary corporation. It is a private charity, originally founded and endowed by an individual, with a charter obtained for it at his request, for the better administration of his charity. "The eleemosynary sort of corporations are such as are constituted for the perpetual distributions of the free alms or bounty of the founder of them, to such persons as he has directed. Of 563*] this *are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges both in our universities and out of them." Eleemosynary corporations are for the management of private property, according to the will of the donors. They are private corporations. A college is as much a private corporation as a hospital; especially a college founded as this was, by private bounty. A college is a charity. "The establishment of learning," says Lord Hardwicke, "is a charity, and so considered in the statute of Elizabeth. A devise to a college, for their benefit, is a laudable charity, and deserves encouragement." The legal signification of a charity is derived chiefly from the statute 43 Eliz., c. 4. "Those purposes," said Sir W. Grant, "are considered charitable which that statute enumerates." Colleges are enumerated as charities in that statute. The government, in these cases, lends its aid to perpetuate the beneficent intention of the donor, by granting a charter, under which his private charity shall continue to be dispensed, after his death. This is done either by incorporating the objects of the charity, as, for instance, the scholars in a college, or the poor in a hospital; or by incorporating those who are to be governors, or trustees, of the charity.⁴ In cases of the first sort, the founder is, by the common law, visitor. In early times it became a maxim, that he who gave the property might regulate it in future. *Cujus est dare, ejus est disponere*. This right of visitation descended from the 564*] founder to his heir, as "a right of property, and precisely as his other property went to his heir; and in default of heirs, it went to the king, as all other property goes to the king, for the want of heirs. The right of visitation arises from the property. It grows out of the endowment. The founder may, if he please, part with it at the time when he establishes the charity, and may vest it in others. Therefore, if he chooses that governors, trustees, or overseers, should be appointed in the charter, he may cause it to be done, and his power of visitation will be transferred to them, instead of descending to his heirs. The persons thus assigned or appointed by the founder will be visitors, with all the powers of the founder, in exclusion of his heir.⁵ The right of visitation, then, accrues to them as a matter of property, by the

gift, transfer, or appointment of the founder. This is a private right which they can assert in all legal modes, and in which they have the same protection of the law as in all other rights. As visitors, they may make rules, ordinances, and statutes, and alter and repeal them, as far as permitted so to do by the charter.⁶ Although the charter proceeds from the crown, or the government, it is considered as the will of the donor. It is obtained at his request. He imposes it as the rule which is to prevail in the dispensation of his bounty in all future times. The king, or government, which grants the charter, is not thereby the founder, but he who furnishes the funds. The gift of the revenues is the foundation.⁷ The leading *case [*565 on this subject is *Phillips v. Bury*.⁸ This was an ejectment brought to recover the rectory house, &c., of Exeter College, in Oxford. The question was, whether the plaintiff or defendant was legal rector. Exeter College was founded by an individual, and incorporated by a charter granted by Queen Elizabeth. The controversy turned upon the power of the visitor, and, in the discussion of the cause, the nature of college charters and corporations was very fully considered; and it was determined that the college was a private corporation, and that the founder had a right to appoint a visitor, and give him such power as he thought fit.⁹ The learned Bishop Stillingfleet's argument in the same cause, as a member of the House of Lords, when it was there heard, exhibits very clearly the nature of colleges and similar corporations.¹⁰ These opinions received the sanction of the House of Lords, and they seem to be settled and undoubted law. Where there is a charter, vesting proper powers of government in trustees, or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds.¹¹ "The [*566 foundations of colleges," says Lord Mansfield, "are to be considered in two views, viz., as they are corporations, and as they are eleemosynary. As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally or specially; he may prescribe particular modes and manners, as to the exercise of part of it. If he makes a general visitor (as by the general words *visitor sit*), the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose and no further. The founder may make a general visitor; and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance."¹² And even if the king be founder, if he grant a charter incorporating trustees and governors, they are visitors, and the king cannot visit.¹³ A subsequent donation, or engraft-

1.—1 Bl. Com. 471.

2.—1 Ves. 537.

3.—9 Ves. 405.

4.—1 Wooddes, 474.

5.—1 Bl. Com. 471.

6.—2 T. R. 350, 351.

7.—1 Bl. Com. 480.

8.—Reported in 1 Lord Raymond, 5; Comb. 285; Holt, 715; 1 Show. 380; 4 Mod. 106; Skinn. 447.

Wheat. 4.

U. S., Book 4.

9.—Lord Holt's judgment, copied from his own manuscript, is in 2 T. R. 346.

10.—1 Burnes's Ecol. Law, 443.

11.—Green v. Rutherford, 1 Ves. 472; Attorney-General v. Foundling Hospital, 2 Ves., Jr., 47; Kyd on Corp. 195; Coop. Eq. Pl. 232.

12.—St. John's College, Cambridge, v. Todington, 1 Burr. 200.

13.—Attorney-General v. Middleton, 2 Ves. 323.

ed fellowship, falls under the same general visitatorial power, if not otherwise specially provided.¹ In New England, and perhaps throughout the United States, eleemosynary corporations have been generally established in the latter mode, that is, by incorporating governors or trustees, and vesting in them the right of visitation. Small variations may have been in some instances adopted; as in the case of Harvard College, where some power of inspection **567*** is given to the overseers, but *not, strictly speaking, a visitatorial power, which still belongs, it is apprehended, to the fellows, or members of the corporation. In general, there are many donors. A charter is obtained, comprising them all, or some of them, and such others as they choose to include, with the right of appointing their successors. They are thus the visitors of their own charity, and appoint others, such as they may see fit, to exercise the same office in time to come. All such corporations are private. The case before the court is clearly that of an eleemosynary corporation. It is, in the strictest legal sense, a private charity. In *King v. St. Catharine's Hall*,² that college is called a private eleemosynary lay corporation. It was endowed by a private founder, and incorporated by letters patent. And in the same manner was Dartmouth College founded and incorporated. Dr. Wheelock is declared by the charter to be its founder. It was established by him, on funds contributed and collected by himself. As such founder, he had a right of visitation, which he assigned to the trustees, and they received it by his consent and appointment, and held it under the charter.³ He appointed these trustees visitors, and in that respect to take place of his heir; as he might have appointed devisees to take his estate, instead of his heir. Little, probably, did he think, at that time, that the legislature would ever take away this property and these privileges, and give them to others. Little did he suppose that this charter secured to him and his successors **568*** no legal rights. Little did *the other donors think so. If they had, the college would have been, what the university is now, a thing upon paper, existing only in name. The numerous academies in New England have been established substantially in the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College. It may, to-day, have more friends; but to-morrow it may have more enemies. Its legal rights are the same. So also of Yale College; and indeed of all the others. When the legislature gives to these institutions, it may, and does, accompany its grants with such conditions as it pleases. The grant of lands by the legislature of New Hampshire to Dartmouth College, in 1789, was accompanied with various conditions. When donations are made, by the legislature, or others, to a charity already existing, without any condition, or the specification of any new use, the donation follows the nature of the charity. Hence the doctrine, that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property.

The public cannot be charitable in these institutions. It is not the money of the public, but of private persons, which is dispensed. It may be public, that is general, in its uses and advantages; and the state may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds. If the doctrine laid down by Lord Holt, and the House of Lords, in *Phillips v. Bury*, and recognized and established in all the other cases, be correct, *the property of this college was private [**569** property; it was vested in the trustees by the charter, and to be administered by them, according to the will of the founder and donors, as expressed in the charter. They were also visitors of the charity, in the most ample sense. They had, therefore, as they contend, privileges, property, and immunities, within the true meaning of the bill of rights. They had rights, and still have them, which they can assert against the legislature, as well as against other wrong-doers. It makes no difference, that the estate is holden for certain trusts. The legal estate is still theirs. They have a right in the property, and they have a right of visiting and superintending the trust; and this is an object of legal protection, as much as any other right. The charter declares, that the powers conferred on the trustees, are "privileges, advantages, liberties, and immunities;" and that they shall be forever holden by them and their successors. The New Hampshire bill of rights declares, that no one shall be deprived of his "property, privileges, or immunities," but by judgment of his peers, or the law of the land. The argument on the other side is, that although these terms may mean something in the bill of rights, they mean nothing in this charter. But they are terms of legal signification, and very properly used in the charter. They are equivalent with franchises. Blackstone says that franchise and liberty are used as synonymous terms. And after enumerating other liberties and franchises, he says, "it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual *succession, and do other corporate [**570** acts; and each individual member of such corporation is also said to have a franchise or freedom."⁴ Liberties is the term used in *Magna Charta*, as including franchises, privileges, immunities, and all the rights which belong to that class. Professor Sullivan says, the term signifies the "privileges that some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the king; as the chattels of felons or outlaws, and the lands and privileges of corporations."⁵ The privilege, then, of being a member of a corporation, under a lawful grant, and of exercising the rights and powers of such member, is such a privilege, liberty, or franchise, as has been the object of legal protection, and the subject of a legal interest, from the time of *Magna Charta* to the present moment. The plaintiffs have such an interest in this corporation, individually, as they could assert and maintain in a court of law, not as agents of the public, but

1.—Green v. Rutherford, *ubi supra*; St. John's College v. Todington, *ubi supra*.

2.—4 Term Rep. 233.

3.—Bl. Com. *ubi supra*.

4.—2 Bl. Com. 37.

5.—Sull. 41st Lec.

in their own right. Each trustee has a franchise, and if he be disturbed in the enjoyment of it, he would have redress, on appealing to the law, as promptly as for any other injury. If the other trustees should conspire against any one of them, to prevent his equal right and voice in the appointment of a president or professor, or in the passing of any statute or ordinance of the college, he would be entitled to his action, for depriving him of his franchise. It makes no difference that this property is to be holden and administered, and these franchises § 71*] exercised, *for the purpose of diffusing learning. No principle and no case establishes any such distinction. The public may be benefited by the use of this property. But this does not change the nature of the property, or the rights of the owners. The object of the charter may be public good; so it is in all other corporations; and this would as well justify the resumption or violation of the grant in any other case as in this. In the case of an advowson, the use is public, and the right cannot be turned to any private benefit or emolument. It is, nevertheless a legal private right, and the property of the owner, as emphatically as his freehold. The rights and privileges of trustees, visitors, or governors of incorporated colleges, stand on the same foundation. They are so considered, both by Lord Holt and Lord Hardwicke.¹ To contend that the rights of the plaintiffs may be taken away, because they derive from them no pecuniary benefit, or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts, is taking an extremely narrow view of the subject. According to this notion, the case would be different, if, in the charter, they had stipulated for a commission on the disbursement of the funds; and they have ceased to have any interest in the property, because they have undertaken to administer it gratuitously. It cannot be necessary to say much in refutation of the idea, that there cannot be a legal interest, or *ownership, in anything which does not yield a pecuniary profit; as if the law regarded no rights but the rights of money, and of visible tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him. The exercise of this right directly and very materially affects the public; much more so than the exercise of the privileges of a trustee of this college. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the *Aylesbury* case.² That was an action against a returning officer, for refusing the plaintiff's vote, in the election of a member of parliament. Three of the judges of the king's bench held, that the action could not be maintained, because, among other objections, "it

was not any matter of profit, either in *presenti* or in *futuro*." It would not enrich the plaintiff, *in presenti*, nor would it, *in futuro*, go to his heirs, or answer to pay his debts. But Lord Holt and the House of Lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived. Individuals have a right *to use their own property for [*573 purposes of benevolence, either towards the public or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, to rescind this contract, and seize on the property, is not law, but violence. Whether the state will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause. That all property, of which the use may be beneficial to the public, belongs therefore to the public, is quite a new doctrine. It has no precedent, and is supported by no known principle. Dr. Wheelock might have answered his purposes, in this case, by executing a private deed of trust. He might have conveyed his property to trustees, for precisely such uses as are described in this charter. Indeed, it appears that he had contemplated the establishing of his school in that manner, and had made his will, and devised the property to the same persons who were afterwards appointed trustees in the charter. Many literary and other charitable institutions are founded in that manner, and the trust is renewed, and conferred on other persons, from time to time, as occasion may require. In such a case, no lawyer would or could say, that the legislature might divest the trustees constituted by deed or will, seize upon the property, and give it to other persons, for other purposes. And does the granting of a charter, which is only done to perpetuate the trust *in a more [*574 convenient manner, make any difference? Does or can this change the nature of the charity, and turn it into a public, political corporation? Happily we are not without authority on this point. It has been considered and adjudged. Lord Hardwicke says, in so many words, "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be."³ The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity. The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private property, and to clothe it with all the security and inviolability of private property. The intent is, that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed. Who ever endowed the public? Who ever appointed a legislature to administer his charity? Or who ever heard, before, that a gift to a college, or hospital, or an asylum, was, in reality, nothing but a gift to the state? The state of Vermont is a princi-

1.—*Phillips v. Bury*; *Green v. Rutherford*, *ubi supra*; *Vide also* 2 Black, 21.

2.—*Ashby v. White*, 2 Ld. Raym. 938.

Wheat. 4.

3.—*Attorney-General v. Pearce*, 2 Atk. 87.

pal donor to Dartmouth College. The lands given lie in that state. This appears in the special verdict. Is Vermont to be considered as having intended a gift to the state of New Hampshire in this case; as it has been said is to be the reasonable construction of all donations to the college? The legislature of New Hampshire affects to represent the public, and there-
 575*] fore claims a right to control *all property destined to public use. What hinders Vermont from considering herself equally the representative of the public, and from resuming her grants, at her own pleasure? Her right to do so is less doubtful than the power of New Hampshire to pass the laws in question. In *University v. Foy*,¹ the Supreme Court of North Carolina pronounced unconstitutional and void a law repealing a grant to the University of North Carolina; although that university was originally erected and endowed by a statute of the state. That case was a grant of lands, and the court decided that it could not be resumed. This is the grant of a power and capacity to hold lands. Where is the difference of the cases, upon principle? In *Terret v. Taylor*,² this court decided, that a legislative grant or confirmation of lands, for the purposes of moral and religious instruction, could no more be rescinded than other grants. The nature of the use was not holden to make any difference. A grant to a parish or church, for the purposes which have been mentioned, cannot be distinguished, in respect to the title it confers, from a grant to a college for the promotion of piety and learning. To the same purpose may be cited the case of *Pawlett v. Clark*. The state of Vermont, by statute, in 1794, granted to the respective towns in that state, certain glebe lands lying within those towns, for the sole use and support of religious worship. In 1799 an act was passed to repeal the act of 1794; but this court declared that the act of 1794, "so far as
 576*] it *granted the glebes to the towns, could not afterwards be repealed by the legislature, so as to divest the rights of the towns under the grant."³ It will be for the other side to show that the nature of the use decides the question, whether the legislature has power to resume its grants. It will be for those who maintain such a doctrine to show the principles and cases upon which it rests. It will be for them also to fix the limits and boundaries of their doctrine, and to show what are, and what are not, such uses as to give the legislature this power of resumption and revocation. And to furnish an answer to the cases cited, it will be for them further to show, that a grant for the use and support of religious worship stands on other ground than a grant for the promotion of piety and learning.

I hope enough has been said to show that the trustees possessed vested liberties, privileges, and immunities, under this charter; and that such liberties, privileges, and immunities, being once lawfully obtained and vested, are as

inviolable as any vested rights of property whatever. Rights to do certain acts, such, for instance, as the visitation and superintendence of a college, and the appointment of its officers, may surely be vested rights, to all legal intents, as completely as the right to possess property. A late learned judge of this court has said: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land."⁴

*If such be the true nature of the [577 plaintiffs' interests under this charter, what are the articles in the New Hampshire bill of rights which these acts infringe?

They infringe the second article; which says, that the citizens of the state have a right to hold and possess property. The plaintiffs had a legal property in this charter; and they had acquired property under it. The acts deprive them of both. They impair and take away the charter; and they appropriate the property to new uses, against their consent. The plaintiffs cannot now hold the property acquired by themselves, and which this article says they have a right to hold. They infringe the twentieth article. By that article it is declared, that in questions of property, there is a right to trial. The plaintiffs are divested, without trial or judgment. They infringe the twenty-third article. It is therein declared, that no retrospective laws shall be passed. This article bears directly on the case. These acts must be deemed retrospective, within the settled construction of that term. What a retrospective law is, has been decided, on the construction of this very article, in the Circuit Court for the first circuit. The learned judge of that circuit says: "Every statute which takes away, or impairs vested rights, acquired under existing laws, must be deemed retrospective." That all such laws are retrospective, was decided also in the case of *Dash v. Van Kleeck*,⁵ where a most learned *judge quotes this article [578 from the constitution of New Hampshire, with manifest approbation, as a plain and clear expression of those fundamental and unalterable principles of justice, which must lie at the foundation of every free and just system of laws. Can any man deny that the plaintiffs had rights, under the charter, which were legally vested, and that by these acts, those rights are impaired? These *acts infringe [579 also, the thirty-seventh article of the constitution of New Hampshire; which says, that the powers of government shall be kept separate. By these acts, the legislature assumes to exercise a judicial power. It declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property and private privileges.

1.—2 Heywood's R.

2.—9 Cranch, 43.

3.—9 Cranch, 202.

4.—3 Dal. 304.

5.—*Society v. Wheeler*, 2 Gal. 108.

6.—7 Johns. R. 477.

7.—"It is a principle in the English law, as an-

cient as the law itself," says Chief Justice Kent, in the case last cited, "that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non præteritis*. Bracton, lib. 4, fol. 228; 2 Inst. 292. The maxim in Bracton was probably taken from the civil law, for we find in that system the same principle, that the law-giver cannot alter his mind to the prejudice of a vested

Wheat. 4.

It shall not judge by act. It shall not decide by act. It shall not deprive by act. But it shall leave all these things to be tried and adjudged by the law of the land. The fifteenth [580*] article has been referred *to before. It declares, that no one shall be "deprived of his property, immunities, or privileges, but by the judgment of his peers, or the law of the land." Notwithstanding the light in which the learned judges in New Hampshire viewed the rights of the plaintiffs under the charter, and which has been before adverted to, it is found to be admitted, in their opinion, that those rights are privileges within the meaning of this fifteenth article of the bill of rights. Having quoted that article, they say: "that the right to manage the affairs of this college is a privilege, within the meaning of this clause of the bill of rights, is not to be doubted." In my humble opinion, this surrenders the point. To resist the effect of this admission, however, the learned judges add: "But how a privilege can be protected from the operation of the law of the land, by a clause in the constitution, declaring that it shall not be taken away but by the law of the land, is not very easily understood." This answer goes on the ground that the acts in question are laws of the land, within the meaning of the constitution. If they be so, the argument drawn from this article is fully answered. If they be not so, it being admitted that the plaintiffs' rights are "privileges," within the meaning of the article, the argument is not answered, and the article is infringed by the acts. Are, then, these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone: "And first, it (*i. e.*, law) is a rule; not a transient sudden order from a superior, to, or concerning, a particular [581*] person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law." Lord Coke is equally decisive and emphatic. Citing and commenting on the cele-

brated 29th chap. of *Magna Charta*, he says: "No man shall be diseized, &c., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), by the due course and process of law." Have the plaintiffs lost their franchises by "due course and process of law?" On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?" By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, [*582 legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country. "Is that the law of the land," said Mr. Burke, "upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate according to the law of the land, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is? Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?" That the power of electing and appointing the officers of this college is not only a right of the

1.—1 Bl. Com. 44.

2.—Co. Ins. 46.

right. *Nemo potest mutare consilium suum in alterius injuriam.* Dig. 50, 17, 75. This maxim of Papinian is general in its terms; but Dr. Taylor (*Elements of the Civil Law*, 168) applies it directly as a restriction upon the law-giver; and a declaration in the code leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim, et de præterito tempore, et adhuc pendenti negotiis cautum sit.* Cod. 1, 14, 7. This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future as contradistinguished from past contracts and vested rights. Perezzi Praelæo. t. It is, indeed, admitted, that the prince may enact a retrospective law, provided it be done expressly; for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial from the legislative power, was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This

was called the *interlocutio principis*; and this, according to Huber's definition, was, *quando principes inter partes loquuntur, et jus dicunt.* Praelæc. Juris. Rom., Vol. II., 545. No correct civilian, and especially no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights, and pending suits, without disgust and indignation; and we are rather surprised to find, that under the violent and irregular genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows that it must be founded in the clearest justice. Our case is happily very different from that of the subjects of Justinian. With us, the power of the law-giver is limited and defined; the judicial is regarded as a distinct independent power; private rights have been better understood, and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering, is now to be regarded as sacred."

Wheat. 4.

645

trustees as a corporation generally, and in the aggregate, but that each individual trustee has also his own individual franchise in such right of election and appointment, is according to the language of all the authorities. Lord Holt says, "it is agreeable to reason and the rules of law that a franchise should be vested in the corporation aggregate, and yet the benefit of it **583*** to redound to the particular members, and to be enjoyed by them in their private capacity. Where the privilege of election is used by particular persons, it is a particular right, vested in every particular man."

It is also to be considered that the president and professors of this college have rights to be affected by these acts. Their interest is similar to that of fellows in the English colleges; because they derive their living wholly, or in part, from the founder's bounty. The president is one of the trustees, or corporators. The professors are not necessarily members of the corporation; but they are appointed by the trustees, are removable only by them, and have fixed salaries, payable out of the general funds of the college. Both president and professors have freeholds in their offices; subject only to be removed by the trustees, as their legal visitors, for good cause. All the authorities speak of fellowships in colleges as freeholds, notwithstanding the fellows may be liable to be suspended or removed, for misbehavior, by their constituted visitors. Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate, but the only support of literary men, who have devoted their lives to the instruction of youth. The president and professors were appointed by the twelve trustees. They were accountable to nobody else, and could be removed by nobody else. They accepted their offices on this tenure. Yet the legislature has **584*** appointed other persons, with power to remove these officers, and to deprive them of their livings; and those other persons have exercised that power. No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men; of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature, and the instruction of youth, in the quiet retreats of academic life. Whether, to dispossess and oust them; to deprive them of their office, and turn them out of their livings; to do this, not by the power of their legal visitors, or governors, but by acts of the legislature; and to do it without forfeiture, and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question, of which there would seem to be but one side fit for a lawyer or a scholar to espouse. Of all the attempts of James II. to overturn the law, and the rights of his subjects, none was esteemed more arbitrary or tyrannical than his attack on Magdalen College, Oxford. And, yet, that attempt was nothing but to put out one president and put in another. The president of that college, according to the charter and statutes, is to be chosen by the fel-

lows, who are the corporators. There being a vacancy, the king chose to take the appointment out of the hands of the fellows, the legal electors of a president, into his own hands. He therefore sent down his mandate commanding the fellows to admit, for president, a person of his nomination; and inasmuch as this was directly against the charter and constitution of the college, he was pleased to add a *non obstante* clause of sufficiently comprehensive import. The fellows were commanded to admit the person mentioned in the mandate, "any statute, custom or constitution to the contrary notwithstanding, wherewith we are graciously pleased to dispense, in this behalf." The fellows refused obedience to this mandate, and Dr. Hough, a man of independence and character, was chosen president by the fellows, according to the charter and statutes. The king then assumed the power, in virtue of his prerogative, to send down certain commissioners to turn him out, which was done accordingly; and Parker, a creature suited to the times, put in his place. And because the president, who was rightfully and legally elected, would not deliver the keys, the doors were broken open. "The nation, as well as the university," says Bishop Burnet, "looked on all these proceedings with just indignation. It was thought an open piece of robbery and burglary, when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold." Mr. Hume, although a man of different temper, and of other sentiments, in some respects, than Dr. Burnet, speaks of this arbitrary attempt of prerogative in terms not less decisive. "The president, and all the fellows," says he, "except two, who complied, were expelled the college; and Parker was put in possession of the office. This act of violence, of all those which were committed during the reign of James, is perhaps the most illegal and arbitrary. When the dispensing power was the most strenuously insisted on by court lawyers, it had still been allowed that the statutes which regard private property could not legally be infringed by that prerogative. Yet, in this instance, it appeared that even these were not now secure from invasion. The privileges of a college are attacked; men are illegally dispossessed of their property for adhering to their duty, to their oaths, and to their religion." This measure King James lived to repent, after repentance was too late. When the charter of London was restored, and other measures of violence retracted, to avert the impending revolution, the expelled president and fellows of Magdalen College were permitted to resume their rights. It is evident that this was regarded as an arbitrary interference with private property. Yet private property was no otherwise attacked than as a person was appointed to administer and enjoy the revenues of a college, in a manner and by persons not authorized by the constitution of the college. A majority of the members of the corporation would not comply with the king's wishes. A minority would. The object was, therefore, to make this minority a majority. To this end, the king's commissioners were directed to interfere in the case, and they united

1.—2 Lord Raym. 952.
646

2.—Hist. of his own times, Vol. III., p. 119.
Wheat. 4.

with the two complying fellows, and expelled the rest; and thus effected a change in the government of the college. The language in which Mr. Hume, and all other writers, speak of this abortive attempt of oppression, shows that col-587*] leges were esteemed to be, as *they truly are, private corporations, and the property and privileges which belong to them, private property and private privileges. Court lawyers were found to justify the king in dispensing with the laws; that is, in assuming and exercising a legislative authority. But no lawyer, not even a court lawyer, in the reign of King James II., as far as appears, was found to say, that even by this high authority, he could infringe the franchises of the fellows of a college, and take away their livings. Mr. Hume gives the reason; it is, that such franchises were regarded, in a most emphatic sense, as private property.¹ If it could be made to appear that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature, and that the property holden belonged to the state, then, indeed, the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities; and these are holden by the trustees expressly against the state forever. It is admitted that the state, by its courts of law, can enforce the will of the donor, and compel a faithful execution of the trust. The plaintiffs claim no exemption from legal responsibility. They hold themselves at all times answerable to the law of the land for their conduct in the trust committed to them. They ask only to hold the property of which they are owners, and the franchises which belong to them, until they shall be found, by due course and process of law, to have forfeited them. It 588*] can make no difference *whether the legislature exercise the power it has assumed, by removing the trustees and the president and professors, directly, and by name, or by appointing others to expel them. The principal is the same, and in point of fact, the result has been the same. If the entire franchise cannot be taken away, neither can it be essentially impaired. If the trustees are legal owners of the property, they are sole owners. If they are visitors, they are sole visitors. No one will be found to say, that if the legislature may do what it has done, it may not do anything and every thing which it may choose to do, relative to the property of the corporation, and the privileges of its members and officers.

If the view which has been taken of this question be at all correct, this was an eleemosynary corporation; a private charity. The property was private property. The trustees were visitors, and their right to hold the charter,

administer the funds, and visit and govern the college, was a franchise and privilege, solemnly granted to them. The use being public, in no way diminishes their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property. They take away privileges, immunities, and franchises. They deny to the trustees the protection of the law; and they are retrospective in their operation. In all which respects, they are against the constitution of New Hampshire.

2. The plaintiffs contend, in the second place, that the acts in question are repugnant to the 10th section *of the 1st article of [*589 the constitution of the United States. The material words of that section are: "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

The object of these most important provisions in the national constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument. "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of those fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the *community. They have seen, [*590 too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding."² It has already been decided in this court, that a grant is a contract, within the meaning of this provision; and that a grant by a state is also a contract as much as the grant of an individual.³

*It has also been decided, that a grant [*591

1.—*Vide* a full account of this case in State Trials, 4 Ed., Vol. IV., p. 282.

2.—Letters of Publius, or The Federalist, No. 44, by Mr. Madison.

3.—In *Fletcher v. Peck*, 6 Cranch, 87, this court says: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; Wheat. 4.

and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. If, under a fair construction of the constitution, grants are comprehended under the term 'contracts,' is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of con-

by a state before the revolution, is as much to be protected as a grant since.¹ But the case of *Terret v. Taylor*, before cited, is of all others most pertinent to the present argument. Indeed, the judgment of the court in that case seems to leave little to be argued or decided in this.² This court, then, does not admit the [592*] doctrine "that a legislature can repeal statutes creating private corporations. If it cannot repeal them altogether, of course it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators. If, therefore, it has been shown that this college is to be regarded as a private charity, this case is embraced within the very terms of that decision. A grant of corporate powers and privileges is as much a contract as a grant of land. What proves all charters of this sort to be contracts, is, that they must be accepted, to give them force and effect. If they are not accepted they are void. And in the case of an existing corporation, if a new charter is given it, it may even accept part and reject the rest. In *Rez v. Vice-Chancellor of Cambridge*,³ Lord Mansfield says: "There is a vast deal of difference between a new charter granted to a new corporation, (who must take it as it is given), and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter *in toto*, and to receive either all or none of it; they may act partly [593*] under it, and *partly under their old charter or prescription. The validity of these new charters must turn upon the acceptance of them." In the same case, Mr. Justice Wilmot says: "It is the concurrence and acceptance of the university that gives the force to the charter of the crown." In the *King v. Passmore*,⁴ Lord Kenyon observes: "Some things are clear; when a corporation exists, capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it."⁵ In all cases relative to charters, the acceptance of

them is uniformly alleged in the pleadings. This shows the general understanding of the law, that they are grants, or contracts; and that parties are necessary to give them force and validity. In *King v. Dr. Askeu*,⁶ it is said: "The crown cannot oblige a man to be a corporator without his consent; he shall not be subject to the inconveniences of it without accepting it and assenting to it." These terms, "acceptance," and "assent," are the very language of contract. In *Ellis v. Marshall*,⁷ it was expressly adjudged that the naming of the defendant, among others, in an act of incorporation, did not, of itself, make him a corporator; and that his assent was necessary to that end. The court speak of the act of incorporation as a grant, and observe, "that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." But Mr. Justice Buller, in *King v. Passmore*, furnishes, if possible, a [594*] still more direct and explicit authority. Speaking of a corporation for government, he says: "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place." This language applies, with peculiar propriety and force, to the case before the court. It was in consequence of the "privileges bestowed," that Dr. Wheelock and his associates, undertook to exert themselves for the instruction and education of youth in this college; and it was on the same consideration that the founder endowed it with his property. And because charters of incorporation are of the nature of contracts, they cannot be altered or varied, but by consent of the original parties. If a charter be granted by the king, it may be altered by a new charter granted by the king, and accepted by the corporators. But if the first charter be granted by parlia-

tracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights, for the people of each state."

1.—*New Jersey v. Wilson*, 7 Cranch, 164.

2.—"A private corporation," says the court, "created by the legislature, may lose its franchises by a misuser or a non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change

of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government, may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

3.—3 Burr. 1656.

4.—3 T. R. 240.

5.—*Vide* also 1 Kyd. on Cor. 65.

6.—4 Burr. 2200.

7.—2 Mass. R. 279.

ment, the consent of parliament must be obtained to any alteration. In *King v. Miller*,¹ Lord Kenyon says: "Where a corporation takes its rise from the king's charter, the king by granting, and the corporation by accepting, another charter, may alter it, because it is done with the consent of all the parties who are competent to consent to the alteration."² There are, in this 595*] case, all the essential constituent parts of a contract. There is something to be contracted about; there are parties, and there are plain terms in which the agreement of the parties, on the subject of the contract, is expressed. There are mutual considerations and inducements. The charter recites, that the founder, on his part, has agreed to establish his seminary in New Hampshire, and to enlarge it, beyond its original design, among other things, for the benefit of that province; and thereupon a charter is given to him and his associates, designated by himself, promising and assuring to them, under the plighted faith of the state, the right of governing the college, and administering its concerns, in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendence, visitation, and government. Is not this a contract? If lands or money had been granted to him and his associates, for the same purposes, such grant could not be rescinded. And is there any difference, in legal contemplation, between a grant of corporate franchises and a grant of tangible property? No such difference is recognized in any decided case, nor does it exist in the common apprehension of mankind.

It is therefore contended, that this case falls within the true meaning of this provision of the constitution, as expounded in the decisions of this court; that the charter of 1789 is a contract, a stipulation, or agreement; mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. That the acts in question impair this contract, 596*] they, "has already been sufficiently shown. They repeal and abrogate its most essential parts.

Much has heretofore been said on the necessity of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined, which might otherwise be without remedy. Abuses, it is contended, might arise in the management of such institutions, which the ordinary courts of law would be unable to correct. But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause which, upon its merits, is indefensible. It would be sufficient to say, in answer, that it is not pretended that there was here any such case of necessity. But a still more satisfactory answer is, that the apprehension of danger is groundless, and, therefore, the whole argument fails. Experience has not taught us that there is danger of great evils or of great inconvenience from this source. Hitherto, neither in our own country nor elsewhere, have such cases of necessity occurred.

The judicial establishments of the state are presumed to be competent to prevent abuses and violations of trust, in cases of this kind, as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom. Under the government and protection of the general laws of the land, those institutions have always been found safe, as well as useful. They go on with the progress of society, accommodating themselves easily, without sudden change or 597*] violence, to the alterations which take place in its condition; and in the knowledge, the habits, and pursuits of men. The English colleges were founded in Catholic ages. Their religion was reformed with the general reformation of the nation; and they are suited perfectly well to the purpose of educating the protestant youth of modern times. Dartmouth College was established under a charter granted by the provincial government; but a better constitution for a college, or one more adapted to the condition of things under the present government, in all material respects, could not now be framed. Nothing in it was found to need alteration at the revolution. The wise men of that day saw in it one of the best hopes of future times, and commended it, as it was, with parental care, to the protection and guardianship of the government of the state. A charter of more liberal sentiments, of wiser provisions, drawn with more care, or in a better spirit, could not be expected at any time, or from any source. The college needed no change in its organization or government. That which it did need was the kindness, the patronage, the bounty of the legislature; not a mock elevation to the character of a university, without the solid benefit of a shilling's donation to sustain the character; not the swelling and empty authority of establishing institutes and other colleges. This unsubstantial pageantry would seem to have been in derision of the scanty endowment and limited means of an unobtrusive, but useful and growing seminary. Least of all was there a necessity, or pretense of necessity, to infringe its legal rights, violate its franchises 598*] and privileges, and pour upon it these overwhelming streams of litigation. But this argument, from necessity, would equally apply in all other cases. If it be well founded, it would prove, that whenever any inconvenience or evil should be experienced from the restrictions imposed on the legislature by the constitution, these restrictions ought to be disregarded. It is enough to say that the people have thought otherwise. They have, most wisely, chosen to take the risk of occasional inconvenience from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restraints; and they have not rendered these altogether vain and nugatory by conferring the power of dispensation. If inconvenience should arise, which the legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No legislature in this country is able (and may the time never come when it shall be able) to apply to itself the memorable expression of a Roman Pontiff; "*Licet hoc de*

1.—6 T. R. 277.

2.—Vide also 2 Bro. Ch. R. 662, *Ex-parte Bolton School*.
Wheat. 4.

jure non possumus, volumus tamen de plenitudine potestatis."

The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence—the inviolability *of their charters. It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their officers. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate.

When the court in North Carolina declared the law of the state, which repealed a grant to its university, unconstitutional and void, the legislature had the candor and the wisdom to repeal the law. This example, so honorable to the state which exhibited it, is most fit to be followed on this occasion. And there is good reason to hope that a state which has hitherto been so much distinguished for temperate councils, cautious legislation, and regard to law, will not fail to adopt a course which will accord with her highest and best interest, and, in no small degree, elevate her reputation. It was for many obvious reasons most anxiously desired that the question of the power of the legislature over this charter should have been finally decided in the state court. An earnest *600* hope was entertained *that the judges of that court might have viewed the case in a light favorable to the rights of the trustees. That hope has failed. It is here that those rights are now to be maintained, or they are prostrated forever. *Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium appellem? quem obtestor? quem implorem? Nisi hoc loco, nisi apud eos, nisi per eos, judices, salutem nostram, quae spe ex extremaque pendet, temerimus; nihil est praeter ea quo confugere possimus.*

Mr. Holmes, for the defendant in error, argued, that the prohibition in the constitution of the United States, which alone gives the court jurisdiction in this case, did not extend to grants of political power; to contracts concerning the internal government and police of a sovereign state. Nor does it extend to contracts which relate merely to matters of civil institution, even of a private nature. Thus, marriage is a contract, and a private contract; but relating merely to a matter of civil institution, which every society has an inherent right to regulate as its own wisdom may dictate, it cannot be considered as within the spirit of this prohibitory clause. Divorces unquestionably impair the obligation of the nuptial contract; they change the relations of the marriage state,

without the consent of both the parties, and thus come clearly within the letter of the prohibition. But, surely, no one will contend that there is locked up in this mystical clause of the constitution a prohibition to the states to grant divorces, a power *peculiarly [*601 appropriate to domestic legislation, and which has been exercised in every age and nation where civilization has produced that corruption of manners, which, unfortunately, requires this remedy. Still less can a contract concerning a public office to be exercised, or duty to be performed, be included within this prohibition. The convention who framed the constitution did not intend to interfere in the exercise of the political powers reserved to the state governments. That was left to be regulated by their own local laws and constitutions; with this exception only, that the Union should guarantee to each state a republican form of government, and defend it against domestic insurrection and rebellion. Beyond this, the authorities of the Union have no right to interfere in the exercise of the powers reserved to the state. They are sovereign and independent in their own sphere. If, for example, the legislature of a particular state should attempt to deprive the judges of its courts (who, by the state constitution, held their places during good behavior) of their offices without a trial by impeachment; or should arbitrarily and capriciously increase the number of the judges so as to give the preponderancy in judicature to the prevailing political faction, would it be pretended that the minority could resist such a law, upon the ground of its impairing the obligation of a contract? Must not the remedy, if anywhere existing, be found in the interposition of some state authority, to enforce the provisions of the state constitution? The education of youth, and the encouragement of the arts and sciences, is one of the most important *objects of civil government.¹ By our [*602 constitutions, it is left exclusively to the states, with the exception of copyrights and patents. It was in the exercise of this duty of government that this charter was originally granted to Dartmouth College. Even when first granted under the colonial government, it was subject to the notorious authority of the British parliament over all charters containing grants of political power. It might have been revoked or modified by act of parliament.² The revolution, which separated the colony from the parent country, dissolved all connection between this corporation and the crown of Great Britain. But it did not destroy that supreme authority which every political society has over its public institutions. That still remained, and was transferred to the people of New Hampshire. They have not relinquished it to the government of the United States, or to any department of that government. Neither does the constitution of New Hampshire confirm the charter of Dartmouth College, so as to give it the immutability of the fundamental law. On the contrary, the constitution of the state admonishes the legislature of the duty of encouraging science and literature, and thus seems to suppose its power of control over the sci-

1.—Vattel, L. 1, c. 11, s. 112, 113.

2.—1 Bl. Com. 486.

tific and literary institutions of the state. The legislature had, therefore, a right to modify this trust, the original object of which was the education of the Indian and English youth of the province. It is not necessary to contend that it had the right of wholly diverting the **603** *fund from the original object of its pious and benevolent founders. Still it must be insisted, that a regal grant, with a regal and colonial policy, necessarily became subject to the modification of a republican legislature, whose right, and whose duty it was, to adapt the education of the youth of the country to the change in its political institutions. It is a corollary from the right of self government. The ordinary remedies which are furnished in the court for a misuser of the corporate franchises, are not adapted to the great exigencies of a revolution in government. They presuppose a permanently established order of things, and are intended only to correct occasional deviations, and minor mischiefs. But neither a reformation in religion, nor a revolution in government, can be accomplished or confirmed by a writ of *quo warranto* or *mandamus*. We do not say that the corporation has forfeited its charter for misuser; but that it has become unfit for use by a change of circumstances. Nor does the lapse of time from 1776 to 1816 infer an acquiescence on the part of the legislature, or a renunciation of its right to abolish or reform an institution, which, being of a public nature, cannot hold its privileges by prescription. Our argument is, that it is, at all times, liable to be new-modeled by the legislative wisdom, instructed by the lights of the age.

The conclusion, then, is, that this charter is not such a contract as is contemplated by the constitution of the United States; that it is not a contract of a private nature, concerning property or other private interests; but that is a **604** *grant of a public nature, *for public purposes, relative to the internal government and police of a state, and, therefore, liable to be revoked or modified by the supreme power of that state.

Supposing, however, this to be a contract such as was meant to be included in the constitutional prohibition, is its obligation impaired by these acts of the legislature of New Hampshire?

The title of the acts of the 27th of June, and the 18th of December, 1816, shows that the legislative will and intention was to amend the charter, and enlarge and improve the corporation. If, by a technical fiction, the grant of the charter can be considered as a contract between the king (or the state) and the corporators, the obligation of that contract is not impaired; but is rather enforced, by these acts, which continue the same corporation, for the same objects, under a new name. It is well settled that a mere change of the name of a corporation will not affect its identity. An addition to the number of the colleges, the creation of new fellowships, or an increase of the number of the trustees, do not impair the franchises of the corporate body. Nor is the franchise of any individual corporator impair-

ed in the words of Mr. Justice Ashurst, in the case of *The King v. Passmore*,¹ "the members of the old body have no injury or injustice to complain of, for they are all included in the new charter of incorporation; and if any of them do not become members, of the new incorporation, but refuse to accept, it is their *own fault." What rights which are [**605** secured by this alleged contract are invaded by the acts of the legislature? Is it the right of property, or of privileges? It is not the former, because the corporate body is not deprived of the least portion of its property. If it be the personal privileges of the corporators that are attacked, these must be either a common and universal privilege, such as the right of suffrage, for interrupting the exercise of which an action would lie; or they must be monopolies and exclusive privileges, which are always subject to be regulated and modified by the supreme power of the state. Where a private proprietary interest is coupled with the exercise of political power or a public trust, the charters of corporations have frequently been amended by legislative authority.² In charters creating artificial persons for purposes exclusively private, and not interfering with the common rights of the citizens, it may be admitted that the legislature cannot interfere to amend without the consent of the grantees. The grant of such a charter might perhaps be considered as analogous to a contract between the state and private individuals, affecting their private rights, and might thus be regarded as within the spirit of the constitutional prohibition. But this charter is merely a mode of exercising one of the great powers of civil government. Its amendment, or even repeal, can no more be considered as the breach of a contract, than the amendment or repeal of any other law. Such repeal or amendment is an ordinary act of public *legislation, and [**606** not an act impairing the obligation of a contract between the government and private citizens, under which personal immunities or proprietary interests are vested in them.

The *Attorney-General*, on the same side, stated, that the only question properly before the court was, whether the several acts of the legislature of New Hampshire, mentioned in the special verdict, are repugnant to that clause of the constitution of the United States which provides that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

Besides its intrinsic difficulty, the extreme delicacy of this question is evinced by the sentiments expressed by the court, whenever it has been called to act on such a question.³ In the case of *Fletcher v. Peck*, the court says: "The question whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be

1.—3 T. R. 244.

2.—Gray v. The Portland Bank, 3 Mass. R. 364; The Commonwealth v. Bird, 12 Mass. R. 443.

Wheat. 4.

3.—*Calder et al. v. Bull et al.*, 3 Dall. 302, 304, 305; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Terret v. Taylor*, 9 Cranch, 43.

pronounced to have transcended its powers, and its acts are to be considered as void. The opposition between the constitution and the law **607***] should be such "that the judge feels a clear and strong conviction of their incompatibility with each other." In *Calder et ux. v. Bull et ux.*,¹ Mr. Justice Chace expressed himself with his usual emphatic energy, and said: "I will not decide any law to be void, but in a very clear case." Is it, then, a very clear case that these acts of New Hampshire are repugnant to the constitution of the United States?

1. Are they bills of attainder? The elementary writer informs us that an attainder is "the stain or corruption of the blood of a criminal capitally condemned."² True it is, that the *Chief Justice* says, in *Fletcher v. Peck*,³ that a bill of attainder may affect the life of an individual, or may confiscate his estate, or both. But the cause did not turn upon this point, and the *Chief Justice* was not called upon to weigh with critical accuracy his expressions in this part of the case. In England, most certainly, the first idea presented is that of corruption of blood, and consequent forfeiture of the entire property of the criminal, as the regular and inevitable consequences of a capital conviction at common law. Statutes sometimes pardon the attainder, and merely forfeit the estate. But this forfeiture is always complete and entire. In the present case, however, it cannot be pretended that any part of the estate of the trustees is forfeited, and, if a part, certainly not the whole.

2. Are these acts "laws impairing the obligation **608***] of contracts?" The mischiefs actually existing at the time the constitution was established, and which were intended to be remedied by this prohibitory clause, will show the nature of the contracts contemplated by its authors. It was the inviolability of private contracts, and private rights acquired under them, which was intended to be protected;⁴ and not contracts which are in their nature matters of civil police, nor grants by a state of power, and even property, to individuals, in trust to be administered for purposes merely public. "The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts," says Mr. Justice Chace, "were inserted to secure private rights."⁵ The cases determined in this court illustrate the same construction of this clause of the constitution. *Fletcher v. Peck* was a case where a state legislature attempted to revoke its grant, so as to divest a beneficial estate in lands; a vested estate; an actual conveyance to individuals as their private property.⁶ In the case of *New Jersey v. Wilson* there was an express contract contained in a public treaty of cession with the Indians, by which the privilege of perpetual exemption from taxation was indelibly impressed upon the lands, and could not be taken away without a violation of the public **609***] faith "solemnly pledged."⁷ *Terret v. Taylor* was also a case of an attempt to divest

an interest in lands actually vested under an act amounting to a contract.⁸ In all those instances the property was held by the grantees, and those to whom they had conveyed, beneficially, and under the sanction of contracts, in the ordinary and popular signification of that term. But this is an attempt to extend its obvious and natural meaning, and to apply it by a species of legal fiction to a class of cases which have always been supposed to be within the control of the sovereign power. Charters to public corporations for purposes of public policy are necessarily subject to the legislative discretion, which may revoke or modify them as the continually fluctuating exigencies of the society may require. Incorporations for the purposes of education and other literary objects, in one age, or under one form of government, may become unfit for their office in another age, or under another government.

This charter is said to be a contract between Doctor Wheelock and the king; a contract founded on a donation of private property by Doctor Wheelock. It is hence inferred, that it is a private eleemosynary corporation; and the right of visitation is said to be in the founder and his heirs; and that the state can have no right to interfere, because it is neither the founder of this charity, nor contributor to it.

But if the basis of this argument is removed, what becomes of the superstructure? The fact that Doctor Wheelock was a contributor, is not found by the "special verdict; and not [**610**] having been such in truth, it cannot be added under the agreement to amend the special verdict. The jury find the charter, and that does not recite that the college was a private foundation by Doctor Wheelock. On the contrary, the real state of the case is, that he was the projector; that he had a school on his own plantation for the education of Indians; and through the assistance of others had been employed for several years in clothing, maintaining and educating them. He solicited contributions, and appointed others to solicit. At the foundation of the college, the institution was removed from his estate. The honors paid to him by the charter were the reward of past services, and of the boldness, as well as piety, of the project. The state has been a contributor of funds, and this fact is found. It is, therefore, not a private charity, but a public institution; subject to be modified, altered, and regulated, by the supreme power of the state.

This charter is not a contract within the true intent of the constitution. The acts of New Hampshire, varying in some degree the forms of the charter, do not impair the obligation of a contract.

In a case which is really a case of contract, there is no difficulty in ascertaining who are the contracting parties. But here they cannot be fixed. Doctor Wheelock can only be said to be a party, on the ground of his contributing funds, and thus being the founder and visitor. That ground being removed, he ceases to be a party to the contract. Are the other con-

1.—6 Cranch, 128.

2.—3 Dall. 386.

3.—Bl. Com. 380.

4.—6 Cranch, 138.

5.—The Federalist, No. 44; 1 Tucker's Bl. Com. part 1, Appendix, 312.

6.—*Calder et ux. v. Bull et ux.* 8, Dall. 380.

7.—6 Cranch, 87.

8.—7 Cranch, 164.

9.—9 Cranch, 48.

tributors alluded to in the charter, and enumerated *by Belknap in his history of New Hampshire, are they contracting parties? They are not, before the court; and even if they were, with whom did they contract? With the King of Great Britain? He, too, is not before the court; and has declared, by his chancellor, in the case of *The Attorney-General v. The City of London*¹ that he has no longer any connection with these corporations in America. Has the state of New Hampshire taken his place? Neither is that state before the court, nor can it be as a party, originally defendant. But suppose this to be a contract between the trustees and the people of New Hampshire. A contract is always for the benefit and advantage of some person. This contract cannot be for the benefit of the trustees. It is for the use of the people. The *cestui que use* is always the contracting party; the trustee has nothing to do with stipulating the terms. The people, then, grant powers for their own use. It is a contract with themselves!

But if the trustees are parties on one side, what do they give, and what do they receive? They give their time and labor. Every society has a right to the services of its members in places of public trust and duty. A town appoints, under the authority of the state, an overseer of the poor, or of the highways. He gives, reluctantly, his labor and services; he receives nothing in return but the privilege of giving his labor and services. Such appointments to offices of public trust have never been [612*] considered *as contracts which the sovereign authority was not competent to rescind or modify. There can be no contract in which the party does not receive some personal, private, individual benefit. To make this charter a contract, and a private contract, there must be a private beneficial interest vested in the party who pays the consideration. What is the private beneficial interest vested in the party in the present case? The right of appointing the president and professors of the college, and of establishing ordinances for its government, &c. But to make these rights an interest which will constitute the end and object of a contract, the exercise of these rights must be for the private individual advantage of the trustees. Here, however, so far from that being the fact, it is solely for the advantage of the public; for the interests of piety and learning. It was upon these principles that Lord Kenyon determined, in the case of *Weller v. Foundling Hospital*,² that the governor and members of the corporation were competent witnesses, because they were trustees of a public charity, and had no private personal interest. It is not meant to deny that mere right—a franchise—an incorporeal hereditament, may be the subject of a contract; but it must always be a direct, individual, beneficial interest to the party who takes that right. The rights of municipal corporations are of this nature. The right of suffrage there belongs beneficially to the individual elector, and is to be exercised for his own exclusive advantage. It is in relation to these

town *corporations that Lord Kenyon [613*] speaks, when he says that the King cannot force a new charter upon them.³ This principle is established for the benefit of all the corporations. It is accompanied by another principle, without which it would never have been adopted: the power of proposing amendments at the desire of those for whose benefit the charter was granted. These two principles work together for the good of the whole. By the one, these municipal corporations are saved from the tyranny of the crown; and by the other, they are preserved from the infinite perpetuity of inveterate errors. But in the present case there is no similar qualification of the immutability of the charter, which is contended for in the argument on the other side. But in truth, neither the original principle, nor its qualification, apply to this case; for there is here no such beneficial interest and individual property as are enjoyed by town corporations.

3. But even admitting it to be a case of contract, its obligation is not impaired by these legislative acts. What vested right has been devested? None! The former trustees are continued. It is true that new trustees are added, but this affords no reasonable ground of complaint. The privileges of the House of Lords in England are not impaired by the introduction of new members. The old corporation is not abolished, for the foundation as now regulated is substantially the same. It is identical in all its essential constituent parts, and all its former rights are *preserved and con- [614*] firmed.⁴ The change of name does not change its original rights and franchises.⁵ By the revolution which separated this country from the British Empire, all the powers of the British government devolved on the states. The legislature of New Hampshire then became clothed with all the powers, both of the King and Parliament, over these public institutions. On whom, then, did the title to the property of this college fall? If before the revolution it was beneficially vested in any private individuals or corporate body, I do not contend that the revolution devested it, and gave it to the state. But it was not before vested beneficially in the trustees. The use unquestionably belonged to the people of New Hampshire, who were the *cestui que trusts*. The legal estate was indeed vested in the trustees before the revolution by virtue of the royal charter of 1769. But that charter was destroyed by the revolution,⁶ and the legal estate, of course, fell upon those who held the equitable estate—upon the people. If those who were trustees, carried on the duties of the trust after the revolution, it must have been subject to the power of the people. If it be said that the state gave its implied assent to the terms of the old charter, then it must be subject to all the terms on which it was granted; and among these, the oath of allegiance to the king. But if, to avoid *this concession, it be said that the [615*] charter must have been so far modified as to adapt it to the character of the new govern-

1.—*The Attorney-General v. The City of London*, 3 Bro. Ch. Cas. 171; 1 Vee., Jun., 248.

2.—*Peake's N. P. Cas.* 154.

3.—*Rex v. Passmore*, 8 T. R. 244.

Wheat. 4.

4.—*See the Mayor of Colchester v. Seaber*, 3 Burr. 1866.

5.—1 Sand. 344, N. 1; *Euttrell's case*, 4 Co. Rep. 87.

6.—*Attorney-General v. City of London*, 3 Bro. Ch. Cas. 171; 8 C. 1 Vee., Jun., 143.

ment, and to the change in our civil institutions, that is precisely what we contend for. These civil institutions must be modified, and adapted to the mutations of society and manners. They belong to the people, are established for their benefit, and ought to be subject to their authority.

Mr. Hopkinson, in reply, insisted, that the whole argument on the other side proceeded on an assumption which was not warranted, and could not be maintained. The corporation created by this charter is called a public corporation. Its members are said to be public officers, and agents of government. They were officers of the king, it is said, before the revolution, and they are officers of the state since. But upon what authority is all this taken? What is the acknowledged principle which decides thus of this corporation? Where are the cases in which such a doctrine has ever prevailed? No case, no book of authority, has been, or can be, cited to this purpose. Every writer on the law of corporations, all the cases in law and equity, instruct us that colleges are regarded in law as private eleemosynary corporations, especially colleges founded, as this was, by a private founder. If this settled principle be not overthrown, there is no foundation for the defendant's argument. We contend that this charter is a contract between the government and the members of the corporation created by it. It is a contract, because it is a grant of valuable rights and privileges; and ***616*** every grant implies "a contract not to resume the thing granted. Public offices are not created by contract or by charter. They are provided for by general laws. Judges and magistrates do not hold their offices under charters. These offices are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power. There is nothing like this in the origin of the powers of the plaintiffs. Nor is there in their duties, any more than in their origin, anything which likens them to public political agents. Their duties are such as they themselves have chosen to assume, in relation to a fund created by private benefaction, for charitable uses. These duties relate to the instruction of youth; but instructors of youth are not public officers. The argument on the other side, if it proves anything, will prove that professors, masters, preceptors, and tutors, are all political persons and public officers; and that all education is necessarily and exclusively the business of the state. The confutation of such an argument lies in stating it. The trustees of this college perform no duties, and have no responsibility in any way connected with the civil government of the state. They derive no compensation for their services from the public treasury. They are the gratuitous administrators of a private bounty; the trustees of a literary establishment, standing, in contemplation of law, on the same foundation as hospitals and other charities. It is true that a college, in a popular sense, is a public institution, because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them; but ***617*** "in a legal and technical sense, they are not public institutions; but private charities. Corporations may, therefore, be very well said to be for public use, of which the property and

privileges are yet private. Indeed, there may be supposed to be an ultimate reference to the public good, in granting all charters of incorporation; but this does not change the property from private to public. If the property of this corporation be public property, that is, property belonging to the state, when did it become so? It was once private property; when was it surrendered to the public? The object in obtaining the charter was not, surely, to transfer the property to the public, but to secure it forever in the hands of those with whom the original owners saw fit to entrust it. Whence, then, that right of ownership and control over this property which the legislature of New Hampshire has undertaken to exercise? The distinction between public, political, or civil corporations, and corporations for the distribution of private charity, is fully explained, and broadly marked, in the cases which have been cited, and to which no answer has been given. The hospital of Pennsylvania is quite as much a public corporation as this college. It has great funds, most wisely and beneficently administered. Is it to be supposed that the legislature might rightfully lay its hands on this institution, violate its charter, and direct its funds to any purpose which its pleasure might prescribe? The property of this college was private property before the charter; and the charter has wrought no change in the nature or title of this property. The school had existed as a charity school ***for years before** ***618** the charter was granted. During this time it was manifestly a private charity. The case cited from *Atkyns* shows that a charter does not make a charity more public, but only more permanent. Before he accepted the charter, the founder of this college possessed an absolute right to the property with which it was endowed, and also the right flowing from that, of administering and applying it to the purposes of the charity by him established. By taking the charter, he assented that the right to the property, and the power of administering it, should go to the corporation of which he and others were members. The beneficial purpose to which the property was to be used, was the consideration of the part of the government for granting the charter. The perpetuity which it was calculated to give to the charity, was the founder's inducement to solicit it. By this charter, the public faith is solemnly pledged that the arrangement thus made shall be perpetual. In consideration that the founder would devote his property to the purposes beneficial to the public, the government has solemnly covenanted with him to secure the administration of that property in the hands of trustees appointed in the charter. And yet the argument now is, that because he so devoted his property to uses beneficial to the public, the government may, for that reason, assume the control of it, and take it out of those hands to which it was confided by the charter. In other words, because the founder has strictly performed the contract, on his part, the government, on its part, is at liberty to violate it. This argument is equally unsound in morality and in law. ***The founder proposed to appro-** ***619** priate his property, and to render his services, upon condition of receiving a charter which should secure to him and his associates certain

privileges and immunities. He undertook the discharge of certain duties, in consideration of obtaining certain rights. There are rights and duties on both sides. On the part of the founder, there is the duty of appropriating the property, and of rendering the services imposed on him by the charter, and the right of having secured to him and his associates the administration of the charity, according to the terms of the charter, forever. On the part of the government, there is the duty of maintaining and protecting all the rights and privileges conferred by the charter, and the right of insisting on the compliance of the trustees with the obligations undertaken by them, and of enforcing that compliance by all due and regular means. There is a plain, manifest, reasonable stipulation, mixed up of rights and duties, which cannot be separated but by the hand of injustice and violence. Yet the attempt now is to break the mutuality of this stipulation; to hold the founder's property, and yet take away that which was given him as the consideration upon which he parted with his property. The charter was a grant of valuable powers and privileges. The state now claims the right of revoking this grant, without restoring the consideration which it received for making the grant. Such a pretense may suit despotic power. It may succeed where the authority of the legislature is limited by no rule, and bounded only by its will. It may prevail in those systems in which **620*** injustice is *not always unlawful, and where neither the fundamental constitution of the government sets any limits to power, nor any just sentiment or moral feeling affords a practical restraint against a power which in its theory is unlimited. But it cannot prevail in the United States, where power is restrained by constitutional barriers, and where no legislature is, even in theory, invested with all sovereign powers. Suppose Dr. Wheelock had chosen to establish and perpetuate this charity by his last will, or by a deed, in which he had given the property, appointed the trustees, provided for their successions, and prescribed their duties. Could the legislature of New Hampshire have broken in upon this gift, changed its parties, assumed the appointment of the trustees, abolished its stipulations and regulations, or imposed others? This will hardly be pretended, even in this bold and hardy argument—and why not? Because the gift, with all its restrictions and provisions, would be under the general and implied protection of the law. How is it in our case? Why, in addition to the general and implied protection afforded to all rights and all property, it has an express, specific, covenanted assurance of protection and inviolability, given on good and sufficient considerations, in the usual manner of contracts between individuals. There can be no doubt that, in contemplation of law, a charter, such as this, is a contract. It takes effect only with the assent of those to whom it is granted. Laws enjoin duties, without or against the will of those who are to perform them. But the duties of the trustees, under this charter, are binding upon them only **621*** *because they have accepted the charter, and assented to its terms.

But taking this to be a contract, the argument of the defendant is, that it is not such a contract as the constitution of the United States protects. But why not? The constitution speaks of contracts, and ought to include all contracts for property or valuable privileges. There is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection. The decisions which have already been made in this court are a complete answer to the defendant's argument.

The Attorney-General has insisted that Dr. Wheelock was not the founder of this college; that other donors have better title to that character; and that, therefore, the plaintiff's argument, so far as it rests on the supposed fact of Dr. Wheelock's being a founder, fails. The first answer to this is, that the charter itself declares Dr. Wheelock to be the founder, in express terms. It also recites facts which would show him to be the founder, and on which the law would invest him with that character if the charter itself had not declared him so. But if all this were otherwise, it would not help the defendant's argument. The foundation was still private; and whether Dr. Wheelock, or Lord Dartmouth, or any other person, possessed the greatest share of merit in establishing the college, the result is the same, so far as it bears on the present question. Whoever was founder, the visitatorial power was assigned to the trustees by the charter; and it therefore is of no importance whether the founder was one individual or another. It *is narrowing [**622**

the ground of our argument to suppose that we rest it on the particular fact of Dr. Wheelock's being founder; although the fact is fully established by the charter itself. Our argument is, that this is a private corporation; that the founder of the charity, before the charter, had a right of visiting and governing it, a right growing out of the property of the endowment; that by the charter this visitatorial power is vested in the trustees, as assignees of the founder; and that it is a privilege, right, and immunity, originally springing from property, and which the law regards and protects, as much as it regards and protects property and privileges of any other description. By the charter, all proper powers of government are given to the trustees, and this makes them visitors; and from the time of the acceptance of the charter, no visitatorial power remained in the founder or his heirs. This is the clear doctrine of the case of *Green v. Rutherford*, which has been cited, and which is supported by all the other cases. Indeed, we need not stop here in the argument. We might go farther, and contend, that if there were no private founder, the trustees would possess the visitatorial power. Where there are charters, vesting the usual and proper powers of government in the trustees, they thereby become the visitors, and the founder retains no visitatorial power, although that founder be the king.¹ Even then, if this college had originated with the government, and had been founded by it; still, if the government had given a charter to *trustees, [**623** and conferred on them the powers of visitation, and control, which this charter contains, it would by no means follow that the government might revoke the grant, merely because it had itself established the institution. Such would not be the legal consequence. If the

1.—2 Ves. 323; 1 Ves. 78.

grant be of privileges and immunities, which are to be esteemed objects of value, it cannot be revoked. But this case is much stronger than that. Nothing is plainer than that Dr. Wheelock, from the recitals of this charter, was the founder of this institution. It is true that others contributed, but it is to be remembered that they contributed to Dr. Wheelock, and to the funds while under his private administration and control, and before the idea of a charter had been suggested. These contributions were obtained on his solicitation, and confided to his trust.

If we have satisfied the court that this charter must be regarded as a contract, and such a contract as is protected by the constitution of the United States, it will hardly be seriously denied that the acts of the legislature of New Hampshire impair this contract. They impair the rights of the corporation as an aggregate body, and the rights and privileges of individual members. New duties are imposed on the corporation; the funds are directed to new purposes; a controlling power over all the proceedings of the trustees is vested in a board of overseers unknown to the charter. Nine new trustees are added to the original number, in direct hostility with the provision of the charter. There are radical and essential **624*** alterations, *which go to alter the whole organization and frame of the corporation.

If we are right in the view which we have taken of this case, the result is, that before, and at the time of, the granting of this charter, Dr. Wheelock had a legal interest in the funds with which the institution was founded; that he made a contract with the then existing government of the state, in relation to that interest, by which he devoted, to uses beneficial to the public, the funds which he had collected, in consideration of the stipulations and covenants, on the part of the government, contained in the charter; and that these stipulations are violated, and the contract impaired, by the acts of the legislature of New Hampshire.

The opinion of the court was delivered by MARSHALL, Ch. J.:

This is an action of trover, brought by the trustees of Dartmouth College against William H. Woodward, in the State Court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs.

625*] *The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined;

and the opinion of the highest law tribunal of a state is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

*The title of the plaintiffs originates [**626** in a charter dated the 18th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "an act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New Hampshire, and the Governor and Lieutenant-Governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the Governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have *brought this suit for the [**627** corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its

Wheat. 4.

faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are:

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in **628*** its greatest latitude, *would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be **629*** confined, to cases of this *description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been

understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be *public [**630** property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes, then, the duty of the court most *seriously to examine this charter, and [**631** to ascertain its true character.

From the instrument itself, it appears that about the year 1754, the Rev. Eleazar Wheelock established at his own expense, and on his own estate, a charity-school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on, and extending, his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money which had been, and should be, contributed; which appointment Dr. Wheelock confirmed

by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth college were by that **632**] name created a body *corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest **633**] *contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity-school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance.

The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It *is, then, an eleemosynary,¹ and, as far **634** as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity-school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have *supposed that his private funds, or **635** those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management

1.—1 Bl. Com. 481.

2.—1 Bl. Com. 471.

of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. [*636] Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural [*637] person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial
Wheat. 4.

to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely, and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, *provided the government will [*638] confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act *change the character of a private [*639] eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured. The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the

neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But, if these words, considered alone, [640*] could admit of doubt, that *doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; [641*] that its trustees or governors *were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college nor the youth for

whose benefit it was founded complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about *which the constitu- [642*] tion is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not, indeed, to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, *are [643*] imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract

would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeded), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand. There is no exception in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Wheat. 4.

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, Charity, and Education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new-modeling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union, the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." They have so far withdrawn science, and the useful arts, from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor,

but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were **648*** "strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? **649*** The charter informs us. Dr. Wheelock had represented "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence *which suggested his undertaking. It [**650** surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science, and of liberal principles, pervades the whole community these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

*From the review of this charter, [**651** which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts, and rights, respecting property, remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unpre-

cedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, *that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. *They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-organized; and re-organized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general, but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the right possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trus-

tees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party, who appears in court to assert that interest; yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State Court must therefore be reversed.

WASHINGTON, J. This cause turns upon the validity of certain laws of the state of New Hampshire, which have been stated in the case, and which, it is contended by the counsel for the plaintiffs *in error, are void, being [*655] repugnant to the constitution of that state, and also to the constitution of the United States. Whether the first objection to these laws be well founded or not, is a question with which this court, in this case, has nothing to do; because it has no jurisdiction, as an appellate court, over the decisions of a state court, except in cases where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission.

The clause in the constitution of the United States which was drawn in question in the court from whence this transcript has been sent, is that part of the tenth section of the first article which declares that "no state shall pass any bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts." The decision of the State Court is against the title specially claimed by the plaintiffs in error, under the above clause, because they contend

that the laws of New Hampshire, above re-
656*] ferred to, *impair the obligation of a
contract, and are, consequently, repugnant to
the above clause of the constitution of the United
States, and void.

There are, then, two questions for this court
to decide:

1st. Is the charter granted to Dartmouth College on the 13th of December, 1769, to be considered as a contract? If it be, then, 2d. Do the laws in question impair its obligation?

1. What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.¹ Under this definition, says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, &c., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved; these must all concur, because the regular effect of all contracts is on one side to acquire, and on the other to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a grant is a contract, the point was decided
657*] in the case of *Fletcher v. Peck*,² *in which it was laid down that a contract is either executory or executed; by the former, a party binds himself to do or not to do a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

If, then, a grant be a contract, within the meaning of the constitution of the United States, the next inquiry is, whether the creation of a corporation by charter be such a grant as includes an obligation of the nature of a contract, which no state legislature can pass laws to impair.

A corporation is defined by Mr. Justice Blackstone³ to be a franchise. "It is," says he, "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. The
658*] *subjects of the grant are not only

privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant.⁴ It implies, therefore, a contract not to re-assert the right to grant the franchise to another, or to impair it. There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, and also, that in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate.

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making by-laws. The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. Mr. Justice Buller, in the case of the *King v. Passmore*,⁵ says, that the grant of a corporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration *of the priv-
659 illeges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone,⁶ may be forfeited through negligence, or abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void.

It appears to me, upon the whole, that these principles and authorities prove, incontrovertibly, that a charter of incorporation is a contract.

2. The next question is, do the acts of the legislature of New Hampshire of the 27th of June, and 18th and 26th of December, 1816, impair this contract, within the true intent and meaning of the constitution of the United States?

Previous to the examination of this question, it will be proper clearly to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case than the one immediately before it.

We are informed by the case of *Philips v. Bury*,⁷ which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz., such as are for public government, and such as are for private charity. The first are those for the government of a town, city, or the like; and being for public advantage, are
*to be governed according to the law [660

1.—Powell on contr. 6.

2.—6 Cranch, 87.

3.—2 Bl. Com. 37.

4.—2 Bl. Com. 37.

5.—3 T. R. 246.

6.—2 Bl. Com. 484.

7.—1 Ld. Raym. 5. S. C. 2 T. R. 346.

of the land. The validity and justice of their private laws and constitutions are examinable in the king's courts. Of these there are no particular founders, and consequently no particular visitor. There are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and, as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full to prove that a college is a private charity, as well as a hospital, and that there is, in reality, no difference between them, except in degree; but they are within the same reason, and both eleemosynary.

These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king or government may bestow upon it, and having no other founder or visitor than the king or government. **661***] the *fundator incipiens*. *The validity and justice of its laws and constitution are examinable by the courts having jurisdiction over them; and they are subject to the general law of the land. It would seem reasonable that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cetui que trust* of the foundation. These trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them than an ordinary trustee, who is called upon in a court of equity to execute the trust. They accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure. But the case of a private corporation is entirely different. That is the creature of private benefaction for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws, and visitation, and not to the general control of the government; and all these powers, rights and privileges, flow from the property of the founder in the funds assigned for the support of the charity. Although the king, by the grant of the charter, is in some sense the founder of all eleemosynary corporations, because, without his grant they cannot exist; yet the patron or endower is the perficient founder,

to whom belongs, as of *right, all the [**662** powers and privilege, which have been described. With such a corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain.

It has been shown that the charter is a contract on the part of the government, that the property with which the charity is endowed shall be forever vested in a certain number of persons, and their successors, to subserve the particular purposes designated by the founder, and to be managed in a particular way. If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be the managers of the fund. If it appropriate the fund intended for the support of a particular charity to that of some other charity, or to an entirely different charity, the grant is in effect set aside, and a new contract substituted in its place; thus disappointing completely the intentions of the founder, by changing the objects of his bounty. And can it be seriously contended that a law which changes so materially the terms of a contract does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract be of its essence, how *is it possible that a new contract, sub- [**663** stituted for, or engrafted on another, without such assent, should not violate the old charter?

This course of reasoning, which appears to be perfectly manifest, is not without authority to support it. Mr. Justice Blackstone, lays it down,¹ that the same identical franchise, that has been before granted to one, cannot be bestowed on another; and the reason assigned is, that it would prejudice the former grant. In *The King v. Passmore*,² Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter. The reason is obvious. A charter is a contract, the validity of which the consent of both parties is essential, and, therefore, it cannot be altered or added to without such consent.

But the case of *Terrett v. Taylor*³ fully supports the distinction above stated, between civil and private corporations, and is entirely in point. It was decided in that case, that a private corporation, created by the legislature, may lose its franchises by misuser, or non-user, and may be resumed by the government under a judicial judgment of forfeiture. In respect to public corporations which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing, however, the property for the use of those for

1.—2 Bl. Com. 37.

2.—3 T. R. 246.

3.—9 Cranch, 48.

whom, and at whose expense, it was purchased. But it is denied that it has power to repeal **664***) statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws; and that it can, by such repeal, vest the property of such corporations in the state, or dispose of the same to such purposes as it may please, without the consent or default of the corporators. Such a law, it is declared, would be repugnant both to the spirit and the letter of the constitution of the United States.

If these principles, before laid down, be correct, it cannot be denied that the obligations of the charter to Dartmouth College are impaired by the laws under consideration. The name of the corporation, its constitution and government, and the objects of the founder, and of the grantor of the charter, are totally changed. By the charter, the property of this founder was vested in twelve trustees, and no more, to be disposed of by them, or a majority, for the support of a college, for the education and instruction of the Indians, also of English youths, and others. Under the late acts, the trustees and visitors are different; and the property and franchises of the college are transferred to different and new uses, not contemplated by the founder. In short, it is most obvious that the effect of these laws is to abolish the old corporation, and to create a new one in its stead. The laws of Virginia, referred to in the case of *Territt v. Taylor*, authorized the overseers of the poor to sell the glebes belonging to the Protestant Episcopal Church, and to appropriate the proceeds to other uses. The laws in question divest the trustees of Dartmouth College of the **665***) property vested in them *by the founder, and vest it in the other trustees, for the support of a different institution, called Dartmouth University. In what respects do they differ? Would the difference have been greater in principle if the law had appropriated the funds of the college to the making of turnpike roads, or to any other purpose of a public nature? In all respects in which the contract has been altered without the assent of the corporation its obligations have been impaired; and the degree can make no difference in the construction of the above provision of the constitution.

It has been insisted, in the argument at the bar, that Dartmouth College was a mere civil corporation, created for a public purpose, the public being deeply interested in the education of its youth; and that, consequently, the charter was as much under the control of the government of New Hampshire as if the corporation had concerned the government of a town or city. But it has been shown that the authorities are all the other way. There is not a case to be found which contradicts the doctrine laid down in the case of *Phillips v. Burry*, viz., that a college founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.

It is objected, in this case, that Dr. Wheelock is not the founder of Dartmouth College. Admit he is not. How would this alter the case? Neither the king nor the province of New Hampshire was the founder; and if the contributions made by the Governor of New Hamp-

shire, by those persons who *granted [**666** lands for the college, in order to induce its location in a particular part of the state, by the other liberal contributors in England and America, bestow upon them claims equal with Dr. Wheelock, still it would not alter the nature of the corporation, and convert it into one for public government. It would still be a private eleemosynary corporation, a private charity endowed by a number of persons, instead of a single individual. But the fact is, that whoever may mediately have contributed to swell the funds of this charity, they were bestowed at the solicitation of Dr. Wheelock, and vested in persons appointed by him, for the use of a charity, of which he was the immediate founder, and is so styled in the charter.

Upon the whole, I am of opinion that the above acts of New Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently, that the judgment of the state court ought to be reversed.

JOHNSON, *J.*, concurred, for the reasons stated by the Chief Justice.

LIVINGSTON, *J.*, concurred, for the reasons stated by the Chief Justice, and Justices Washington and Story.

STORY, *J.* This is a cause of great importance, and, as the very learned discussions, as well here as in the State Court, show, of no inconsiderable difficulty. There are two questions to which the appellate jurisdiction of this court properly applies: *1. Whether [**667** the original charter of Dartmouth College is a contract within the prohibitory clause of the constitution of the United States, which declares that no state shall pass "any law impairing the obligation of contracts." 2. If so, whether the legislative acts of New Hampshire of the 27th of June, and of the 18th and 27th of December, 1816, or any of them, impair the obligations of that charter.

It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights, and duties of aggregate corporations at common law; that we may apply the principles, drawn from this source, to the exposition of this charter, which was granted emphatically with reference to that law.

An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character which do not belong to the natural persons composing it. Among other things it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members; and

668*] *may contract with them in the same manner as with any strangers.¹ A great variety of these corporations exist in every country governed by the common law; in some of which the corporate existence is perpetuated by new elections, made from time to time; and in others by a continual accession of new members, without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits.²

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations **669*]** *are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities **670*]** ties, and cannot be *shaken but by

undermining the most solid foundations of the common law.³

It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity, which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense the language was unquestionably used by Lord Hardwicke in the case cited at the argument;⁴ and, in this sense, a private corporation may well enough be denominated a public charity. So it would be if the endowment, instead of being vested in a corporation, were assigned to a private trustee; yet in such a case no one would imagine that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authorities. Lord Hardwicke, in the case already alluded to, says, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be; but it is the extensiveness which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular *object may be [**671** said to be private, yet in the extensiveness of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor housekeepers, is of this kind." The charity, then, may, in this sense, be public, although it may be administered by private trustees; and, for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke.⁵

When, then, the argument assumes, that because the charity is public the corporation is public, it manifestly confounds the popular with the strictly legal sense of the terms. And if it stopped here, it would not be very material to correct the error. But it is on this foundation that a superstructure is erected which is to compel a surrender of the cause. When the corporation is said at the bar to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such *an authority does not [**672**

1.—1 Bl. Com. 469, 475; 1 Kyd. Corp. 13, 69, 189; 1 Woodes. 471, &c., &c.

2.—1 Bl. Com. 469, 470, 471, 482; 1 Kyd. Corp. 25; 1 Woodes. 474; Attorney-General v. Whorwood, 1 Ves. 534; St. John's College v. Todington, 1 Bl. Rep. 84; S. C. 1 Bur. 200; Phillips v. Bury, 1 Ld. Raym. 5; S. C. 2 T. R. 346; Porter's case, 1 Co. 22, b. 23.

Wheat. 4.

3.—Phillips v. Bury, 1 Ld. Ray. 5, 9; S. C. 2 T. R. 346.

4.—Attorney-General v. Pearse, 2 Atk. 87; 1 Bac. Abr. tit. Charitable Uses, E. 589.

5.—The case of Sutton's Hospital, 10 Co. 23.

exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord Holt down to the present day.¹ Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet, who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy as we now find of law to sustain it.

An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered, what is deemed a **673** foundation, *and who is the founder. This cannot be stated with more brevity and exactness than in the language of the elegant commentator upon the laws of England. "The founder of all corporations (says Sir William Blackstone), in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital."

To all eleemosynary corporations a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the

charity to be faithfully fulfilled.² The nature and extent of this visitatorial power has been **674** expounded *with admirable fullness and accuracy by Lord Holt in one of his most celebrated judgments.³ And of common right by the dotation the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs.⁴ This visitatorial power is, therefore, an hereditament founded in property, and valuable in intendment of law; and stands upon the maxim that he who gives his property has a right to regulate it in future. It includes also the legal right of patronage, for as Lord Holt justly observes, "patronage and visitation are necessary consequents one upon another." No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modifications or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee.⁵ In the construction *of [**675** charter, too, it is a general rule that if the objects of the charity are incorporated, as for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character.⁶

When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or devert the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change, or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well-settled doctrines of the common law.⁷

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises, by misuser or non-user *of them. It is subject to [**676** the controlling authority of its legal visitor, who, unless restrained by the terms of the charter,

1.—Rex v. Bury, 1 Ld. Ray; 5 S. C. Comb. 265; Holt, 715; 1 Show. 880; 4 Mod. 106; Skin. 447, and Ld. Holt's opinion from his own MSS. in 2 T. R. 346.

2.—1 Bl. Com. 480; 10 Co. 33.

3.—1 Bl. Com. 480.

4.—Phillips v. Bury, 1 Ld. Ray, 5; S. C. 2 T. R. 346.

5.—1 Bl. Com. 482.

6.—Eden v. Foster, 2 P. W. 325; Attorney-General

v. Middleton, 2 Ves. 327; St. John's College v. Todington, 1 Bl. Rep. 84; S. C. 3 Bur. 200; Attorney-General v. Clare College, 3 Atk. 662; S. C. 1 Ves. 78.

7.—Phillips v. Bury, 1 Ld. Ray, 5; S. C. 2 T. R. 346; Green v. Rutherford, 1 Ves. 472; Attorney-General v. Middleton, 2 Ves. 327; Case of Sutton Hospital, 10 Co. 23, 31.

8.—See Rex v. Passmore, 3 T. R. 199, and the cases there cited.

may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where, indeed, the visitatorial power is vested in the trustees of the charity in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts to redress grievances, and suppress frauds.¹ And where a corporation is a mere trustee of a charity, a court of equity will go yet farther; and though it cannot appoint or remove a corporator, it will yet, in a case of §77*] gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands.²

Thus much it has been thought proper to premise respecting the nature, rights and duties of eleemosynary corporations, growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College.

It begins by a recital, among other things, that the Rev. Eleazar Wheelock, of Lebanon, in Connecticut, about the year 1754, at his own expense, on his own estate, set on foot an Indian Charity-School; and by the assistance of other persons, educated a number of the children of the Indians, and employed them as missionaries and schoolmasters among the savage tribes; that the design became reputable among the Indians, so that more desired the education of their children at the school than the contributions in the American colonies would support; that the said Wheelock thought it expedient to endeavor to procure contributions in England, and requested the Rev. Nathaniel Whitaker to go to England as his attorney, to solicit contribution, and also solicited the Earl of Dartmouth and others to receive the contributions and become trustees thereof, which they cheerfully agreed to, and he constituted them trustees, accordingly, by a power of attorney, and they testified their acceptance by a sealed instrument. That the said Wheelock also authorized the §78*] trustees to fix and determine *upon the place for the said school; and, to enable them understandingly to give the preference, laid before them the several offers of the governments in America, inviting the settlement of the school among them; that a large number of the

proprietors of lands, in the western part of New Hampshire, to aid the design, and considering that the same school might be enlarged and improved to promote learning among the English, and to supply the churches there with an orthodox ministry, promised large tracts of land for the uses aforesaid, provided the school should be settled in the western part of said province; that the trustees thereupon gave a preference to the western part of said province, lying on Connecticut River, as a situation most convenient for said school. That the said Wheelock further represented the necessity for a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same; that in the infancy of said institution, certain gentlemen whom he had already nominated in his last will (which he had transmitted to the trustees in England) to be trustees in America, should be the corporation now proposed; and lastly, that there were already large contributions for said school in the hands of the trustees in England, and further success might be expected; for which reason the said Wheelock desired they might be invested with all that power therein which could consist with their distance from the same. The charter, after these recitals, declares, that the king, considering the premises, and being willing to *encour- [*679] age the charitable design, and that the best means of education might be established in New Hampshire for the benefit thereof, does, of his special grace, certain knowledge, and mere motion, ordain and grant, that there be a college erected in New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes, and also of English youth and others; that the trustees of said college shall be a corporation forever, by the name of the Trustees of Dartmouth College; that the then Governor of New Hampshire, the said Wheelock, and ten other persons, specially named in the charter, shall be trustees of the said college, and that the whole number of trustees shall forever thereafter consist of twelve, and no more; that the said corporation shall have power to sue and to be sued by their corporate name, and to acquire and hold for the use of the said Dartmouth College, lands, tenements, hereditaments, and franchises; to receive, purchase, and build any houses for the use of said college, in such town in the western part of New Hampshire as the trustees, or a major part of them, shall by a written instrument agree on; and to receive, accept, and dispose of any lands, goods, chattels, rents, gifts, legacies, &c., &c., not exceeding the yearly value of £6,000. It further declares, that the trustees, or a major part of them, regularly convened (for which purpose seven shall form a quorum), shall have authority to appoint and remove the professors, tutors and other officers of the college, and to pay them and also such missionaries and schoolmasters as shall be employed by the trustees for instructing the Indians, salaries and *al- [*680] lowances, as well as other corporate expenses, out of the corporate funds. It further declares, that the said trustees, as often as one or more of the trustees shall die, or, by removal or otherwise, shall, according to their judgment,

1.—2 Fonb. Eq. B. 2, pt. 2, ch. 1, s. 1, note c; Coop. Eq. Pl. 202; 2 Kyd. Corp. 195; Green v. Rutherford, 1 Ves. 463; Attorney-General v. Foundling Hospital, 4 Bro. Ch. 165, S. C.; 2 Ves. Jun. 42; Eden v. Foster, 2 P. W. 325; 1 Woodes. 476; Attorney-General v. Price, 3 Atk. 108; Attorney-General v. Lock, 3 Atk. 164; Attorney-General v. Dixie, 18 Ves. 519; Ex-parte Kirkby Ravensworth Hospital, 15 Ves. 304, 314; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499; Berkhamstead Free School, 2 Ves. & Beames, 134; Attorney-General v. Corporation of Carmarthen, Coop. Rep. 30; Mayor, &c., of Colchester v. Lowten, 1 Ves. & Beames, 226; Rex v. Watson, 2 T. R. 199; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. R. 371; Attorney-General v. Middleton, 3 Ves. 327.

2.—Mayor, &c., of Coventry v. Attorney-General, 7 Bro. Parl. Cases, 235; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499.

Wheat 4.

become unfit or incapable to serve the interests of the college, shall have power to elect and appoint other trustees in their stead, so that when the whole number shall be complete of twelve trustees, eight shall be resident freeholders of New Hampshire, and seven of the whole number laymen. It further declares that the trustees shall have power from time to time to make and establish rules, ordinances, and laws for the government of the college not repugnant to the laws of the land, and to confer collegiate degrees. It further appoints the said Wheelock, whom it denominates "the founder of the college," to be president of the college, with authority to appoint his successor, who shall be president until disapproved of by the trustees. It then concludes with a direction that it shall be the duty of the president to transmit to the trustees in England, so long as they should perpetuate their board, and as there should be Indian natives remaining to be proper objects of the bounty, an annual account of all the disbursements from the donations in England, and of the general plans and prosperity of the institution.

Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government in any manner to alter, amend, or control the charter. It is also apparent, from 681*) *the very terms of the charter, that Dr. Wheelock is recognized as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place, it is apparent that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was, in the sense already explained, a public charity, that is, for the general promotion of learning and piety; but in this respect it was just as much public before as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action, and granting a perpetuity of corporate powers and franchises the better to secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power; but the whole government and control, as well of the officers as of the revenues of the college, being with his consent assigned to the trustees in their corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the state; but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination it follows that Dartmouth College was, under its original charter, a private eleemosynary corporation, 682*) endowed with *the usual privileges and franchises of such corporations, and, among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected and appointed, from time to time, by the existing board, as vacancies or removals should occur.

We are now led to the consideration of the first question in the cause, whether this charter is a contract, within the clause of the constitution prohibiting the states from passing any law impairing the obligation of contracts. In the case of *Fletcher v. Peck*,¹ this court laid down its exposition of the word "contract" in this clause, in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state under a legislative act. It determines, in the most unequivocal manner, that the grant of a state is a contract within the clause of *the constitution now in [*683 question, and that it implies a contract not to re-assume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king.

But it is objected that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, it purporting to be granted *ex mero motu*, and further, that no contracts merely voluntary are within the prohibitory clause. It must be admitted that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficacy to nude pacts. But it must, on the other hand, be also admitted, that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, *bona fide*, into grant, neither the king or any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no such subsequent change of intention of the donor can change the rights of the donee.² And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely *within the principle, and [*684 is, in the strictest sense of the terms, a grant.³ Was it ever imagined that land, voluntarily granted to any person by a state, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land titles had their origin in gratuitous grants of the states, it would go

1.—6 Cranch, 87, 136.

2.—2 Bl. Com. 441; Jenk. Cent. 104.

3.—2 Bl. Com. 317, 346; Shep. Touch. ch. 12, p. 27.

Wheat. 4.

far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract that the grantees should hold, and the grantor should not re-assume the grant, as much as if it had been founded on the most valuable consideration.

But it is not admitted that this charter was not granted for what the law deems a valuable consideration. For this purpose it matters not how trifling the consideration may be; a pepper corn is as good as a thousand dollars. Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of benefit, or any act done, or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer.¹

With these principles in view, let us now examine [*685] the terms of this charter. It purports, indeed, on its face, to be granted "of the special grace, certain knowledge, and mere motion" of the king; but these words were introduced for a very different purpose from that now contended for. It is a general rule of the common law (the reverse of that applied in ordinary cases), that a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee. Wherefore, it is usual to insert in the king's grants a clause, that they are made, not at the suit of the grantee, but of the special grace, certain knowledge, and mere motion of the king; and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities.² But the charter also on its face purports to be granted in consideration of the premises in the introductory recitals. Now, among these recitals it appears that Dr. Wheelock had founded a charity-school at his own expense, on his own estate; that divers contributions had been made in the colonies, by others, for its support; that new contributions had been made and were making in England for this purpose, and were in the hands of trustees appointed by Dr. Wheelock to act in his behalf; that Dr. Wheelock had consented to have the school established at such other place as the trustees should select; that offers had been made by several of the governments in America, inviting the [*686] establishment of the school among them; that offers of land had also been made by divers proprietors of lands in the western parts of New Hampshire, if the school should be established there; that the trustees had finally consented to establish it in New Hampshire; and that Dr. Wheelock represented that, to effectuate the purposes of all parties, an incorporation was necessary. Can it be truly said that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied con-

tract by Dr. Wheelock, if a charter is granted, that the school shall be removed from his estate to New Hampshire? and that he will relinquish all his control over the funds collected, and to be collected, in England under his auspices, and subject to his authority? that he will yield up the management of his charity school to the trustees of the college? that he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied that he gave up the right any longer to maintain the charity school already established on his own estate; and that the funds collected for its use, and subject to his management, were yielded up by him as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity-school, and, in virtue of this endowment, declares him the founder of the college. It matters not whether the funds were great or small: Dr. Wheelock had procured them by his own influence, and they were under his control, to be applied to the [*687] support of his charity-school; and when he relinquished this control he relinquished a right founded in property acquired by his labors. Besides, Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a pepper corn be, in the eye of the law, of sufficient value to found a contract, as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money. *A fortiori*, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage (*jus patronatus*) is of great value in indentment of law. Nobody doubts that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which cannot be legally sold to the intended incumbent.³

In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations on his part in the charter itself. He relinquished valuable rights, and undertook a laborious office in consideration of the grant of the incorporation.

*This is not all. A charter may be [*688] granted upon an executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet *in fieri*. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it. This was the doctrine asserted by the late learned Mr. Justice Buller, in a modern case.⁴ He there said: 'I

1.—*Pillans v. Van Mierop*, per Yates, J., 3 Burr. 1063; *Forth v. Staunton*, 2 Saund. Rep. 211; *Williams' note 2*, and the cases there cited.

2.—2 Bl. Com. 347; *Finch's Law*, 100; 10 Rep. 112; 1 Shep. Abridg. 136; *Bull. N. P.* 136.

Wheat. 4.

3.—2 Bl. Com. 22, note by Christian.

4.—*Rex v. Passmore*, 3 T. R. 199, 239, 246.

do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place," (i. e., the place incorporated). It will not be pretended, that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant without consideration, and, therefore, revocable at the pleasure of the grantor. Yet here the funds are to be managed, and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services without reward, exclusively for the benefit of others, for public charity, can it be reasonably argued that these services are less valuable to the government than if performed for the private **689** emolument of the trustees themselves? In respect, then, to the trustees also, there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them in execution of a charity, from which they could receive no private remuneration.

There is yet another view of this part of the case, which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter, the trustees, and their successors, in their corporate capacity, were to receive, hold, and exclusively manage, all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor **690** upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter.

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist, as to the founder, the trustees, and the benefactors. And upon the soundest legal principles, the charter may be properly deemed, according to the various aspects, in which it is viewed, as a several contract with each of these parties, in virtue of the foundation, or the endowment of the college, or

the acceptance of the charter, or the donations to the charity.

And here we might pause; but there is yet remaining another view of the subject, which cannot consistently be passed over without notice. It seems to be assumed by the argument of the defendant's counsel, that there is no contract whatsoever, in virtue of the charter, between the crown and the corporation itself. But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt that the grant would have been an executed contract with the corporation; as much so, as if it had been to any private person. But it is supposed, that as this corporation was not then in existence, but was created and its franchises bestowed, *uno flatu*, the charter cannot be construed a contract, because there was no person *in rerum natura*, with whom it might be made. Is this, however, a just and legal view of the subject? If **691** the corporation had no existence so as to become a contracting party, neither had it for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority wherever it is necessary to effectuate the objects of the grant.¹ From the nature of things, the artificial person called a corporation must be created before it can be capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence without any act of the natural persons who compose it, and gives such corporation any privileges, franchises, or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it. There may be, in intentment of law, a priority of time, even in an instant, for this purpose.² And if the corporation have an existence before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument at a subsequent period? It behooves those also, who hold that a grant to a corporation, not then in existence, is incapable of being **692** deemed a contract on that account, to consider, whether they do not at the same time establish that the grant itself is nullity for precisely the same reason. Yet such a doctrine would strike us all as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights, or property, on the corporation it created. It may be admitted that two parties are necessary to form a perfect contract, but it is denied that it is

1.—Case of Sutton's Hospital, 10 Co. 23, Buckland v. Fowler, cited 10 Co. 27, 28, and recognized in Attorney-General v. Bowyer, 3 Ves., Jun., 714, 723, 737; S. P. Highmore on Mortum, 200. &c.

2.—Ib.

necessary that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee to the first child of A to be hereafter born; as soon as such child should be born the estate would vest in it. Would it be contended that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked in a case of a gratuitous grant by the king or the legislature to A, for life, and afterwards to the heirs of B, who is then living. Take the case of a bank, incorporated for a limited period, upon the express condition that it shall pay out of its corporate funds a certain sum, as the consideration for the charter, and after the corporation is organized a payment duly made of the sum out of the corporate funds; will it be contended that there is not a subsisting contract between the government and the corporation, by the matters thus arising *ex post facto*, that the charter shall not be revoked during the stipulated period? Suppose an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should **693** be tenants in common of certain lands belonging to the state in certain proportions; if a person afterwards born pays the stipulated sum into the treasury, is it less a contract with him than it would be with a person *in esse* at the time the act passed? We must admit that there may be future springing contracts in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be in respect to natural persons, why not also in respect to artificial persons, created by the law, for the very purpose of being clothed with corporate powers? I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, the grant is just as much an executed contract as if its prior existence had been established for a century.

Supposing, however, that in either of the views which have been suggested, the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature.

It is, in the first place, contended that it is not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institution, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest.

It is admitted that the state legislatures have **694** *power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases, where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature. But when the legislature makes

a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition as a like contract would be between two private citizens. Will it be contended that the legislature of a state can diminish the salary of a judge holding his office during good behavior? Such an authority has never yet been asserted to our knowledge. It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), *does the legislature, under our forms [**695** of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.¹

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts, recognized as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed that when acquired, *bona fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court.² A general law regulating divorces from the contract of marriage, like a law regulating *remedies in other cases of breaches of [**696** contracts, is not necessarily a law impairing the obligation of such a contract.³ It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law,

1.—Terret v. Taylor, 9 Cranch, 43; Town of Pawlet v. Clark, 9 Cranch, 202.

2.—Ib.

3.—See Holmes v. Lansing, 3 Johns. Cas. 73.

compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert that the legislative power to dissolve such a contract, without any breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition as any other contract for a valuable consideration. A man has just as good a right to his wife as to the property acquired under a marriage contract. *He has a legal right to her society and her fortune; and to divest such right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate. I leave this case, however, to be settled when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument, derived from this source, does not press my mind with any new and insurmountable difficulty.

In respect also to grants and contracts, it would be far too narrow a construction of the constitution to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee for the benefit of a particular *cestui que trust*, or for any special, private or public charity, cannot be the less a contract because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage.¹ The fallacy of the argument consists in assuming the very ground in controversy. It is not admitted that a contract with a trustee is in its own nature revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer *in its own way. The truth is, that the government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation for special uses. It cannot recall its own endowments granted to any hospital, or college, or city, or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

Another objection growing out of, and connected with that which we have been considering, is, that no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements, and hereditaments, &c., &c., which may be sold by the grantees for their own benefit; and that grants of franchises, immunities, and authorities not valuable to the parties as property, are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption. There are many rights, franchises, and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant of the next presentation to a church, limited to the grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. *A grant of lands to a trustee to raise portions or pay debts, is, in law, a valuable grant, and conveys a legal estate. Even a power given by will to executors to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship.² Many dignities and offices, existing at common law, are merely honorary, and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the less a contract on that account. In respect to franchises, whether corporate or not, which include a permanency of profits, such as a right of fishery, or to hold a ferry, a market, or a fair, or to erect a turnpike, bank, or bridge, there is no pretense to say that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them in case of any injury, obstruction, or disseizin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant. *Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded as a contract for the use and dominion of property. Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him for that very reason. But it is otherwise where a power is to be exercised in aid of a right vested in the grantee. We all know that a power of attorney, forming a part of a security upon the assignment of a chose in action, is not revocable by the grantor. For it then sounds in contract and is coupled with an

2.—Co. Lit. 113, a; Harg. and Butler's note 2; Sugden on Powers, 140; Jackson v. Jansen, 6 Johns. Rep. 73; Franklin v. Osgood, 2 Johns. Cas. 1; S. C. 14 Johns. Rep. 527; Zebach v. Smith, 3 Blinn. Rep. 69; Lessee of Moody v. Vandyke, 4 Blinn. 7, 31; Attorney-General v. Gleg, 1 Atk. 356; 1 Bac. Abr. 506 (Gwillim edit.)

interest.¹ So, if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature; and there can be no doubt that such grants are contracts within the prohibition in question.

In respect to corporate franchises, they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest. The property of the corporation vests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its **701*** ordinary franchises. "It is likewise a franchise," says Justice Blackstone, "for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom."² In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights in their character, as corporators. The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege.³

702* This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demesnes of the corporation held by it, not, as the argument supposes, for the use and benefit of the people of New Hampshire, but, as the charter itself declares, "for the use of Dartmouth College." There were not, and in the nature of things could not be, any other *cestui que use* entitled to claim those

funds. They were indeed to be devoted to the promotion of piety and learning, not at large, but in that college, and the establishments connected with it; and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, or annul their discretion in the application of them, or distribute them among its own favorites. Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative, until it is established, that the legislature may lawfully take the property of A and give it to B; and if it ⁴could not take away or restrain the **703** corporate funds, upon what pretence can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college and to the cause of religion and learning.

Thus far, the rights of the corporation itself, in respect to its property and franchises, have been more immediately considered. But there are other rights and privileges belonging to the trustees collectively, and severally, which are deserving of notice. They are entrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The *jus patronatus* is vested in them. The visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs, it escheats to the government.⁴ It is a valuable right founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right in return for his endowment as for any other equivalent? and, if instead of holding it as an hereditament, he assigns it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a collective right in all the trustees; ⁵each of them also has a franchise in it. **704** Lord Holt says, "it is agreeable to reason, and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man."⁵ Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If

1.—*Walah v. Whitcomb*, 2 Esp. 565; *Bergen v. Bennett*, 1 Caines' Cases in Error, 1, 15; *Raymond v. Squire*, 11 Johns. Rep. 47.

2.—2 BL. Com. 37; 1 Kyd on Corp. 14, 16.

Wheat. 4.

3.—*Ashby v. White*, 2 Ld. Raym. 938; 1 Kyd on Corp. 16.

4.—*Rex v. St. Catharine's Hall*, 4 T. R. 283.

5.—*Ashby v. White*, 2 Ld. Raym. 938, 952; *Attorney-General v. Dixie*, 13 Ves. 519.

ousted unlawfully from his office, the law would, by a *mandamus*, compel a restoration.

It is attempted, however, to establish, that the trustees have no interest in the corporate franchises, because it is said that they may be witnesses in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting, that in a suit brought against a charitable corporation for a recompense for services performed for the corporation, the governors, constituting the corporation (but whether entrusted with its funds or not by the act of incorporation does not appear), are competent witnesses against the plaintiff.¹ But assuming this case to have been rightly decided (as to which, upon the authorities, there may be room to doubt), the corporators being [705*] "technically parties to the record," it does not establish that in a suit for the corporate property vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish, that in a suit for the corporate franchises to be exercised by the trustees, or to enforce their visitatorial power, the trustees would be competent witnesses. On a *mandamus* to restore a trustee to his corporate or visitatorial power, it will not be contended that the trustee is himself a competent witness to establish his own rights, or the corporate rights. Yet why not, if the law deems that a trustee has no interest in the franchise? The test of interest assumed in the argument proves nothing in this case. It is not enough to establish that the trustees are sometimes competent witnesses; it is necessary to show that they are always so in respect to the corporate franchises, and their own. It will not be pretended, that in a suit for damages for obstruction in the exercise of his official powers, a trustee is a disinterested witness. Such an obstruction is not a *damnum absque injuria*. Each trustee has a vested right and legal interest in his office, and it cannot be divested but by due course of law. The illustration, therefore, lends no new force to the argument, for it does not establish that when their own [706*] rights "are in controversy the trustees have no legal interest in their offices.

The principal objections having been thus answered satisfactorily, at least to my own mind, it remains only to declare that my opinion, after the most mature deliberation, is, that the charter of Dartmouth College, granted in 1769, is a contract within the purview of the constitutional prohibition.

I might now proceed to the discussion of the second question, but it is necessary previously to dispose of a doctrine which has been very seriously urged at the bar, viz., that the charter of Dartmouth College was dissolved at the revolution, and is, therefore, a mere nullity. A case before Lord Thurlow has been cited in support of this doctrine.² The principal question in that case was, whether the corporation

of William and Mary's College in Virginia (which had received its charter from King William, and Queen Mary) should still be permitted to administer the charity under Mr. Boyle's will, no interest having passed to the college under the will, but it acting as an agent or trustee under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the court. Lord Thurlow directed a new scheme, because the college belonging to an independent government, was no longer within the reach of the court. And he very unnecessarily added, that he could not now consider the college as a corporation, or as another report³ states, that he "could not take notice of it as a corpo- [*707] ration, it not having proved its existence as a corporation at all. If, by this, Lord Thurlow meant to declare that all charters acquired in America from the crown were destroyed by the revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principal of the common law, which has been recognized as well in this as in other courts, that the division of an empire works no forfeiture of previously-vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice.⁴ This objection, therefore, may be safely dismissed without further comment.

The remaining inquiry is, whether the acts of the legislature of New Hampshire now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt certainly is to force upon the corporation a new charter against the will of the corporators. Nothing seems better settled at the common law than the doctrine that the crown cannot force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporation.⁵ Neither can the crown compel a man "to become a member of [*708] such corporation against his will." As little has it been supposed, that under our limited governments, the legislature possessed such transcendent authority. On one occasion, a very able court held that the state legislature had no authority to compel a person to become a member of a mere private corporation created for the promotion of a private enterprise, because every man had a right to refuse a grant.⁶ On another occasion, the same learned court declared, that they were all satisfied that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation.⁷ These principles are so consonant with justice, sound policy, and legal reasoning, that it is difficult to resist the impression of

4.—1 Ves., Jun., 243.

5.—Terrett v. Taylor, 9 Cranch, 43, 50; Kelly v. Harrison, 2 Johns. Cas. 59; Jackson v. Lunn, 3 Johns. Cas. 109; Calvin's case, 7 Co. 27.

6.—Rex v. Vice-Chancellor of Cambridge, 3 Bur. 1656; Rex v. Passmore, 3 T. R. 240; 1 Kyd on Corp. 65; Rex v. Larwood, Comb. 816.

7.—Rex v. Dr. Askew, 4 Bur. 2200.

8.—Ellis v. Marshall, 2 Mass. Rep. 209.

9.—Wales v. Stetson, 2 Mass. Rep. 143, 146.

1.—Weller v. The Governor of the Foundling Hospital, Peake's N. P. Rep. 153.

2.—Attorney-General v. City of London, &c., 3 Bro. Ch. c. 171, S. C.; 1 Ves., Jun., 243; Burton v. Hinde, 5 T. R. 174; Nason v. Thatcher, 7 Mass. R. 306; Phillips on Evid. 42, 52, 57, and notes; 1 Kyd on Corp. 304, &c.; Highmore on Mortm. 514.

3.—Attorney-General v. City of London, 3 Bro. ch. c. 171; S. C. 1 Ves., Jun., 243.

their perfect correctness. The application of them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this court in this case.

A very summary examination of the acts of New Hampshire will abundantly show, that in many material respects they change the charter of Dartmouth College. The act of the 27th of June, 1816, declares that the corporation known by the name of the Trustees of Dartmouth College shall be called the Trustees of Dartmouth University. That the whole number of 700* shall be twenty-one, a *majority of whom shall form a quorum; that they and their successors shall hold, use, and enjoy forever, all the powers, authorities, rights, property, liberties, privileges, and immunities, heretofore held, &c., by the trustees of Dartmouth College, except where the act otherwise provides; that they shall also have power to determine the times and places of their meetings and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof; to appoint and displace officers, and determine their duties and compensation; to delegate the power of supplying vacancies in any of the offices of the university for a limited term; to pass ordinances for the government of the students; to prescribe the course of education; and to arrange, invest, and employ the funds of the university. The act then provides for the appointment of a board of twenty-five overseers, fifteen of whom shall form a quorum, of whom five are to be such *ex officio*, and the residue of the overseers, as well as the new trustees, are to be appointed by the governor and council. The board of overseers are, among other things, to have power "to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings." The act then provides that the president and professors shall be nominated by the trustees, and 710* appointed by the overseers, *and shall be liable to be suspended and removed in the same manner; and that each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards. The supplementary act of the 18th of December, 1816, declares that nine trustees shall form a quorum, and that six votes at least shall be necessary for the passage of any act or resolution. The act of the 26th of December, 1816, contains other provisions, not very material to the question before us.

From this short analysis it is apparent that, in substance, a new corporation is created including the old corporators, with new powers, and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees in their corporate capacities. The quorum is no longer seven, but nine. The old trustees have no longer the sole right to

perpetuate their succession by electing other trustees, but the nine new trustees are in the first instance to be appointed by the governor and council, and the new board are then to elect other trustees from time to time as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a minority of the old board, co-operating with the new trustees, possess the unlimited power to remove the majority of the old board. The powers, too, of the corporation are varied. It has authority to organize new colleges in *the university, and to establish an [711 institute, and elect fellows and members thereof." A board of overseers is created (a board utterly unknown to the old charter), and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trustees are in future only to nominate, and the overseers are to approve the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A, in trust for special purposes, can the grant be revoked, and a new grant thereof be made to A, B and C, in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A and B, for the use of a college, or a hospital, of private foundation, is not the obligation of that grant impaired when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A and B, is it no violation of their right to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank, or insurance company, by the terms of its charter, be under the management of directors, elected by the stockholders, would not the *rights acquired [712 by the charter be impaired if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am therefore bound to declare that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that

charter, and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predicament in which this court stands in relation to the nation at large is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state and its citizens, and between different states. It stands, therefore, in 713*] the midst of *jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that.

Under these impressions I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country.

DUVALL, J., dissented.¹

714*] *Upon the suggestion of the plaintiff's counsel, that the defendant had died since the last term, the court ordered the judgment to be entered *nunc pro tunc* as of that term, as follows:

JUDGMENT.—This cause came on to be heard on the transcript of the record, and was argued by counsel. And thereupon all and singular the premises being seen, and by the court now

here fully understood, and mature deliberation being thereupon had, *It appears to this [*715 court, that the said acts of the legislature of New Hampshire, of the twenty-seventh of June and of the eighteenth and twenty-sixth of December, *Anno Domini*, 1816, in the record mentioned, are repugnant to the constitution of the United States, and so not valid; and, therefore, that the said Superior Court of Judicature of the state of New Hampshire erred in rendering judgment on the said special verdict in favor of the said plaintiffs; and that the said court ought to have rendered judgment thereon, that the said trustees recover against the said Woodward, the amount of damages found and assessed, in and by the verdict aforesaid, viz., the sum of twenty thousand dollars. Whereupon it is considered, ordered, and adjudged by this Court, now here, that the aforesaid judgment of the said Superior Court of Judicature of the state of New Hampshire be, and the same hereby is, reversed and annulled. And this court proceeding to render such judgment in the premises as the said Superior Court of Judicature ought to have rendered, it is further considered by this court, now here, that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of twenty thousand dollars, with costs of suit; and it is by this court, now here, further ordered, that a special mandate do go from this court to the said Superior Court of Judicature to carry this judgment into execution.

Cited.—8 Wheat. 481; 12 Wheat. 296; 3 Pet. 153; 5 Pet. 47; 6 Pet. 738; 11 Pet. 582, 618, 645; 12 Pet. 751; 13 Pet. 587; 2 How. 538; 6 How. 331, 332, 337; 9 How. 184; 10 How. 536; 14 How. 275, 276, 281; 16 How. 380, 382; 18 How. 378; 19 How. 601; 22 How. 377; 3 Wall. 73; 6 Wall. 606; 8 Wall. 437; 13 Wall. 212, 214; 15 Wall. 493, 494, 496, 511; 16 Wall. 232; 18 Wall. 225; 5 Otto, 312, 683, 694, 968; 6 Otto, 607; 7 Otto, 672; 8 Otto, 295; 9 Otto, 748, 765; 10 Otto, 557; 11 Otto, 580, 614, 616, 619; 5 Bank. Reg. 242, 250; Bald. 219, 220, 223; 1 Sumn. 297, 298, 301; 4 Bls. 41; 12 Blatchf. 461; 1 Wall., Jr., 291; 3 Cliff. 346, 353; 1 Woods 540; 3 Woods 194, 230, 234, 237, 242.

1.—In the discussions which arose in France in 1786 upon the new charter then recently granted to the French East India Company, it seems to have been taken for granted by the lawyers on both sides, to whom the questions in controversy were submitted by the company, and by the merchants who considered themselves injured by its establishment, that if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited for non-user or misuser. The advocates (M. M. Lacroix and Blonde), who were consulted by the merchants of the kingdom opposed to the establishment of the company, denied its legal existence, on the ground that the king had been surprised in his grant; that it was not yet perfected by the issuing of letters patent, nor duly registered by the parliaments; and that it both might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy.

On the other hand it was contended by the company that their grant was irrevocable; that it was but a renewal and confirmation of the charter of

the old company which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was at the time solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested as a right of property, of which they could not be deprived by any authority in the kingdom. "En effet, quand le roi accorde un privilège exclusif, ce privilège est le prix d'une mise de fonds, dans un commerce hasardeux, dont l'entreprise est jugée avantageuse à l'état. Delà naît par conséquent un contrat synallagmatique, qui se forme entre le souverain et les actionnaires. Delà naît un droit de propriété qui devient inébranlable pour le souverain lui-même." And of this opinion were the advocates (M. M. Hardoin, Gerbier, and De Bonnières), consulted by the company. See a Collection of Tracts on the French East Company, Paris, 1788, in the Library of Congress.

Wheat. 4.

APPENDIX.

[NOTE I.]

ON CHARITABLE BEQUESTS.

VERY few cases upon the subject of charitable donations have originated in the United States; in some of which, however, it is highly probable the English doctrines on this subject may be of limited, and, perhaps, even of general application. Where this is not the case, they may gratify professional curiosity, and afford materials for illustration in analogous branches of the law, as there is hardly any portion of the science in which more ingenious reasoning and indefatigable diligence have been employed. The object of the following sketch is to give a connected view of some of the principal features of the system.

It is highly probable that the rudiments of the law of charities were derived from the civil law. One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity, was a permission to his subjects to bequeath their property to the church.¹ This permission was soon abused to so great a degree as to induce Valentinian to enact a mortmain law, by which it was restrained.² But this restraint was gradually relaxed, and in the time of Justinian it became fixed, as a maxim of Roman jurisprudence, that legacies to pious uses, which included all legacies destined for works of charity, whether they related to spiritual or temporal concerns, were 4*) of "peculiar favor, and to be deemed privileged testaments."³ The construction of testaments of this nature was most liberal; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence, if a legacy was given to the church, or to the poor, generally, without any description of what church or what poor, the law sustained it by giving it in the first case to the parish church of the place where the testator lived; and in the latter case, to the hospital of the same place; and, if there was none, then to the poor of the same parish.⁴ And in all cases where the objects were indefinite, the legacy was carried into effect, under the direction of the judge having cognizance of the subject.⁵ So, if a legacy were given for a definite object,

which either was previously accomplished, or which failed, it was, nevertheless, valid, and applied under judicial direction to some other object.⁶

The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce the principles of pious legacies into the common law of England; and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord Thurlow⁷ was clearly of opinion that the doctrine of charities grew up from the civil law; and Lord Eldon,⁸ in assenting to that opinion, has judiciously remarked, that, as at an early period the Ordinary had power to apply a portion of every man's personal estate to charity, when afterwards the statute compelled a distribution, it is not impossible that the same favor should have been extended to charity in wills, which, by their own force, purported to authorize such a distribution. Be the origin, however, what it may, it cannot be *denied that [*5 many of the privileges attached to pious legacies have been for ages incorporated into the English law. Indeed, in former times, the construction of charitable bequests was pushed to a most alarming extravagance; and though it has been, in a great measure, checked in later and more enlightened times, there are still some anomalies in the law of this subject which are hardly reconcilable with any sound principles of judicial interpretation, or the proper exercise of judicial authority.

The history of the law of charitable bequests, previous to the statute of the 43 Elizabeth, c. 4, which is emphatically called the statute of Charitable Uses, is extremely obscure.⁹ Few traces remain of the exercise of jurisdiction over charities in any shape, by any courts, previous to that period. Of the jurisdiction of Chancery, nothing is ascertained with precision; and the few cases to be found at law, turned mainly upon the question, whether the uses were charitable, or whether they were superstitious, within the statutes against superstitious uses. One of the earliest cases is Porter's case,¹⁰ already alluded to in the decision of the Su-

1.—Cod. Theodos., l. 16, t. 2, leg. 4.

2.—Cod. Theodos., l. 16, t. 2, leg. 20.

3.—2 Domat, Lohe Civiles, l. 4, t. 2, s. 6, l. 1, 2, 7, p. 161, 163; Ferriere, Dict. h. t.; Swinburne, p. 1, s. 16, p. 108.

4.—2 Domat, l. 4, t. 2, s. 6, l. 4, p. 162; Ferriere, Dict. h. t.

5.—2 Domat, l. 4, t. 2, s. 6, l. 5, p. 162; Swinburne, p. 1, s. 16, p. 104.

Wheat. 4.

6.—2 Domat, l. 4, t. 2, s. 6, l. 6, p. 162, 163.

7.—White v. White, 2 Bro. Ch. Cas. 12.

8.—Moggridge v. Thackwell, 7 Ves. 36, 60; Mills v. Farmer, 1 Merivale, 55, 94, 95.

9.—There was, in fact, a statute passed respecting charitable uses, in 39 Eliz. c. 9; but it was repealed by the statute 43 Eliz. See Com. Dig. Charitable Uses, N. 14.

10.—1 Co. Rep. 22, b. in 34 and 35 Eliz.

preme Court in the text;¹ but there the parties made out their case at law upon general principles, without reference to any peculiar rules of construction as to charities; and Lord Eldon seems to think that this was the usual course prior to the time of Lord Ellesmere.²

The statute of Elizabeth is now considered as the principal source of the law of charities, and has given rise to various questions. It is to this statute that the very extensive jurisdiction at present exercised by the Court of Chancery over subjects of this nature is generally, if not exclusively, to be referred.

The statute, in its preamble,³ enumerates [6*] certain uses which it deems charitable. These are gifts, devises, &c., for the relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; for education and preferment of orphans; for, or towards the relief, stock, or maintenance for houses of correction; for marriages of poor maids; for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes. These are all the classes of uses which the statute reaches.

Since the passage of the statute, it has become general rule, that no uses are to be considered as charitable, and entitled as such to the protection of the law, except such as fall within the words or obvious intent of the statute. Sir William Grant has observed, that the word "charity," in its widest extent, denotes all good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in the Court of Chancery. There its signification is chiefly derived from the statute of Elizabeth.⁴ And, therefore, where a testatrix bequeathed her personal estate to the Bishop of Durham, &c., upon trust, to pay her debts and legacies, &c., and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, shall most approve of; and she appointed the Bishop her sole executor, upon a bill brought by the next of kin to establish the will, and all the legacies except the residuary bequest, and to declare that void, and a resulting trust for the next of kin, it was held, first, by the Master of the Rolls, and afterwards on appeal by the Lord Chancellor, that the residuary bequest was void, and that the property was a resulting trust for the next of kin, upon the ground that objects of benevolence and liberality were not necessarily such as were within the statute of [7*] Elizabeth, and, *therefore, were objects too indefinite to be executed by the court; and if so, then the trust was void; for there can be

no valid trust over which the Court of Chancery will not assume a control. The Master of the Rolls said, those purposes are considered as charitable which the statute enumerates, or which by analogies are deemed within its spirit or intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear that liberality and benevolence can find numberless objects not included in the statute in the largest construction of it. The use of the word "charitable" seems to have been purposely avoided in this will. The question is not, whether the Bishop may not apply the residue upon purposes strictly charitable, but whether he is bound so to apply it.⁵

The statute appoints a mode of inquiring into, and enforcing all charitable uses, bequests, &c., by a commission issuing out of chancery; and the commissioners, upon such inquiry, are authorized to set down such orders, judgments, and decrees, as that the lands, &c., may be faithfully employed for the charitable uses to which they were appointed; which orders, judgments and decrees, are to stand good until undone and altered by the Court of Chancery, upon due complaint of the party grieved. The statute, then, after enumerating certain exceptions to its operation, gives authority to the Court of Chancery to take order for the due execution of the orders, judgments, and decrees of the commissioners returned into chancery, and upon any complaint in the premises, and the hearing thereof, to "annul, diminish, alter, or enlarge the said orders, judgments, and decrees, &c., as shall be thought to stand with equity and good conscience, &c."

Shortly after the statute passed, it became a question, whether the Court of Chancery could grant relief by original bill in cases within the statute, or whether the remedy was confined to the process by commission. That doubt remained until the reign of Charles II., when the question was finally settled in *favor of [8*] the jurisdiction by original bill.⁶ It is not quite certain upon what grounds the court arrived at this conclusion. The probability is, that in cases of charitable uses of a definite nature, where the trustees were alive, and the objects were certain, the court exercised a general jurisdiction by original bill, upon the same grounds as other bills; for definite trusts are maintained upon its ordinary jurisdiction. And as the court might upon all commissions alter, amend, and enlarge the decrees of the commissioners in all cases of charities within the statute, whether definite or indefinite, the proceeding in both cases became mixed in practice, and was inveterately established before its correctness was very extensively questioned. And it was in reality more convenient for all parties, that the court should do that in the first instance, which it certainly could do after the return of the commission upon complaint, so that public convenience and private interest might produce a general acquiescence in a course which settled the law of the case with-

1.—*Trustees of the Baptist Association v. Hart's Executors*, ante, p. 33.

2.—*Attorney-General v. Boyer*, 3 Ves. 714, 726.

3.—See the statute at large, 2 Inst. 707; *Bridgman's Duke on Charit. Uses*, c. 1.

4.—*Morice v. Bishop of Durham*, 9 Ves. 309.

5.—*Morice v. Bishop of Durham*, 9 Ves. 309; 8 C. 10 Ves. 522.

6.—*Attorney-General v. Newman*, 1 Ch. Cas. 157; S. C. 1 Lev. 284; *West v. Knight*, 1 Ch. Cas. 134; *Anon.*, 1 Ch. Cas. 267; *Parish of St. Dunstan v. Beauchamp*, 1 Ch. Cas. 183; 2 Foul. Eq. b. 3, p. 2, c. 1, s. 1.

out any circuitry, until it became too late successfully to combat its regularity.¹

Be this as it may, it is very certain that chancery will now relieve by original bill, or information upon gifts, bequests, &c., within the statute of Elizabeth; and informations by the Attorney-General to settle, establish, or direct charitable donations, are very common in practice.² But where the gift is not a charity within the statute, no information lies in the name of the Attorney-General to enforce it.³ And if an information be brought in the name of the Attorney-General, and it appears to be such a charity as the court ought to support, though the information be mistaken in the title or prayer of relief, yet the bill will not be dismissed, but the court will support and establish [9*] *the charity in such manner as by law it may.⁴ But the jurisdiction of chancery over charities does not exist where there are local visitors appointed; for it then belongs to them and their heirs to visit and control the charity.⁵

As to what charities are within the statute, they are enumerated with great particularity in Duke on Charitable Uses, and Comyn's Digest, tit. Charitable Uses, (N. 1). It is clear that no superstitious uses are within its purview, such as gifts of money for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or for prayers for the dead, or to such purposes as the superior of a convent or her successor may judge expedient.⁶ But there are certain uses, which, though not within the letter, are yet deemed charitable within the equity of the statute; such as money given to maintain a preaching minister; to maintain a schoolmaster in a parish; for the setting up a hospital for the relief of poor people; for the building of a sessions house for a city or county; the making a new or repairing an old pulpit in a church, or the buying of a pulpit cushion or pulpit cloth; or the setting up of new bells, where none are, or a mending of them, where they are out of order.⁷

And charities are so highly favored in the law that they have always been more liberally construed than the law will allow in gifts to individuals. In the first place the same words in a will, applied to individuals, may require a very different construction when applied to the case of a charity. If a testator give his property to such person as he shall hereafter

name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, the latter dies in the life-time *of [*10 the testator, and no other person is appointed in his stead, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favor of charity, chancery will in both instances supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether.⁸ Again, in the case of an individual, if an estate be devised to such person as the executor shall name, and no executor is appointed, or one being appointed, dies in the testator's life-time, and no one is appointed in his place, the bequest amounts to nothing. Yet such bequest to charity would be good, and the Court of Chancery would in such case assume the office of executor.⁹ So, if a legacy be given to trustees to distribute in charity, and they die in the testator's life-time, although the legacy is lapsed at law (and if they had taken to their own use, it would have been gone forever), yet it will be enforced in equity.¹⁰ Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy; yet where the legacy is to charity, the court will consider charity as the substance; and in such cases, and in such cases only, if the mode pointed out fail, it will provide another mode, by which the charity may take, but by which no other than charitable legatees can take.¹¹ A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity.¹² *Therefore, it has been held, that [*11 if a man devises a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the Court of Chancery will dispose of it to such charitable purposes as it thinks fit.¹³ So, if a testator bequeath a sum for such a school as he should appoint, and he appoints none, the Court of Chancery may apply it for what school it pleases.¹⁴ The doctrine has been

1.—See Attorney-General v. Dixie, 13 Ves. 519; Kirkby Ravensworth Hospital, 15 Ves. 305; Green v. Rutherford, 1 Ves. 363; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499; 2 Fonbl. Eq. b. 3, p. 2, c. 1, s. 1, note (a); Cooper's Eq. Pl. 232; Bailiffs, &c., of Barford v. Lenthall, 2 Atk. 550.

2.—Com. Dig. Chan. (2 N. 1). The proceeding by commission appears to have almost fallen practically into disuse. Ed. Rev. No. lxii, p. 383.

3.—Attorney-General v. Hever, 2 Vern. 382.

4.—Attorney-General v. Smart, 1 Ves. 72; Attorney-General v. Jeanes, 1 Atk. 355; Attorney-General v. Breton, 2 Ves. 425; Attorney-General v. Middleton, 2 Ves. 327; Attorney-General v. Parker, 1 Ves. 43; 8 C. 2 Atk. 576; Attorney-General v. Whitley, 11 Ves. 241, 247.

5.—Attorney-General v. Price, 3 Atk. 103; Attorney-General v. Governors of Harrow School, 2 Ves. 552.

6.—Duke's Char. 105; Bridg. Duke, 349, 466; Adams v. Lambert, 4 Co. Rep. 104; Smart v. Spurrier, 6 Ves., Jun., 567.

Wheat. 4.

7.—Duke, 105, 113; Bridg. Duke, 354; Com. Dig. Charit. Uses. (N. 1.)

8.—Mills v. Farmer, 1 Merivale, 55, 96; Moggridge v. Thackwell, 7 Ves. 36.

9.—Mills v. Farmer, 1 Merivale, 55, 94; Moggridge v. Thackwell, 7 Ves. 36; Attorney-General v. Jackson, 11 Ves. 365, 367.

10.—Attorney-General v. Hickman, 2 Eq. Cas. Ab. 198; 8 C. Bridg. Duke, 476; Moggridge v. Thackwell, 3 Bro. Ch. Cas. 517; 8 C. 1 Ves., Jun., 464; 8 C. 7 Ves. 36; Mills v. Farmer, 1 Merivale, 55, 100; White v. White, 1 Bro. Ch. Cas. 12.

11.—Mills v. Farmer, 1 Meriv. 55, 100; Moggridge v. Thackwell, 7 Ves. 36; Attorney-General v. Berryman, 1 Dickens, 168; Roper on Legacies, 130.

12.—Mills v. Farmer, 1 Meriv. 55, 95; Moggridge v. Thackwell, 7 Ves. 36; White v. White, 1 Bro. Ch. Cas. 12.

13.—Attorney-General v. Syderfin, 1 Vern. 224; 8 C. 2 Freem. 261; recognized in Mills v. Farmer, 1 Meriv. 55, and Moggridge v. Thackwell, 7 Ves. 36, 70.

14.—Freeman, 261; Moggridge v. Thackwell, 7 Ves. 36, 73, 74.

pressed yet farther; and it has been established, that if the bequest indicate a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some charity, agreeable to the law, in the room of that contrary to it.¹ Thus, a sum of money bequeathed to found a Jews' synagogue has been taken by the court and judicially transferred to the benefit of a foundling hospital.² And a bequest for the education of poor children in the Roman Catholic faith has been decreed in chancery to be disposed of by the king at his pleasure, under his sign-manual.³

Another principle, equally well established, is, that if the bequest be for charity, it matters not how uncertain the persons or objects may be; or whether the persons who are to take, are *in esse* or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried into exact execution or not. In all these, and the like cases, the court will sustain the legacy, and give it effect according to its own principles; and, where a literal execution becomes inexpedient or impracticable, will execute it *cy pres*.⁴ Thus, a devise of lands to the church wardens of a parish (who are not a corporation capable of holding lands) for a charitable purpose, though void at law, will be sustained in equity.⁵ So, if a corporation for whose use a charity is designed is not *in esse*, and cannot come into existence but by some future act of the crown, as for instance, a gift to found a new college, which requires an incorporation, the gift is valid, and the court will execute it.⁶ So, if a devise be to an existing corporation by a misnomer which makes it void at law.⁷ So, where a devise was to the poor generally, the court decreed it to be executed in favor of three public charities in London.⁸ So, a legacy towards establishing a bishop in America, was held good, though none was yet appointed.⁹ And where a charity is so given, that there can be no objects, the court will order a new scheme; but if objects may, though they do not at present, exist, the court will keep the fund for the old scheme.¹⁰ And when objects cease to exist, the court will new-model the charity.¹¹

In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity and disposable estate, and his mode of donation does not contravene the provisions of any statute.¹² The doctrine is laid down with great accuracy by Duke,¹³ [*13] who says that a disposition of lands, &c., to charitable uses is good, "albeit there be defect in the deed, or in the will, by which they were first created and raised, either in the party trusted with the use, where he is misnamed, or the like; or in the party for whose use, or that are to have the benefit of the use, or where they are not well named, or the like; or in the execution of the estate, as where livery of seizin or attornment, is wanting, or the like. And therefore, if a copy-holder doth dispose of copy-hold land to a charitable use without a surrender; or a tenant in tail convey land to a charitable use without a fine; or a reversion without attornment or insolvency, and in divers such like cases, &c., this statute shall supply all the defects of assurance; for these are good appointments within the statute."¹⁴ But a parol devise to charity out of lands being defective, as a will, which was the manner of the conveyance the testator intended to pass it by, it can have no effect as an appointment, which he did not intend.¹⁵ Yet it has been nevertheless held, that where a married woman, administratrix of her husband, and entitled to certain personal estates belonging to him (viz., a chose in action), afterwards intermarried, and then during coverture made a will disposing of that estate, partly to his heirs, and partly to charity, the bequest, though void at law, was good as an appointment under the statute of Elizabeth, for this reason, "that the goods in the hands of administrators are all for charitable uses, and the office of the ordinary and of the administrator, is to employ them in pious uses, and the kindred and children have no property [*14] nor pre-eminence but under the title of charity."¹⁶

With the same view the Court of Chancery was in former times most astute to find out grounds to sustain charitable bequests. Thus, an appointment under a will to charitable uses, that was precedent to the statute of Elizabeth, and thus utterly void, was held to be made

1.—*De Costa v. De Pas*, 1 Vern. 248; *Attorney-General v. Guise*, 2 Vern. 266; *Casey v. Abbot*, 7 Ves. 480; *Moggridge v. Thackwell*, 7 Vern. 38, 75; *Bridg. Duke*, 468.

2.—*Id.* and *Mills v. Farmer*, 1 Meriv. 55, 100.

3.—*Casey v. Abbot*, 7 Ves. 490.

4.—*Attorney-General v. Oglander*, 3 Bro. Ch. Cas. 168; *Attorney-General v. Green*, 2 Bro. Ch. Cas. 432; *Frier v. Peacock*, Rep. temp. Finch, 245; *Attorney-General v. Boultree*, 2 Ves., Jun., 380; *Bridg. Duke*, 355.

5.—1 Burn's Eccl. Law, 226; *Duke*, 33, 115; *Com. Dig. Chancery*, 2 N. 2; *Attorney-General v. Combe*, 2 Ch. Cas. 13; *Rivett's case*, Moore, 390; *Attorney-General v. Bowyer*, 3 Ves., Jun., 714; *West v. Knight*, 1 Ch. Cas. 135; *Highmore on Mortm.* 204; *Tothill*, 34; *Mills v. Farmer*, 1 Meriv. 55.

6.—*White v. White*, 1 Bro. Ch. Cas. 12; *Attorney-General v. Downing*, Amb. 550, 571; *Attorney-General v. Bowyer*, 3 Ves., Jun., 714, 727.

7.—*Anon.*, 1 Ch. Cas. 267; *Attorney-General v. Platt*, Rep. temp. Finch, 221.

8.—*Attorney-General v. Peacock*, Rep. temp. Finch, 245; *Owens v. Bean*, Id. 365; *Attorney-General v. Syderfin*, 1 Vern. 224; *Clifford v. Francis*, 1 Freem. 330.

9.—*Attorney-General v. Bishop of Chester*, 1 Bro. Ch. Cas. 144.

10.—*Attorney-General v. Oglander*, 3 Bro. Ch. Cas. 160.

11.—*Attorney-General v. City of London*, 3 Bro. Ch. Cas. 171; *S. C.* 1 Ves., Jun., 243.

12.—*Case of Christ's College*, 1 W. Bl. 90; *S. C.* Amb. 351; *Attorney-General v. Rye*, 2 Vern. 453, and *Raithby's Notes*; *Rivett's case*, Moore, 390; *Attorney-General v. Burdett*, 2 Vern. 755; *Attorney-General v. Bowyer*, 3 Ves., Jun., 714; *Damer's case*, Moore, 322; *Collinson's case*, Hob. 136; *Mills v. Farmer*, 1 Merivale, 55; *Attorney-General v. Bowyer*, 3 Ves., Jun., 714.

13.—*Duke*, 84, 85; *Bridg. Duke*, 355.

14.—*Duke*, 84, 85; *Bridg. Duke*, 355; *Christ's Hospital v. Hanes*, *Bridg. Duke*, 370; 1 Burn's Eccl. Law, 226; *Tufnel v. Page*, 2 Atk. 57; *Tay v. Slaughter*, Prec. Ch. 18; *Attorney-General v. Rye*, 2 Vern. 453; *Rivett's case*, Moore, 390; *Kenson's case*, Hob. 136; *Attorney-General v. Burdett*, 2 Vern. 755.

15.—*Jenner v. Harper*, Prec. Ch. 380; 1 Burn's Eccles. Law, 226, and see *Attorney-General v. Bains*, Prec. Ch. 271.

16.—*Damer's case*, Moore, 322.

good by the statute.¹ And a devise which was not within the statute, was nevertheless decreed as a charity, and governed in a manner wholly different from that contemplated by the testator, although there was nothing unlawful in his intent; the Lord Chancellor giving as his reason "*summa est ratio, quæ pro religione facit*;" and because the charity was for a weekly sermon, to be preached by a person to be chosen by the greatest part of the best inhabitants of the parish, he treated this as a wild direction, and decreed that the bequests should be to maintain a catechist in the parish, to be approved by the bishop.² So, though the statute of Hen. VIII., of wills, did not allow of devises of land to corporations to be good, yet such devises to corporations for charitable uses, were held good, as appointments under the statute of Elizabeth.³ Lord Chancellor Cowper, in a case where he was called upon to declare a charitable bequest valid, notwithstanding the will was not executed according to the statute of frauds, and these cases were cited, observed: "I shall be very loth to break in upon the statute of frauds and perjuries in this case, as there are no instances where men are so easily imposed upon as at the time of their dying, under the pretense of charity. It is true, the charity of judges has carried several cases on the statute of Elizabeth great lengths; and this occasioned the distinction between operating by will and by appointment, which surely the makers of that statute never contemplated."⁴

It has been already intimated that the disposition of modern judges has been to curb this [15*] excessive latitude of construction *assumed by the Court of Chancery in early times. But, however strange some of the doctrines already stated may seem to us, as they have seemed to Lord Eldon, yet they cannot now be shaken, without doing (as he says) that in effect which no judge will avowedly take upon himself—to reverse decisions that have been acted upon for centuries.⁵

A charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heir of the donor and the donees.⁶ And where several distinct charities are given to a parish for several purposes, no agreement of the parishioners can alter or divert them to other uses.⁷

The doctrine of *cy pres*, as applied to charities, was formerly pushed to a most extravagant length;⁸ but this sensible distinction now prevails, that the court will not decree execution of the trust of a charity in a manner different from that intended, except so far as it is seen

that the intention cannot be literally executed, but another mode may be adopted consistent with the general intention, so as to execute it, though not in mode, yet in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated, if it can be obtained.⁹ And where there are no objects remaining to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme, and upon the principles of *cy pres*. The rule is, that if lands are given to a corporation for charitable uses, which the donor contemplates to last forever, the heir never can have the land back again; but if it becomes impracticable to execute the charity, another similar charity must be substituted, so long as the corporation *exists. [*16] If the charity does not fail, but the trustees or corporation fail, the Court of Chancery will substitute itself in their stead, and carry on the charity.¹⁰

When the increased revenues of a charity extend beyond the original objects, the rule, as to the application of such increased revenues, is, that they are not a resulting trust for the heirs at law, but are to be applied to similar charitable purposes, and to the augmentation of the benefit of the charity.¹¹

In former times, the disposition of chancery to assist charities was so strong that, in equity, assets were held to satisfy charitable uses before debts or legacies; though assets at law were held to satisfy debts before charities. But even at law, charities were then preferred before other legacies.¹² And this, indeed, was in conformity to the civil law, by which charitable legacies are preferred to all others.¹³ The doctrine, however, is now altered, and charitable legacies, in case of a deficiency of assets, abate in proportion as well as other pecuniary legacies.¹⁴ And the courts have shown a disinclination to favor charities so far as to marshal a testator's assets, where the residue, bequeathed to charitable purposes, consists of mixed property, of real and personal estate, so as to direct the debts and other legacies to be paid out of the real estate, and reserve the personal to fulfill the charity, where the charity would be void as to the real estate.¹⁵ Yet where there are general legacies, and the testator has charged his estate with payment of all his legacies, if the personal estate be not sufficient to pay the whole, the court has said the charity shall be paid out of the personal estate, and the rest out of the real estate, that the whole may be performed *in toto*.¹⁶

It has been already stated that charitable bequests are not void on account of any uncertainty as to the persons or objects *to [*17

1.—*Smith v. Stowell*, 1 Ch. Cas. 186; *Collinson's case*, Hob. 136.

2.—*Attorney-General v. Combe*, 2 Ch. Cas. 18.

3.—*Griffith Flood's case*, Hob. 136.

4.—*Attorney-General v. Bains*, Prec. Ch. 261; and see *Adlington v. Cann*, 3 Atk. 141.

5.—*Moggridge v. Thackwell*, 7 Ves. 38, 37.

6.—*Attorney-General v. Platt*, Rep. temp. Finch, 221, and see *Margaret Professors Cambridge*, 1 Vern. 55.

7.—*Man v. Ballet*, 1 Vern. 42; 1 Eq. Ab. 90, p. 4; and see *Attorney-General v. Gleg*, 1 Atk. 356; Amb. 584.

8.—*Attorney-General v. Minshall*, 4 Ves., Jun., 11, 14; *Attorney-General v. Whitechurch*, 3 Ves., Jun., 141.

Wheat. 4.

9.—*Attorney-General v. Boultree*, 2 Ves. 380, 387; 8. C. 3 Ves., Jun., 220; *Attorney-General v. Whitechurch*, 3 Ves., Jun., 141; *Attorney-General v. Stepney*, 10 Ves. 22.

10.—*Attorney-General v. Hicks*, High. Mortm. 326, 353, &c.

11.—*Attorney-General v. Earl of Winchelsea*, 3 Bro. Ch. Cas. 373; High. Mortm. 187, 327; *Ex-parte Jortin*, 7 Ves. 340; *Bridg. Duke*, 588.

12.—High. Mortm. 67.

13.—*Fielding v. Bond*, 1 Vern. 230.

14.—*Id.* and *Raithby's Note* (2).

15.—High. Mortm. 355; *Moff v. Hodges*, 2 Ves., 52.

16.—*Attorney-General v. Graves*, Amb. 158; *Arnold v. Chapman*, 1 Ves. 108.

which they are to be applied; although almost all the cases on this subject have been collected, compared, and commented on with his usual diligence and ability by Lord Eldon, in two recent decisions. The first was the case of *Moggridge v. Thackwell*,¹ where the testator gave the residue of her personal estate to James Vaston, his executors and administrators, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen, who have large families and good characters," and appointed Mr. Vaston one of her executors. Mr. Vaston died in her life-time, of which she had notice; but the will remained unaltered. The next of kin claimed the residue, as being lapsed by the death of Mr. Vaston; but the bequest was held valid, and established. In the next case,² the testator, by his will, after giving several legacies, proceeded, "the rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts, and in England; for bringing up ministers in different seminaries, and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The bill was filed by the next of kin, praying an account and distribution of the residue, as being undisposed of by the will or any codicil of the testator. The master of the rolls held the residuary bequest to charitable purposes void for uncertainty, and because the testator expressed not a present, but a future, intention to devise this property. Lord Eldon, however, upon an appeal, reversed the decree, and established the bequest, as a good charitable bequest, and directed it to be carried into effect accordingly.

It has been made a question, whether a court of equity, sitting in one jurisdiction, can execute any charitable bequests for foreign objects in another jurisdiction. In the case last stated, no objection occurred to the residuary bequest, on the ground that it contemplated the promotion of the gospel in foreign parts. In the case of Mr. Boyle's will, the bequest was not limited in terms to foreign countries or objects,³ but it was applied "to a foreign object under a decree of the Court of Chancery; and when that object failed, a new scheme was directed."⁴ There are several other cases in which charities for foreign objects have been carried into effect. In the *Provost, &c., of Edinburgh v. Audery*,⁵ there was a devise of £3,500, South Sea annuities to the plaintiffs, to be applied to the maintenance of poor laborers residing in Edinburgh and the towns adjacent; and Lord Hardwicke said he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland; and, therefore, he directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. So, in *Oliphant v. Hendrie*, where A

by will gave £380 to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest.⁶ In *Campbell v. Radnor*, the court held a bequest of £7,000 to be laid out in the purchase of lands in Ireland, and the rents and profits to be distributed among poor people in Ireland, &c., to be valid in law.⁷ So, a legacy towards establishing a bishop in America, was supported, although no bishop was yet established.⁸ In the late case of *Ourtis v. Hutton*, a bequest of personal estate for the maintenance of a charity (a college) in Scotland was established;⁹ and in another still more recent case, a bequest in trust to the magistrates of Inverness in Scotland, to apply the interest and income for the education of certain boys, was enforced as a charity.¹⁰ Nor is the uniformity of the cases broke in upon by the doctrine in *De Garcia v. Lawson*.¹¹ There the bequests were to Roman Catholic clergymen, or for Roman Catholic establishments, and were considered as void and illegal, being equally against the policy and the enactments of the British legislature.

In respect to the mode of administering charities in chancery, it is not easy to extract from the authorities any consistent doctrine. Where the trust is for definite objects, and a trustee is appointed to administer it, who is *in esse* and capable of performing it, all the court does is to watch over the charity, and see that it is executed faithfully, and without fraud; and if the trustees should die, so that it remains unexecuted, the court will then act as trustee, and do as the trustees ought to do, if living. But where money is given to charity generally, without trustees or objects selected, in some cases the charity has been applied by the king under his sign-manual, and in others by the Court of Chancery, according to its usual course, that is, by a scheme reported by a master and approved by the court. It is not easy to perceive upon what principle the one case has in practice been distinguished from the other. Lord Eldon has observed, "all I can say upon it is, I do not know what doctrine could be laid down, that would not be met with some authority upon this point; whether the proposition is, that the crown is to dispose of it, or the master by a scheme."¹²

It is laid down in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities not regulated by charter, which he exercises by the keeper of his conscience, the chancellor; and, therefore, the Attorney-General, at the relation of some informant, when it is necessary, files *ex officio* an information in the Court of Chancery to have the charity properly established and applied.¹³ And, it is added, that the jurisdiction thus established does not belong to the Court of Chancery, as a court of equity, but as administering

1.—7 Ves. 36; S. C. 1 Ves., Jun., 464; 3 Bro. Ch. Cas. 517.

2.—*Mills v. Farmer*, 1 Merivale, 55.

3.—*Attorney-General v. City of London*, 3 Bro. Ch. Cas. 171; S. C. 1 Ves., Jun., 243.

4.—*Amb.* 236.

5.—1 Bro. Ch. Cas. 571.

6.—1 Bro. Ch. Cas. 171.

7.—*Attorney-General v. Bishop of Chester*, 1 Bro. Ch. Cas. 444.

8.—14 Ves. 537.

9.—*Mackintosh v. Townsend*, 16 Ves. 330.

10.—4 Ves., Jun., 433. Note.

11.—*Moggridge v. Thackwell*, 7 Ves. 36, 38.

12.—3 Bl. Com. 427; 2 Fonbl. Eq. b. 3, p. 2, c. 1. a. 1. and note a.

the prerogative and the duties of the crown.¹ And it seems also to be held, that the jurisdiction vested in the Lord Chancellor by the statute of Elizabeth, is personal, and not in his or-
 20*] dinary *or extraordinary jurisdiction in chancery; like that, in short, which he exercises as to idiots and lunatics.² It seems in the highest degree reasonable that the king, as *parens patrie*, should have a right to guard and enforce all charities of a public nature, by virtue of his general superintending power over the public interests, where no other person is entrusted with such right. But where money is given to charity generally and indefinitely without any trustees, there does not seem to be any difficulty in considering it as a personal trust devolved on the crown, to be executed by the crown; and whether it be executed by the keeper of the king's conscience, his Lord Chancellor, as his personal delegate, or by himself under his sign-manual, is not very material, and may well enough be considered as an authority distinct from that belonging to a court of equity. But where there is a trust and trustees, with some general or specific objects pointed out, or trustees for indefinite or general charity, it is not easy to perceive why, as a matter of trust, a court of equity may not take cognizance of it in virtue of its ordinary jurisdiction; and the better authorities would seem to countenance this view of the subject.³ At all events, where there are trustees, and the trust is for a definite object, and sustainable in law, there seems no reason why a court of equity, as such, may not take cognizance of such trust at the suit of any competent party, whether the Attorney-General or any interested private relator, as well as of any other trust, the execution of which is sought of the court.

In respect, however, to cases of indefinite trusts, or trusts where some general objects are pointed out, the distinction which appears to be most reconcilable with the cases, and to be acted upon in the modern decision, is this: that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is 21*] in the king by sign-manual; *but where the execution is to be by a trustee with general or some objects pointed out, whether such trustee survive the testator or not, there the administration of the trust will be taken by the Court of Chancery (either as personal delegate of the crown, or as a court of equity), and managed under a scheme reported by a master, and approved by the court.⁴

As to the remedy for misapplication of the

charity funds, &c., in cases within the statute of Elizabeth, a proper, though not an exclusive remedy, is by commission under the statute.⁵ But as the statute does not extend to any college, hospital, or free school, which have special visitors, or governors, or overseers, appointed by their founders,⁶ it is necessary to consider what is the remedy for frauds or misconduct in such cases. As to this, it may be observed that all trustees, who are the managers of the revenues of such charities, are subject to the general superintending power of the Court of Chancery, not as of itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction of an abuse of trusts, to redress grievances, and suppress frauds.⁷ And if a corporation be the mere trustee of a charity, and grossly abuse the trust, the Court of Chancery will take it away from them, and vest it in other hands.⁸ But the general controlling power of the court over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust; and this will not be presumed, but must be apparent, and made out in evidence.⁹

*It seems, that with a view to encourage [*22 the discovery of charitable donations, given for indefinite purposes, it is the practice for the crown to reward the persons who make the communication, if they can bring themselves within the scope of the charity, by giving them a part of the fund; and the like practice, whether well or ill founded, takes place in relation to escheats.¹⁰

These are the principal doctrines and decisions under the statute of Elizabeth, of charitable uses, which it seemed most important to bring in review before the learned reader. And it may not be useless to add, that the statute of Mortmain and Charities of the 9th of George II., c. 36, has very materially narrowed the extent and operation of the statute of Elizabeth, and has formed a permanent barrier against what the statute declares a "public mischief," which "had of late greatly increased, by many large and improvident alienations or dispositions made by languishing and dying persons, or by others, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." It was the original design of this note, to have included a summary view of the principal clauses of this statute, and the decisions which have followed it; but it is already extended to so great a length, that it is thought best to omit it. The learned reader

1.—Cooper's Eq. Pl. xxvii.; 2 Fonbl. Eq. b. 2, p. 2, c. 1; Lord Falkland v. Bertie, 2 Vern. 342, Miff. Pl. 20; Bailiffs, &c., of Burford v. Lenthall, 2 Atk. 551.

2.—Bailiffs, &c., of Burford v. Lenthall, 2 Atk. 551; 2 Fonbl. Eq. b. 2, p. 2, c. 2, s. 1, and note a, s. 2, and note f.

3.—Moggridge v. Thackwell, 7 Ves. 38, 83, 85, 86; Mills v. Farmer, 1 Meriv. 55; Paill v. Archbishop of Canterbury, 14 Ves. 364; Attorney-General v. Matthews, 2 Lev. 167; Attorney-General v. Wansay, 15 Ves. 231; Attorney-General v. Price, 17 Ves. 371; Waldo v. Caley, 16 Ves. 206.

4.—Ib.

5.—Bridg. Duke, 580, 602. This proceeding appears to have almost fallen practically into disuse. Edin. Review, Vol. xxxi., p. 503. It has been mentioned before, that the proceedings may be by information or original bill; and by a recent statute (52 Geo. Wheat. 4.

III., c. 101) a more summary remedy is given by petition.

6.—Stat. 43 Eliz., c. 4, 2d proviso; Attorney-General v. Smart; 1 Ves. 72; Attorney-General v. Harrow School, 2 Ves. 551.

7.—Fonbl. b. 2, p. 2, c. 1, s. 1, note a, and the authorities cited by Mr. Justice Story in the case of Dartmouth College v. Woodward, ante. See also Attorney-General v. Utica Ins. Co., 2 Johns. Ch. Rep. 371, 384, 386.

8.—Attorney-General v. Mayor, &c., of Coventry, 7 Bro. Parl. Cas. 235; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. Rep. 380; Bridg. Duke, 574, &c.

9.—Attorney-General v. Foundling Hospital, 2 Ves., Jun., 42.

10.—Per Lord Eldon, in Moggridge v. Thackwell, 7 Ves. 38, 71.

will, however, find a very accurate statement of both in Justice Blackstone's Commentaries (2 Bl. Com., 268) and in Bridgman's Duke on Charitable Uses, and Highmore's History of Mortmain and Charitable Uses. This statute was never extended to or adopted by the colonies, in general.¹ But certain of the provisions of it, or of the older statutes of Mortmain, (7th of Edw. I., stat. 2, *De Religionis*; the 13th of Edw. I., c. 32; the 15th of Richard II., c. 5, and the 28d of Hen. VIII., c. 10) have been adopted by some of the states of the Union;² and it de-

serves the consideration of every wise and enlightened American legislator, whether provisions similar to those of "this celebrated [*23 statute are not proper to be enacted in this country, with a view to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check that unhappy propensity which sometimes is found to exist under a bigoted enthusiasm, and the desire to gain fame as a religious devotee and benefactor, at the expense of all the natural claims of blood and parental duty to children.

—Attorney-General v. Stewart, 2 Merivale, 143.

2.—3 Binney, Appendix, 628; Laws of New York, sess. 36, c. 80, s. 4; 2 Caines' Cas. 337.

[NOTE II.]

DIFFERENT PUBLIC ACTS BY WHICH THE GOVERNMENT OF THE UNITED STATES HAS RECOGNIZED THE EXISTENCE OF A CIVIL WAR BETWEEN SPAIN AND HER AMERICAN COLONIES.

Extract from the President's Message to Congress, November 17, 1818.

"In suppressing the establishment of Amelia Island, no unfriendliness was manifested towards Spain, because the post was taken from a force which had wrested it from her. The measure, it is true, was not adopted in concert with the Spanish government, or those in authority under it; because, in transactions connected with the war in which Spain and the colonies are engaged, it was thought proper, in doing justice to the United States, to maintain a strict impartiality towards both the belligerent parties, without consulting or acting in concert with either. It gives me pleasure to state that the governments of Buenos Ayres and Venezuela, whose names were assumed, have explicitly disclaimed all participation in those measures, and even the knowledge of them, until communicated by this government, and have also expressed their satisfaction that a course of proceedings had been suppressed, which, if justly imputable to them, would dishonor their cause.

"The civil war, which has so long prevailed between Spain, and the provinces in South America, still continues without any prospect of [*24] its speedy termination. The information respecting the condition of those countries, which has been collected by the commissioners, recently returned from thence, will be laid before Congress, in copies of their reports, with such other information as has been received from other agents of the United States.

"It appears, from these communications, that the government at Buenos Ayres declared itself independent in July, 1816, having previously exercised the power of an independent government, though in the name of the King of Spain,

from the year 1810; that the Banda Oriental, Entre Rios, and Paraguay, with the city of Santa Fe, all of which are also independent, are unconnected with the present government of Buenos Ayres; that Chili had declared itself independent, and is closely connected with Buenos Ayres; that Venezuela has also declared itself independent, and now maintains the conflict with various success; and that the remaining parts of South America, except Monte Video, and such other portions of the eastern bank of the La Plata as are held by Portugal, are still in the possession of Spain, or, in a certain degree, under her influence.

"By a circular note addressed by the ministers of Spain to the allied powers with whom they are respectively accredited, it appears that the allies have undertaken to mediate between Spain and the South American provinces, and that the manner and extent of their interposition would be settled by a Congress, which was to have met at Aix-la-Chapelle in September last. From the general policy and course of proceeding observed by the allied powers in regard to this contest, it is inferred that they will confine their interposition to the expression of their sentiments, abstaining from the application of force. I state this impression, that force will not be applied, with the greater satisfaction, because it is a course more consistent with justice, and likewise authorizes a hope that the calamities of the war will be confined to the parties only, and will be of shorter duration.

"From the view taken of this subject, founded on all the information that we have been able to obtain, there is good cause to be satisfied with the course heretofore pursued by the United States, in regard to this contest, and to [*25 conclude, that it is proper to adhere to it, especially in the present state of affairs."

Extract from Mr. Commissioner Rodney's report.

"Their private armed vessels are subjected to very strict regulations, agreeably to their prize code, which is among the original papers presented, and herewith delivered. It may be proper, in this place, to introduce the subject of the irregular conduct of the privateers under the patriot flag, against which the commissioners were directed to remonstrate. Having taken an opportunity of explaining to Mr. Tagle, the Secretary of State, the proceedings of our government relative to Amelia Island and Galvestown, agreeably to their instructions, the commissioners embraced a suitable occasion to urge the just cause of complaint, which the malpractices of private armed vessels wearing the patriot colors, had furnished our government. On both topics they had long and interesting conversations. With the conduct of the government respecting Amelia Island and Galvestown, Mr. Tagle expressed himself perfectly satisfied, and he disclaimed for his government any privacy or participation in the lodgements made at those places, by persons acting in the name of the patriots of South America. In reference to the acts of cruisers under the patriot flags, he said he was sensible that great irregularities had occurred, though his government had done everything in their power to prevent them, and were willing, if any instance of aggression were pointed out, to direct an inquiry into the case, and if the facts were established, to punish those concerned, and redress the injured individuals. He professed his readiness to adopt any measures that would more effectually prevent a recurrence of such acts, in which he expressed his belief that the privateers of Buenos Ayres had rarely participated, though the character of the government had suffered from the conduct of others. He stated that they had on one occasion sent out some of their public vessels to examine all cruisers wearing the Buenos Ayrean flag, to see that they were lawfully commissioned-26*] ed, *and to ascertain whether they had violated their instructions."

Extract from Mr. Commissioner Bland's Report.

"In a short time after our introduction to the director, and in about a week after our arrival, we waited on the Secretary of State, as being the most formal and respectful mode of making our communications to this new and provisional revolutionary government. We stated to the Secretary that our government had not viewed the struggle now pending between the provinces of South America and Spain merely as a rebellion of colonists, but as a civil war, in which each party was entitled to equal rights and equal respect; that the United States had, therefore, assumed, and would preserve with the most impartial and the strictest good faith, a neutral position; and in the preservation of this neutrality, according to the established rules of the law of nations, no rights, privileges or advantages would be granted by our government to one of the contending parties, which would not, in like manner, be extended to the other. The Secretary expressed his approbation of this course; but, in an interview Wheat. 4.

subsequent to the first, when the neutral position of the United States was again spoken of, he intimated a hope that the United States might be induced to depart from its rigid neutrality in favor of his government; to which we replied, that as to what our government might be induced to do, or what would be its future policy towards the patriots of South America, we could not, nor were we authorized to say anything.

"We stated to the Secretary, that it had been understood that many unprincipled and abandoned persons, who had obtained commissions as privateers from the independent patriot government, had committed great depredations on our commerce; and had evidently got such commissions, not so much from any regard to the cause of independence and freedom, as with a view to plunder; and that we entertained a hope that there would be a due degree of circumspection exercised by *that government in [*27 granting commissions, which, in their nature, were so open to abuse.

"The Secretary replied, that there had hitherto been no formal complaint made against any of the cruisers of Buenos Ayres; and if any cause of complaint should exist, his government would not hesitate to afford proper redress, on a representation and proof of the injury; that the government of Buenos Ayres had taken every possible precaution in its power, in such cases; that it had established and promulgated a set of rules and regulations for the government of its private armed vessels, a copy of which should be furnished us; and, that it had in all cases, as far as practicable, enjoined and enforced a strict observance of those regulations, and the law of nations."

Extract from Mr. Commissioner Bland's Report relative to Chili.

"I then told him that the government of the United States had been informed that some of the cruisers, under the real flag of the patriot authorities, had committed considerable violations on our commerce; that, if any such wrongs were to be committed by armed vessels, sailing under the Chileno flag, he could not but perceive, how inevitably such acts would tend to disturb all harmony between the two countries, and to crush, in the very formation, every friendly relation that might be begun, and desired to be matured between the two nations; since my government would feel itself bound to protect the rights of its citizens against the insults or injuries of any other people, however deeply it might regret the repulsive measures it was thus driven to adopt; and, that the President would wish to be informed if there were any prize courts yet established in the country; and, if any, what regulations had been adopted for the government of the public and private armed vessels of Chili. The director said that whatever cause of complaint the United States might have against the people of any other of the patriot powers, none, he felt satisfied, could be made against Chilenos, or those under the flag of Chili; because, until very *lately, there were no shipping or vessels [*28 of any kind belonging to it, excepting, indeed, some fishing boats; and that, within a few months only, some few vessels had been com-

missioned; that he had heard of complaints of abuses committed under the flag of other patriot powers; and, to prevent the like, as far as practicable, from being perpetrated by those of Chili, it had been determined to put on board each an officer, and such a number of marines as would be able to control and prevent the mischievous propensities of seamen; that, with regard to matters of prize, they were brought before the ordinary and temporary tribunals of the country, until more formal and systematic institutions could be established, and, that for the regulation and government of armed vessels, a set of rules and orders had been adopted, a copy of which should be furnished me, which was accordingly handed me, and accompanies this as document marked (A.)"¹

AN ORDINANCE OF THE GOVERNMENT OF BUENOS AYRES, REGULATING PRIVATEERS.

By the Supreme Director of the United Provinces of South America.

The bloody war which King Ferdinand VII. has, since his restoration to the throne of his ancestors, prosecuted through his myrmidons against all the inhabitants of the new world, who have claimed their natural freedom, demands that a recourse should be had to those measures of retaliation, which the law of nations permits, in order to make the Spanish nation sensible of the consequences attending the barbarous obstinacy of her monarch, fascinated by corrupted ministers, against the just claims of the injured Americans.

The insults offered to mankind by the cruel agents of the court of Madrid, and the approbation by which it has confirmed all the acts of devastation, which, in contempt of divine and human laws, the Spanish leaders have committed both with fire and sword, through all parts of America, unfortunately visited by them, would, in the opinion of all the world, justify any act of reprisals. But being unwilling to tarnish, by acts unworthy of an enlightened age, the holy principles on which the emancipation of the United Provinces of the south rests, and resolved to regulate my conduct by that system of war which is received among civilized nations—being likewise aware of the advantages obtained by the privateers of the free governments of America—I have determined to give a suitable encouragement and extend to the hostilities by sea, in order to increase the losses which King Ferdinand himself, in his decree of the 8th of February of the present year, confesses to have already been caused to his subjects by this kind of warfare, which is to be vigorously prosecuted until Spain shall acknowledge the independence proclaimed by the Sovereign Congress of these provinces, with the direction and security of which I am entrusted.

And for the purpose of intercepting the navigation and commerce of both countries, by opposing the naval force equipped in regular form by the state or by private individuals, I

have resolved, that privateering shall henceforth be continued against the subjects of Ferdinand VII. and their property, and that the same be done, strictly observing the provisions and regulations laid down and enacted in the following provisional ordinance:

A Provisional Ordinance to regulate Privateering.

ARTICLE I. This government will grant commissions or letters of marque to those persons who may apply for the same, to arm any vessel, in order to act as a privateer against all vessels sailing under the enemy's flag; the requisite bond being previously given therefor at the naval department. In such application, a description must be given of the kind of vessel intended for that purpose, her tonnage, arms, ammunitions, and crew.

II. A commission being granted to arm any vessel as a privateer, the commandant of the marine will give, by all the means within his power, every facility to expedite the fitting out of any such vessel, allowing her to receive all the men she may require, excepting such as are enlisted for the service of the state, or actually employed therein. The equipment of the vessel being finished, the said commandant will deliver to her captain a copy of this ordinance, together with all other regulations made known to him through the private channel of communications of the naval department, touching the manner in which he is to act in particular cases with neutral vessels, more especially of such nations the flags of which may be entitled to certain immunities or privileges, arising from the treaties or agreements made with them for the punctual observance thereof in what concerns them.

III. The officers of the commissioned vessels or privateers are under the protection of the laws of these United Provinces; and they shall enjoy, even if foreigners, all the privileges and immunities of any other citizen thereof, whilst employed in their service.

IV. The owners of such privateers are at liberty to enter into any agreement they may think fit, with the officers and crew of the same, provided they do not contain any clause contrary to the laws and ordinances of the government. It being the duty of the owners, as aforesaid, to present a copy of the agreements they may make to the department of the general commandant of the marine, where care must be taken that the same be strictly fulfilled.

V. The owners of privateers, on giving bond, will be furnished from the public magazines of the state with the guns, muskets, gunpowder, and ammunitions, they may be in want of for the complete equipment of the privateer; under the condition to return, after the expiration of the cruise, the articles thus supplied; they not being obliged to make any allowance for the deterioration or consumption thereof, caused by their use in the service. And in case of either wreck or capture of the privateer, the same being proved, they shall be discharged from all responsibility.

VI. The privateers are to be visited at the time of their departure by the commissioners appointed by the Commandant-General of the Marine, who shall read to them the penal laws, a copy whereof must be given to [31

1.—This document corresponds *verbatim* with the Prize Code of Buenos Ayres, which follows.

their commanders, with injunctions to read them to the crew once a week, mention of which circumstance is to be made in the certificate of the visit; should the privateers be cleared out in friendly ports, they shall be visited by the consuls or agents of the government, in pursuance of their private instructions.

VII. All merchandise, liquors, and other articles fit for the consumption of the country, which may be imported as proceeding from captured cargoes, must be appraised by the custom-house, the same as any other cargo of commerce, and out of the sum total of duties which may result therefrom, a third part shall be deducted for the benefit of the captors.

VIII. All prizes must be sent to the ports of these united provinces, there to be adjudged in the customary lawful way in such cases; but, should there occur any extraordinary circumstance to prevent it, the commander of the privateer, consulting his security, may exercise his own discretion in this respect, reserving documents justifying the same, in order to present them in due time before the competent tribunal.

IX. Silver or gold, whether coined or in bars, or in bullion, being a capital proceeding from capture, shall pay to the treasury of the state at the rate of six per centum, as a compensation for the benefits granted in the fifth and seventh articles.

X. Silver and gold manufactured into articles of luxury, shall, on their importation, pay the same duties as any other commercial article, according to the particular valuation that may be made of them.

XI. The privateers that may take from the enemy important communications, officers of rank, &c., or that may cause similar damages to the enemy, shall be rewarded in a manner worthy the generosity of the government, and in proportion to the importance of the service they may have thus rendered.

XII. The government offers a reward to all privateers that shall capture a transport of the enemy with troops, ammunition, or other warlike accoutrements, destined to commit hostilities against the free countries of America, or to re-inforce any part of the Spanish dominions; [32*] which reward shall be regulated *according to the circumstances of the case, and in proportion to the amount of the capture.

XIII. The commanders of the privateers employed to destroy the Spanish commerce, without being cruel in the treatment of the prisoners, shall burn and sink on the high seas every enemy's vessel which they may think proper not to man as a prize, owing to her small value. And they are prohibited, under the penalties which the case may require, either to restore or leave in the possession of the enemy, under any pretext whatever, any vessel of the said class; any favor of this nature being considered as an hostility against the united provinces.

XIV. Captured vessels shall be free of all duties, those of the port excepted.

XV. All articles of war captured, shall be free of duties. In case the same are wanted by this government, it may take them at the rate of ten per centum below the current prices in the market.

XVI. Should any negro slaves be captured, they must be sent to the ports of these united provinces; and the government will allow, as a bounty, the sum of fifty dollars for each of such slaves as may be fit to take up arms, from the age of twelve to forty years inclusively; they being obliged to serve four years in the armies, and then they shall be free of duties. Should they be either over or under that age, or unfit for the army, they will be absolutely free, and this government will distribute them in guardianship.

XVII. Any negroes captured, that, on account of the blockade or unfitness of the vessel, &c., cannot be brought into the ports of these united provinces, shall be sent to those of the free nations of America, and there given up to the disposal of those governments, with the express condition not to sell them as slaves, under the penalties to the transgressors of being deprived of all their privileges (whatever their services may be), and also of the protection of the laws of these united provinces, who detest slavery, and have prohibited this cruel traffic in human beings.

XVIII. The cognizance of the prizes which the privateers *may bring or send into [*33 our ports shall exclusively belong to our courts.

XIX. Should it be declared by the sentence of the court, that the captured vessel is not a lawful prize, or that there is no reason to detain her, she shall be forthwith set at liberty, without causing her the least expense, being exempted even from the duties of the port. And, in case of said vessel being detained any longer, under that or any other pretext, all the damages which on that account may fall on her owners, shall be laid to the charge of the persons causing the same.

XX. If the captor does not acquiesce in the sentence of the court of prizes, and intends to appeal from it, having a special power from the parties interested, he is allowed so to do to the supreme director, on his giving, previously to the entering of such an appeal, the proper bond, to the satisfaction of the captured captain, to answer unto him for all the damages and detriments which he may have a right to claim of the said captor, after the confirmation of the first sentence, on account of the detention and demurrage, loss of time and freight, damages, and deterioration of both vessel and cargo, and any other occurrences. Which damages, together with the costs of the prosecution, shall be paid unto the captured captain by the captor, before his leaving the port; and in case of his not being able to make payment, recourse shall be had to the bonds or sureties he may have given, who, without any further step or delay, shall be compelled to do it by all the rigor of the law.

XXI. No person enjoying a salary from the naval department shall exact any fees, stipend, or contribution, for services rendered in the adjudication of prizes. They are also prohibited to take or appropriate to themselves any merchandise, or other articles of prize goods, under the penalty of confiscation, and of the loss of their employment.

XXII. Privateers and letters of marque are authorized to board all commercial vessels of any nation, and to oblige them to exhibit their sea-letters, passes, commissions, and passports,

together with the documents showing the ownership of the vessel, charter-parties, or agreements of freight, the journal or log-book, the roll d'equipage, and the lists of the crew and 34*] passengers. *This examination shall be made without employing any violence, or causing any damage or considerable detention to the vessels on board whereof the same is to be performed, and whose master or captain, with the above said documents, shall be ordered on board the privateer, that her captain may attentively examine them himself, or cause the same to be done by the interpreter he may have for that purpose. And in case no cause be found to detain the vessel any longer, she shall be permitted freely to continue her navigation. Should any vessel resist this examination, the privateer may compel her to do it by force. But the officers, as well as other individuals belonging to the crews of said privateers, can in no case exact or require any contribution from the captain, sailors, or passengers of the vessels they may board, neither cause, nor permit to be caused, to them, any extortion or violence of any kind whatsoever, under the penalty of being exemplarily punished, even unto death, according to the enormity of the case.

XXIII. When the captain of the vessels on board of which there shall be any articles belonging to enemies, shall *bona fide* declare them so to be, the removal thereof shall be made, without interrupting the navigation or detaining them longer than it shall be necessary, the safety of the vessel permitting the same. In this case, the captains shall be furnished with a receipt for the articles thus removed, therein expressing all the circumstances attending the same; and, should the privateer be unable to pay them in cash, the proportionate amount of freight of said articles up to the place of their destination, according to the bills of lading or agreement of freight, he will furnish them with a note or draft for the same amount on the owner or agent of the said privateer, who shall be obliged to pay it on its being presented; the captains or commanders of the privateers being hereby ordered to bring, in such cases, the declaration made by the captain of the detained vessel, signed by him, and authenticated in the most formal manner.

XXIV. All vessels found navigating without lawful passes, sea-letter, or commissions from the republics, provinces, or states, having authority to grant them, shall be detained; as well as those that may fight under a flag other 35*] than that of the *prince or state by which their commission may have been granted; as likewise such as may be found holding different commissions from several princes or states; all of which are declared a good prize; and in case of their being armed in war, their commanders and officers shall be considered as pirates.

XXV. Vessels of pirates, and such as may have been taken possession of by their revolted crews, shall be declared good prize, together with all the articles appertaining thereto or found on board the same; excepting such as may be proved to belong to persons who neither directly or indirectly have contributed to the piracy, and are not enemies.

XXVI. It being unlawful within the jurisdiction of this state to arm any vessel in order to act as a privateer without my permission, as

likewise to admit for that purpose a commission or letters of marque from any other prince or republic, even if allied with this, any vessel found on the high seas with such commissions, or without any commission at all, shall be adjudged a good prize, and her captain or commander punished as pirates.

XXVII. All armed vessels, whether commissioned cruisers or merchant vessels with letters of marque, navigating under the flag, or with a commission from princes or state enemies to this government, shall be good prize, together with all the articles that may be found on board thereof, even if belonging to citizens of these United Provinces, in case of their having shipped them after the declaration of war, and the requisite time being elapsed for their having notice thereof.

XXVIII. Merchant vessels belonging to any nation whatsoever, that may make any defense after the privateer's hoisting up her flag, shall be declared good prize unless her captain should prove that the privateer gave him sufficient motive for such a resistance.

XXIX. Such vessels as may be found without the papers and documents specified in the 22d article, or the most important of them, to wit, the sea-letter, pass or commission, the bills of lading of the cargo, and other documents, in order to prove that it, as well as the vessel, are neutral property, shall be *declared [*36 a good prize; unless on proof of their being lost by inevitable accident. All the documents that may be presented must be signed in due form in order to be admitted in proof.

XXX. Should the captains, or other individuals of the vessels detained by the privateers, or by any of the vessels belonging to the navy of the state, throw overboard any papers; if this fact be proved in due form, by that very act they shall be declared good prize. And the same construction is to be given to the foregoing and any other articles touching the same matter.

XXXI. Privateers are prohibited to attack, to commit any kind of hostilities, or to capture the vessels of the enemy, that may be found in the ports of allied or neutral princes or states; as likewise those that may be within cannon-shot of their fortifications. It being declared, in order to remove all doubts, that the distance of the cannon-shot must be observed, even if there should be no batteries on the spot where the capture may take place, provided the distance be the same, and that the enemy shall likewise respect this immunity in the territory of the neutral or allied powers.

XXXII. The vessels that privateers may capture in the ports, or within the reach of the cannon-shot of the territory of allied or neutral powers, even in the case of their being in fresh pursuit, and attacking them from sea, are declared to be no prize, as taken in a spot which is entitled to immunity; provided the enemy respect the same in like manner.

XXXIII. Every privateer that may retake a national vessel, within twenty-four hours after her capture, shall be entitled to one-half of the value of said prize for salvage, the other half being restored for the benefit of the original owner of said vessel; which division is to be made speedily and summarily, in order to diminish the cost as much as possible. But if the recapture should take place after the lapse

of twenty-four hours from the capture, the privateer thus retaking her shall be entitled to the whole value of the same.

XXXIV. If a vessel should be found on the sea, or brought into our ports, without the bills of lading of her cargo, or other documents by which the ownership thereof may be ascertained, **37*** and not having on board persons belonging to her own crew, both the captor and the captain of said prize shall be separately examined, touching the circumstances in which the said vessel was found and taken possession of. Her cargo is likewise to be inspected by intelligent persons, and every possible means resorted to, in order to discover the true owner. Should this not be found out, an inventory of the whole shall be made, and everything kept deposited, to restore them to whomsoever shall, within a year, prove to be such; unless there should be ground to declare the same good prize; giving, in all events, the third part of the value to the captors. If the owner does not appear in the above said term, the other two remaining thirds shall be divided, as derelict goods, into three parts; one of which is likewise to be given to the captors, and the other two to be applied to the use of the state.

XXXV. In any of the aforesaid cases, and when the privateer shall detain a vessel, care shall be taken to collect all her papers, of what kind soever they may be, and that the clerk shall make a correct memorandum thereof, giving a receipt to the captain or supercargo of the vessel thus detained, for them; and warning him not to conceal any papers he may have, it being declared that only such as he may exhibit shall be admitted in the adjudication of the capture. This being done, the captain of the privateer shall secure the papers in a bag, or package, sealed, which he must deliver to the prize-master, with orders to deliver the same to the government. The captain of the privateer, or any individual of her crew, who, from any motive whatever, may conceal, break, or embezzle any of said papers, shall be condemned to corporal punishment, as the circumstances of the case may require; the captain being over and above obliged to make good the damages; and other individuals to be sent to the public works for ten years.

XXXVI. The captain of the privateer shall, at the same time, take care to have the hatches of the vessels thus detained nailed up, and to seal them in such a manner as to render it impossible to open them without breaking the seals. He must secure the keys of the cabin, and other passages, and cause all the articles that may be found on deck, to be locked up—**38*** taking down, if the time should permit it, a memorandum of everything that may be easily mislaid, in order to put them under the charge of the person who shall be appointed to command the same vessel.

XXXVII. The articles that may be found on deck, or in the cabin, state-rooms, or fore-castle, shall not be permitted to be plundered, the right of so doing (commonly called *pendolage*) being absolutely prohibited; which, however, may be tolerated only in the case of the vessel's having shown resistance, even to the point of being boarded. But care must always be taken to prevent the disorders that an extensive license may produce.

Wheat. 4.

XXXVIII. When the crew of a vessel, detained as aforesaid, shall be removed on board the privateer, the clerk shall, in the presence of the master, take a deposition from him, the mate, and other individuals of such detained vessel, touching the circumstances of her navigation, voyage, and cargo—writing down everything that may be necessary to the adjudication of the capture. He is also to interrogate them, whether they have on board any jewels, or other valuables, not expressed in the bills of lading of the cargo, in order that proper measures may be taken to prevent their being embezzled.

XXXIX. The prize-master appointed to command any vessel detained as aforesaid, shall be furnished with a detailed information, comprising everything that may appear from the above-mentioned depositions—making him responsible for whatever, owing to his omission or fault, may be lost. And it is hereby declared, that any person who shall, without license, break open the sealed hatches, trunks, bales, casks, packages, or lockers, where there may be any articles of merchandise, shall not only lose that part which of right might belong to him, should they be declared a good prize, but a prosecution shall be instituted against him, and he punished according to the result thereof.

XL. No other papers or documents are to be admitted, in order to decide upon the lawfulness or unlawfulness of the capture, but those that were produced and found on board the prize vessel. However, if, in case of a defect of papers to determine the cause, the captain of the captured vessel should **offer to** **39** prove his having lost them by unavoidable accident, the court will grant him a sufficient term for that purpose; regarding the summary manner with which such causes are to be determined.

XLI. If, before sentence is pronounced on the prize, it should become necessary to unload the whole or part of the cargo, in order to prevent the loss thereof, the hatches are to be broken open in the presence of the commandant of the marine, or commissioners appointed by him, and of the respective parties concerned, who must be present at that act. An inventory shall then be made of all the articles that may be unladen; which, with the assistance and knowledge of the officer of the revenue, appointed by the collector of the customs, must be deposited either in the hands of a trusty person or in storehouses, of which the master or supercargo of the captured vessel is to keep a key.

XLII. Should the sale of any articles be deemed necessary, owing to the impossibility of preserving them, such sale must be effected at public auction, with all the customary solemnities, in the presence of the captured captain, and with the assistance of the officer of the custom-house, as aforesaid; and the proceeds thereof, are to be deposited with a trusty person, to be delivered to whom the same may belong, after the sentence is pronounced on the capture.

XLIII. No person, whatever his rank or condition may be, is permitted secretly to buy or conceal anything, knowing it to belong to the prize or detained vessel, under the penalty of making restitution for the same, and of a fine triple the value of the goods concealed or clan-

destinely bought, and even of corporal punishment, as the case may be; the cognizance of which causes shall exclusively belong to the courts of prize, as incidental thereto.

XLIV. If the vessel detained should not be condemned as good prize, her master or owner, together with her officers and crew, shall be forthwith re-instated in the possession of the same; restoring unto them whatever may belong to her, without retaining the least thing. She is to be furnished with a suitable safe conduct, in order that she may prosecute her voyage without any further detention; she is declared 40*] free of the *duties of the port, and, before her departure, is to be indemnified by the captor for all the expenses, damages, and losses that may have been caused to her, and which she may have a right to claim with justice, should her case be comprehended among those specified in the 22d and 30th articles. But such claim is not to be admitted, if she should have given reasonable cause for suspicion to the capturing vessel, or incurred any other penalty comprised in this ordinance, in consequence of which a prosecution may have been instituted; all of which may appear from the proceedings had thereon.

XLV. Should the captured vessel be condemned as good prize, the captors shall be permitted the free use of her, previously paying the duties due to the treasury of this government.

The whole amount resulting from sales of the captures made by vessels of war, shall be divided into two parts; one of them containing three-fifths for the use of the crew and mariners, and the other two-fifths for the officers. No person, whether belonging to the navy or army, being a passenger, or going as a transport on board said vessels, at the time of the capture, shall, under any pretext whatever be comprehended in the distribution. But it shall be the duty of the commander of such vessel to inform the chief officer of the naval department whether any of the persons going on board as passenger, or otherwise, has distinguished himself by a special service in the action; to the end that if he should deem it just, he may order such person to share according to his rank, as if he had been comprehended amongst the number belonging to the complement of the vessel.

XLVI. Any other decrees, orders or regulations, prior or contrary to this present provisional ordinance, are, by virtue hereof, declared void and without any effect.

Done at the Fortress of Buenos Ayres, on the 15th day of May, 1817.

JUAN MARTIN PUETREDON.

MATHIAS DE YRIGOYEN,
Secretary of War and of the Navy.

The foregoing is a copy from the original.
YRIGOYEN.

41*] *OFFICIAL REPORT, &C., OF THE SECRETARY OF STATE TO CONGRESS.

Washington, Jan. 29.—I transmit to the House of Representatives, in compliance with the resolution of the 14th of this month, a report from the Secretary of State, concerning the applications which have been made by any of the

independent governments of South America, to have a minister or consul-general accredited by the United States, with the answers of this government to the applications addressed to it.

JAMES MONROE.

The Report.

The Secretary of State; to whom has been referred the resolution of the House of Representatives, of the 14 inst., requesting of the President information whether any application has been made by any of the independent governments of South America, to have a minister or consul-general accredited by the government of the United States, and what was the answer given to such application, has the honor of submitting copies of applications made by Don Lino de Clemente, to be received as the representative of the republic of Venezuela, and of David C. De Forest, a citizen of the United Provinces, to be accredited as consul-general of the United Provinces of South America, with the answers respectively returned to them. The reply of Mr. De Forest is likewise inclosed, and copies of the papers, signed and avowed by Mr. Clemente, which the President considers as rendering any communication between this department and him, other than that now inclosed, improper.

It is to be observed, that while Mr. Clemente, in March, 1817, was assuming, with the name of Deputy from Venezuela, to exercise with the United States powers transcending the lawful authority of any ambassador, and while in January, 1818, he was commissioning, in language disrespectful to this government, Vincente Pazos, in the name of the republic of Venezuela, *to "protest against the invasion of Amelia Island, and all such further acts of the government of the United States as were contrary to the rights and interests of the several republics, and the persons sailing under their respective flags duly commissioned;" he had himself not only never been received by the government of the United States as Deputy from Venezuela, but had never presented himself to it in that character, or offered to exhibit any evidence whatsoever of his being invested with it. The issuing of commissions, authorizing acts of war against a foreign nation, is a power which not even a sovereign can lawfully exercise within the dominions of another in amity with him, without his consent. Mr. Pazos, in his memorial to the President, communicated the commission signed by Mr. Clemente, at Philadelphia, and given to General M'Gregor, alleges, in its justification, the example of the illustrious Franklin, in Europe; but this example, instead of furnishing an exception, affords a direct confirmation of the principle now advanced. The commissions issued by the diplomatic agents of the United States in France, during our revolutionary war, were granted with the knowledge and consent of the French government, of which the following resolution from the secret journal of Congress, of the 23d of December, 1776, is decisive proof:

"Resolved, That the commissioners (at the court of France) be authorized to arm and fit for war any number of vessels, not exceeding six, at the expense of the United States, to war upon British property; and that commissions

Wheat. 4.

and warrants be for this purpose sent to the commissioners; provided the commissioners be well satisfied this measure will not be disagreeable to the court of France."

It is also now ascertained by the express declaration of the supreme chief, Bolivar, to the agent of the United States at Angostura, "that the government of Venezuela had never authorized the expedition of General M'Gregor, nor any other enterprise against Florida or Amelia." Instructions have been forwarded to the same agent to give suitable explanations to the government of Venezuela, of the motives for declining further communication with Mr. 43* Clemente, and assurances that it *will readily be held with any person not liable to the same or like objection.

The application of Mr. De Forest, to be accredited as consul-general of the United Provinces of South America, was first made in May last; his credential was a letter from the supreme director of Buenos Ayres, Pueyrredon, announcing his appointment, by virtue of articles concluded, in the names of the United States of America, and of the United Provinces of Rio de la Plata, between persons authorized by him, and W. G. D. Worthington, as agent of this government, who neither had nor indeed pretended to have, any power to negotiate such articles. Mr. De Forest was informed, and requested to make known to the supreme director, that Mr. Worthington had no authority whatsoever to negotiate on the part of the United States any articles to be obligatory on them, and had never pretended to possess any full power to that effect. That any communication interesting to the supreme director, or to the people of Buenos Ayres, would readily be held with Mr. De Forest, but that the recognition of him, as a consul-general from the United Provinces of South America, could not be granted, either upon the stipulation of supposed articles, which were a nullity, or upon the commission, or credential letter of the supreme director, without recognizing thereby the authority from which it emanated, as a sovereign and independent power.

With this determination, Mr. De Forest then declared himself entirely satisfied. But shortly after the commencement of the present session of Congress, he renewed his solicitations, by the note dated the 9th of December, to be accredited as the consul-general of the United Provinces of South America, founding his claim on the credentials from his government, which had been laid before the President last May.

A conversation was shortly afterwards held with him, by direction of the President, in which the reasons were fully explained to him upon which the formal acknowledgment of the government of Buenos Ayres, for the present, was not deemed expedient. They were also, at his request, generally stated in the note dated 31st of December.

It has not been thought necessary, on the 44* part of this government, *to pursue the correspondence with Mr. De Forest any further; particularly as he declares himself unauthorized to agitate or discuss the question with regard to the recognition of Buenos Ayres as an independent nation. Some observations, however, may be proper with reference to circumstances alleged by him, arguing that a consul-
Wheat. 4.

general may be accredited without acknowledging the independence of the government from which he has his appointment. The Consul of the United States, who has resided at Buenos Ayres, had no other credential than his commission. It implied no recognition by the United States of any particular government; and it was issued before the Buenos Ayrean declarations of independence, and while all the acts of the authorities there were in the name of the King of Spain.

During the period while this government declined to receive Mr. Onis as the minister of Spain, no consul received an *exequatur* under a commission from the same authority. The Spanish consuls who had been received before the contest for the government of Spain had arisen, were suffered to continue the exercise of their functions, for which no new recognition was necessary. A similar remark may be made with regard to the inequality alleged by Mr. De Forest, to result from the admission of Spanish consuls, officially to protect before our tribunals the rights of Spanish subjects generally, while he is not admitted to the same privileges with regard to those of the citizens of Buenos Ayres. The equality of rights to which the two parties to a civil war are entitled in their relations with neutral powers, does not extend to the rights enjoyed by one of them, by virtue of treaty stipulations contracted before the war; neither can it extend to rights, the enjoyment of which essentially depends upon the issue of the war. That Spain is a sovereign and independent power is not contested by Buenos Ayres, and is recognized by the United States, who are bound by treaty to receive her consuls. Mr. De Forest's credential letter asks that he may be received by virtue of a stipulation in supposed articles concluded by Mr. Worthington, but which he was not authorized to make; so that the reception of Mr. De Forest, upon the credential on which he founds his claim, would imply *a recognition, [*45 not only of the government of the supreme director, Pueyrredon, but a compact as binding upon the United States, which is a mere nullity.

Consuls are, indeed, received by the government of the United States from acknowledged sovereign powers with whom they have no treaty. But the *exequatur* for a consul-general can obviously not be granted without recognizing the authority from whom his appointment proceeds as sovereign. "The consul," says Vattel (book 2, chap. 2, s. 24), "is not a public minister; but as he is charged with a commission from his sovereign, and received in that quality by him where he resides, he should enjoy, to a certain extent, the protection of the law of nations."

If, from this state of things, the inhabitants of Buenos Ayres cannot enjoy the advantage of being officially represented before the courts of the United States, by a consul, while the subjects of Spain are entitled to that privilege, it is an inequality resulting from the nature of the contest in which they are engaged, and not from any denial of their rights, as parties to a civil war. The recognition of them, as such, and the consequent admission of their vessels into the ports of the United States, operates with an inequality against the other party to that contest, and in their favor.

It was stated in conversation to Mr. De Forest, and afterwards in the note of the 31st of December, that it would be desirable to the United States to understand whether Buenos Ayres itself claims an entire, or only an imperfect independence. That the necessity of an explanation upon this point arose from the fact, that in the negotiation of the supposed article with Mr. Worthington, the supreme director had declined contracting the engagement, though with the offer of reciprocity, that the United States should enjoy at Buenos Ayres the advantages and privileges of the most favored nation. That the reason given by him for refusing such an engagement was, that Spain having claims of sovereignty over Buenos Ayres, the right must be reserved of granting special favors to her for renouncing them, which other nations, having no such claims to renounce, could not justly expect to obtain. 46*] Without discussing *the correctness of this principle, it was observed the United States, in acknowledging Buenos Ayres as independent, would expect either to be treated on the footing of the most favored nation, or to know the extent and character of the benefits which were to be allowed to others and denied to them; and that while an indefinite power should be reserved, of granting to any nation advantages to be withheld from the United States, an acknowledgment of independence must be considered premature.

Mr. De Forest answers that this reservation must appear to every one contrary to the inclination, as well as interest of the government of Buenos Ayres; that it must have been only a proposition of a temporary nature, not extending to the acknowledgment by the United States of the independence of South America, which he is confident would have rendered any such reservations altogether unnecessary, in the opinion of the government of Buenos Ayres, who must have seen they were treating with an unauthorized person, and suggested the idea, from an opinion of its good policy; and, he adds, that Portugal is acknowledged by the United States as an independent power, although their commerce is taxed higher in the ports of Brazil than that of Great Britain.

It had not been intended to suggest to Mr. De Forest that it was in any manner incompatible with the independence or sovereignty of a nation to grant commercial advantages to one foreign state and to withhold them from another. If any such advantage is granted for an equivalent, other nations can have no right to claim its enjoyment, even though entitled to be treated as the most favored nations, unless by the reciprocal grant of the same equivalent. Neither had it been intended to say that a nation forfeited its character of acknowledged sovereignty even by granting, without equivalent, commercial advantages to one foreign power, and withholding them from another. However absurd and unjust the policy of a nation granting to one and refusing to another such gratuitous concessions might be deemed, the questions whether they affected its independence or not would rest on the concessions themselves. The idea meant to be conveyed was, that the reservation of an indefinite right 47*] *to grant hereafter special favors to Spain, for the renunciation of her claims of

sovereignty, left it uncertain whether the independence of Buenos Ayres would be complete or imperfect, and it was suggested with a view to give the opportunity to the supreme director of explaining his intention in this respect, and to intimate to him that while such an indefinite right was reserved, an acknowledgment of independence must be considered as premature. This caution was thought the more necessary, inasmuch as it was known that at the same time, while the supreme director was insisting on this reservation, a mediation between Spain and her colonies had been solicited by Spain, and agreed to by the five principal powers of Europe, the basis of which was understood to be a compromise between the Spanish claim to sovereignty and the colonial claim to independence.

Mr. De Forest was understood to have said that the Congress at Tucuman had determined to offer a grant of special privileges to the nation which should be the first to acknowledge the independence of Buenos Ayres. He stated in his notes that he knew nothing of any such resolution by that Congress, but that it was a prevailing opinion at Buenos Ayres, and his own opinion also, that such special privileges would be granted to the first recognizing power, if demanded. It has invariably been avowed by the government of the United States that they would neither ask nor accept of any special privilege or advantage for their acknowledgment of South American independence; but it appears that the supreme director of Buenos Ayres, far from being prepared to grant special favors to the United States for taking the lead in the acknowledgment, declined even a reciprocal stipulation, that they should enjoy the same advantages as other nations. Nor was this reservation, as Mr. De Forest supposes, defensible, by the acknowledgment, on the part of the United States, of South American independence. The supreme director could not be ignorant that it was impossible for this government to ratify the articles prepared by his authority with Mr. Worthington, and yet to withhold the acknowledgment of independence. He knew that if that instrument should be ratified, the United States must thereby [*48 necessarily be the first to grant the acknowledgment, yet he declined inserting in it an article, securing to each party, in the ports of the other, the advantages of the most favored nation. It is, nevertheless, in conformity to one of those same articles that Mr. De Forest claimed to be received in the formal character of consul-general.

With regard to the irregularities and excesses committed by armed vessels, sailing under the flag of Buenos Ayres, complained of in the note of the 1st of January, it was not expected that Mr. De Forest would have the power of restraining them, otherwise than by representing them to the supreme director, in whom the authority to apply the proper remedy is supposed to be vested. The admission of Mr. De Forest, in the character of consul-general, would give him no additional means of suppressing the evil. Its principal aggravation arises from the circumstance that the cruisers of Buenos Ayres are almost, if not quite, universally manned and officered by foreigners, having no permanent connection with that country, or interest in its

cause. But the complaint was not confined to the misconduct of the cruisers. It was stated that blank commissions for privateers, their commanders, and officers, had been transmitted to this country, with the blanks left to be filled up here, for fitting out, arming, and equipping them, for purposes prohibited by the laws of the United States, and in violation of the law of nations. It was observed that this practice, being alike irreconcilable with the rights and the obligations of the United States, it was expected by the President, that being made known to the supreme director, no instance of it would again occur hereafter. No reply to this part of the note has been made by Mr. De Forest, for it is not supposed that he meant to disclaim all responsibility of himself, or of the government of Buenos Ayres, concerning it, unless his character of Consul-General should be recognized. As he states that he has transmitted a copy of the note itself to Buenos Ayres, the expectation may be indulged that the exclusive sovereign authority of the United States, within their own jurisdiction, will hereafter be respected. All which is respectfully submitted.

JOHN QUINCY ADAMS.

Department of State, January 28, 1819.

49*] *Correspondence with Mr. Clemente.

No. 1. Lino de Clemente to the Secretary of State.

MOST EXCELLENT SIR—Having been appointed by the government of the republic of Venezuela, its representative near the United States of North America, I have the honor to inform you of my arrival in this city, for the purpose of discharging the trust committed to me; to effect this, I have to request that you will please to inform me at what time it will be convenient for you to afford me an opportunity of presenting my respects to you personally; and of communicating to you the object of my arrival in the federal city. I avail myself of this occasion to tender to you the assurance of the high consideration and respect with which I am, &c.,

LINO DE CLEMENTE.

WASHINGTON, Dec. 11, 1818, 8th year of the republic.

The Honorable John Q. Adams.

No. 2. The Secretary of State to Don L. de Clemente.

Department of state, Washington,
December 16, 1818:

SIR—Your note of the 11th inst. has been laid before the President of the United States, by whose direction I have to inform you, that your name having been avowedly affixed to a paper drawn up within the United States, purporting to be a commission to a foreign officer, for undertaking and executing an expedition in violation of the laws of the United States, and also to another paper avowing that act, and otherwise insulting to this government, which papers have been transmitted to Congress by the message of the President, of the 25th of March last, I am not authorized to confer with you, and that no further communication will be received from you at this department. I am, &c.,

J. Q. ADAMS.

Wheat. 4.

Correspondence with Mr. De Forest.

No. 5. Mr. De Forest to the Secretary of State.

I have the honor to announce to Mr. Adams that I have again arrived in this district, in order to renew my solicitations *to be ac-[*50 credited by this government as the consul-general of the United Provinces of South America, founding my claim on the credentials from my government, in the month of May last.

The information recently acquired by this government, respecting the provinces of South America, I presume has established the fact beyond doubt that Buenos Ayres, their capital, and a large portion of their territory, are, and have been, free and independent of the government of Spain for more than eight years; and possess ample ability to support their independence in future. That a regular system of government is established by their inhabitants, who show themselves, by the wisdom of their institutions, sufficiently enlightened for self-government; and that they look up to this great republic as a model, and as to their elder sister, from whose sympathies and friendship they hope and expect ordinary protection at least.

The messages of the President of the United States, as well the last as the present year, have created a general belief that the United States have placed us on an equal footing with Spain, as it respects our commercial operations; but, sir, it is found not to be the case. A consul of Spain is known and respected as such by your tribunals of justice, which enables him, *ex officio*, to protect and defend the interests of his countrymen. Whereas the verbal permission I have to act in the duties of my office, will not avail in your tribunals; and a number of instances have already occurred where the property of my absent fellow-citizens has been jeopardized, for want of a legally-authorized protector. The case of the Spanish schooner —, a prize to our armed vessels Buenos Ayres and Tucuman, which was brought into Scituate, some time since, by her mutinous crew, after having murdered the captain and mate, by throwing them overboard, is a striking instance of the necessity of there being resident here an accredited agent, to superintend the commercial concerns of South America; and without such accredited agent, our citizens cannot be considered as completely protected in their rights.

I request you, sir, to lay this communication before the President of the United States as early as may be convenient, and to assure him, that I duly appreciate the friendly reception I *met with from his government on my [*51 arrival in this country; and that, as circumstances have since materially altered, I have no doubt but I shall receive his permission to act in the accustomed form.

While I remain, with the highest consideration and respect, sir, your most obedient servant,
D. C. DE FOREST.

Georgetown, Dec. 9.

The honorable John Q. Adams,
Secretary of State.

No. 6. Mr. De Forest to the Secretary of State.

I took the liberty, on the 9th inst., of addressing a note to Mr. Secretary Adams, re-

questing to be accredited as the Consul-General of the United Provinces of South America; and have now the honor of informing Mr. Adams, that I have lately received an official communication from the government of Buenos Ayres, directing me to inform the government of this country that the supposed conspiracy against the person of the supreme director proves to have originated with an obscure and disappointed individual; who, to gain adherents, pretended to be connected with people of the first respectability and influence, several of whom he named, but who have convinced the government that they had no knowledge whatever of his base project.

The supreme director, anxious to do away any unfavorable impressions which the report of such an affair might cause at this distance, has ordered me to assure the President of the United States that the government of South America was never more firmly supported, nor its prospects more brilliant, than at the present time. I have the honor, &c.,

(Signed) DAVID C. DE FOREST.

Georgetown, December 12, 1818.

No. 7. Mr. Adams to Mr. De Forest.

Mr. Adams presents his compliments to Mr. De Forest, and has the honor of assuring him, by direction of the President of the United States, of the continued interest that he takes in the welfare and prosperity of the provinces 52*] of La Plata, and of *his disposition to recognize the independent government of Buenos Ayres, as soon as the time shall have arrived, when that step may be taken with advantage to the interests of South America, as well as of the United States.

In the meantime, he regrets an *exequatur* to Mr. De Forest, as Consul-General of the United Provinces of South America, cannot be issued, for reasons stated in part by the President, in his message to Congress, at the commencement of the present session; and further explained to Mr. De Forest by Mr. Adams, in the conversation which he has had the honor of holding with him. Mr. De Forest must have seen, that any privileges which may be attached to the consular character, cannot avail in the judicial tribunals of this country, to influence in any manner the administration of justice; and with regard to the schooner brought into Scituate, such measures have been taken, and will be taken, by the authorities of the United States, as are warranted by the circumstances of the case, and by the existing laws.

With respect to the acknowledgment of the government of Buenos Ayres, it has been suggested to Mr. De Forest, that, when adopted, it will be merely the recognition of a fact, without pronouncing or implying an opinion with regard to the extent of the territory or provinces under their authority, and particularly without being understood to decide upon their claim to control over the Banda Oriental, Santa Fe, Paraguay, or any other provinces disclaiming their supremacy or dominion. It was also observed, that in acknowledging that government as independent, it would be necessary for the United States to understand whether Buenos Ayres claims itself an entire or only an imperfect independence. From certain transactions between persons authorized by the supreme

director, and an agent of the United States (though unauthorized by their government), after the declaration of independence by the Congress at Tucuman, and within the last year, it appears that the supreme director declined contracting the engagement, that the United States should hereafter enjoy at Buenos Ayres the advantages and privileges of the most favored nation, although with the offer of a reciprocal stipulation on the part of the United *States. The reason assigned by the su- [*53] preme director was, that Spain, having claims to the sovereignty of Buenos Ayres, special privileges and advantages might ultimately be granted to the Spanish nation, as a consideration for the renunciation of those claims. It is desirable that it should be submitted to the consideration of the government of Buenos Ayres, whether, while such a power is reserved, their independence is complete; and how far other powers can rely, that the authority of Spain might not be eventually restored. It has been stated by Mr. De Forest, that the Congress at Tucuman had passed a resolution, to offer special advantages to the nation which should first acknowledge their independence, upon which the question was proposed, whether such a resolution, if carried into effect, would not be rather a transfer of dependence from one nation to another than the establishment of independence? rather to purchase support than to obtain recognition? The United States have no intention of exacting favors of Buenos Ayres for the acknowledgment of its independence: but in acknowledging it, they will expect either to enjoy, in their intercourse with it, the same privileges and advantages as other foreign nations, or to know precisely the extent and character of the benefits which are to be allowed to others, and denied to them. It should, indeed, be known to the supreme director, that, while such an indefinite power is reserved of granting to any nation advantages to be withheld from the United States, an acknowledgment of independence must be considered premature.

In adverting to these principles, it was observed to Mr. De Forest, that their importance could not but be peculiarly felt by the United States, as having been invariably and conspicuously exemplified in their own practice, both in relation to the country whose colony they had been, and to that which was the first to acknowledge their independence. In the words of their declaration, issued on the 4th of July, 1776, they resolved thenceforth "to hold the British nation, as they hold the rest of mankind, enemies in war, in peace, friends;" and in the treaty of amity and commerce, concluded on the 6th of February, 1778, between the United States and France, being the first acknowledgment by a foreign power of the independence of *the United States, and the [*54] first treaty to which they were a party, the preamble declares that the King of France and the United States, "willing to fix, in an equitable and permanent manner, the rules which ought to be followed relative to the correspondence and commerce which the two parties desire to establish between their respective countries, states, and subjects, have judged that the said end could not be better obtained than by taking for the basis of their agreement the most

perfect equality and reciprocity, and by carefully avoiding all those burdensome preferences, which are usually sources of debate, embarrassment, and discontent; by leaving also each party at liberty to make, respecting commerce and navigation, those interior regulations which it shall find most convenient to itself; and by founding the advantage of commerce solely upon reciprocal utility, and the just rules of free intercourse; reserving withal to each party the liberty of admitting, at its pleasure, other nations to a participation of the same advantage."

In the second article of the same treaty, it was also stipulated, that neither the United States nor France should thenceforth grant any particular favor to other nations, in respect of commerce and navigation, which should not immediately become common to the other nations, freely, if the concession was free, or for the same compensation, if conditional.

In answer to Mr. De Forest's note of the 12th instant, Mr. Adams has the honor of assuring him, that the President has received with much satisfaction the information contained in it; and will derive great pleasure from every event which shall contribute to the stability and honor of the government of Buenos Ayres.

Mr. Adams requests Mr. De Forest to accept the assurance of his distinguished consideration.—Washington, Dec. 31, 1818.

No. 8. Mr. Adams to Mr. De Forest.

Mr. Adams presents his compliments to Mr. De Forest, and in reference to the case of the schooner brought into Scituate, mentioned in Mr. De Forest's communication of the 9th inst., as well as to several others which have occurred of a similar character, requests him to have the **55*** goodness to impress upon the "government of Buenos Ayres the necessity of taking measures to repress the excesses and irregularities committed by many armed vessels, sailing under their flag, and bearing their commissions. The government of the United States have reason to believe that many of these vessels have been fitted out, armed, equipped, and manned in the ports of the United States, and in direct violation of their laws.

Of the persons composing the prize crew of the vessel at Scituate, and now in confinement upon charges of murder and piracy, it is understood that three are British subjects, and one a citizen of the United States. It is known that commissions for private armed vessels, to be fitted out, armed, and manned in this country, have been sent from Buenos Ayres to the United States, with the names of the vessels, commanders, and officers, in blank, to be filled up here, and have been offered to the avidity of speculators, stimulated more by the thirst for plunder than by any regard for the South American cause.

Of such vessels, it is obvious that neither the captains, officers, nor crews, can have any permanent connection with Buenos Ayres, and from the characters of those who alone could be induced to engage in such enterprises, there is too much reason to expect acts of atrocity, such as those alleged against the persons implicated in the case of the vessel at Scituate.

The President wishes to believe that this practice has been without the privity of the Wheat. 4.

government of Buenos Ayres, and he wishes their attention may be drawn to the sentiment, that it is incompatible both with the rights and the obligations of the United States—with their rights, as an offensive exercise of sovereign authority by foreigners, within their jurisdiction, and without their consent—with their obligations, as involving a violation of the neutrality which they have invariably avowed, and which it is their determination to maintain. The President expects, from the friendly disposition manifested by the supreme director towards the United States, that no instance of this cause of complaint will hereafter be given.

Mr. Adams requests Mr. De Forest to accept the renewed assurances of his distinguished consideration.—Washington, Jan. 1, 1819.

*No. 9.

*56

SIR—It is not my intention to give any unnecessary trouble to the department of state; but having had the honor of receiving two notes from Mr. Secretary Adams, on the 4th instant, dated December 31st, and January 1st, some explanation appears to be necessary.

In the first place, I do not suppose "that any privileges which may be attached to the consular character can avail in the judicial tribunals of this country, to influence, in any manner, the administration of justice." But, I suppose, that a consul duly accredited is, *ex officio*, the legal representative of his fellow-citizens, not otherwise represented by an express power; and that the tribunals of justice do, and will, admit the legality of such representation. Mr. Adams has misunderstood me in another observation, which was in substance, that there was a general opinion prevailing at Buenos Ayres, that the power first recognizing our independence would expect some extraordinary privilege or advantage therefor; and that, in my opinion, the government of Buenos Ayres would readily grant it if demanded. I know nothing, however, of any resolution having been passed on this subject by the Congress at Tucuman.

It appears, from the relation of a fact in Mr. Adams's note of the 31st ultimo, that the government of Buenos Ayres had intimated a desire (in the course of a negotiation with an agent of the United States) to reserve the right of granting more extraordinary privileges to Spain, on the settlement of a general peace, which must appear to every one contrary to their inclination, as well as interest; and it can be accounted for only by supposing that the proposition of the United States agent was merely of a temporary nature, and did not extend to an acknowledgment, by the United States, of the independence of South America; which act, I am confident, would have rendered any such reservation altogether unnecessary in the opinion of the government of Buenos Ayres, who must have seen that they were treating with an unauthorized person, and must have thought it good policy at this time to suggest such an idea. Indeed, were the government of Buenos Ayres to pursue that course, *they might plead the example ***57** of a neighboring power, acknowledged to be independent by the United States; and its chief, both illustrious and legitimate. It is well known that the government of Brazil taxes the

commerce of the United States about thirty per cent. higher than that of Great Britain. It may be that Great Britain is entitled to this preference, on account of important services rendered by her to the King of Portugal; and permit me to ask you, sir, what services could be rendered to any nation already in existence, so great as would be the acknowledgment by Great Britain, or by the United States, of the independence of South America? Such recognition, merely, by either of these powers, would probably have the immediate effect of putting an end to the cruel and destructive war, now raging between Spain and South America, and crown with never-fading laurels the nation thus first using its influence in favor of an oppressed, but high-minded people.

The account given by Mr. Adams, in his note of the 1st instant, respecting the irregular conduct of vessels sailing under the Buenos Ayres flag, has caused me much mortification, and has already been transmitted to my government by the Plattsburg; as also a copy of Mr. Adams's frank and friendly communication of the 31st ultimo. The supreme director will certainly be desirous to adopt the most prompt and efficacious measures within his power to remedy the evils complained of. But pray, sir, what can he do more than has already been done? The government of Buenos Ayres have established the most just rules and regulations for the government of their vessels of war, as well as of commerce; and have sent me to this country, invested with the title and powers of their consul-general; as well as to guard against any breach of those rules and regulations, by their citizens and vessels frequenting these seas, and the ports of these United States, as to protect them in their rights; but, sir, without a recognition of my powers, on the part of the government, I can have no right whatever to question any individual on the subject of his conduct; nor can any responsibility attach to **58**] me, nor to my government, *during such a state of things, for irregularities committed.

A considerable number of our seamen are foreigners by birth, who have voluntarily entered our service; therefore, it is not a matter of surprise, that, of the mutineers of the prize crew of the vessel at Scituate, three should have been born Englishmen, and one a North American. It is, however, an absolute fact, to which I am personally knowing, that the captors of that prize (the Buenos Ayres and Tucuman privateers) were legally fitted out at Buenos Ayres, early in the last year, from which port they sailed on a cruise off Cadiz; and it will afford the government of South America much satisfaction to learn that the United States will prosecute those mutineers, and punish such as are found guilty of crimes, according to the laws.

Before I close this note, I beg leave to make a few observations in answer to one of the reasons for not accrediting me, given by Mr. Adams, by direction of the President of the United States, in a conversation which I have had the honor of holding with him, viz.: "That the act of accrediting me as consul-general would be tantamount to the formal acknowledgment of the independence of the government which sent me." I do not profess to

be skilled in the law of nations, nor of diplomacy, nor would I doubt the correctness of any opinion expressed by the President, for whose person and character I have entertained the most profound respect; yet, I must say that I cannot understand the difference between the sending of a consular agent, duly authorized, to Buenos Ayres, where one was accredited from this country, four or five years ago, and has continued ever since in the exercise of the duties of his office, and the reception of a similar agent here. I also beg leave to mention, that I was in this country soon after the arrival of the present minister of Spain, the Chevalier de Onis; and recollect to have heard it observed, that being a political agent, he was not accredited, because the sovereignty of Spain was in dispute; but, that the consuls, who acknowledged the same government (one of the claimants to the sovereignty, and the one actually in possession of it), were allowed to exercise their functions. *If this was the case at that [**59** time, the government of the United States must have then had a different opinion on this subject from what it now has. Mr. Adams will please to bear in mind that I have only solicited to be accredited as a consular agent, having never agitated the question of an acknowledgment of our independence as a nation, which most certainly is anxiously desired by the government and people of South America, but which, being a political question, I have never asked.

Mr. Adams will also be pleased to accept the renewed assurances of my most distinguished consideration and respect.

(Signed) DAVID C. DE FOREST.
GEORGETOWN, January 8, 1819.

No. 10.

The Supreme Director of the United Provinces of La Plata, to his Excellency the President of the United States of North America.

MOST EXCELLENT SIR—The supreme government of these provinces have long exerted their zealous efforts to establish the closest and most amicable relations with the United States of America, to which the most obvious interests seem mutually to invite them. This desirable object has hitherto been frustrated by the events of the times; but the moment appears at length to have arrived, which presents to the people of these provinces the flattering prospect of seeing their ardent wishes accomplished. In consideration of these circumstances, and in conformity with the 28d of the articles agreed upon with citizen William G. D. Worthington, the agent of your government in these provinces, I have nominated citizen David C. De Forest, their consul-general to the United States, with the powers specified in his commission and instructions respectively. I therefore request your excellency to grant him the attention and consideration, which in the like case will be afforded to the public agents of your excellency resident in these regions.

I avail myself of this renewed occasion of reiterating to your excellency, assurances of the sentiments of respect and consideration, with which I have the honor to be, your excellency's most obedient and most humble servant.

(Signed) JN. MM. DE PUEYREDON.

GENERAL INDEX

TO THE

FOUR VOLUMES OF WHEATON CONTAINED IN THIS BOOK. FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

Figures in parenthesis refer to marginal paging of the volumes contained in this book respectively, while the black-faced figures indicate the page of this book on which the marginal paging, referred to is found.

ADMIRALTY—1.

1. Prosecutions under the non-importation laws are causes of admiralty and maritime jurisdiction, and the proceedings may be by libel in the admiralty.

The Samuel, (9) 23

2. Revenue causes are, in their nature, causes of admiralty and maritime jurisdiction.

Id. note 7, (19) 25

3. Criminal jurisdiction of the admiralty.

The Octavia, note 4, (22) 26

4. The admiralty jurisdiction embraces all questions of prize and salvage, and also maritime torts, contracts and offenses.

Martin v. Hunter's Lessee, (304) 97

See Prize.

See Alien Enemy.

See Amendments.

See Contraband.

See Deposition.

See Domicile.

See Duties.

See Evidence, 3, 4.

See Hypothecation.

See Information.

See Jurisdiction, 1, 2, 3.

See License.

See Practice.

See Sale, 3, 4, 5.

See Salvage.

ADMIRALTY—2.

1. The courts of the United States have exclusive jurisdiction of all seizures for a breach of the laws of the United States; and if the seizure be adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the court of admiralty, for damages for the illegal act.

Stocum v. Mayberry et al. (1, 10) 169, 171

2. Under the Judiciary Act of the 20th September, 1789, ch. 20., and the act of the 3d March, 1803, ch. 93, causes of admiralty and maritime jurisdiction cannot be removed by writ of error, from the Circuit Court for re-examination in the Supreme Court. The appropriate mode of removing such causes is by appeal.

The San Pedro, (132, 137) 202, 204

See Prize.

See Jurisdiction, 1.

ADMIRALTY—3.

1. Libel under the non-importation acts. Alleged excuse of distress repelled. Condemnation pronounced.

The New York, (56) 333

2. Necessity, which will excuse a violation of the laws of trade, must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skillful mariner, a well-grounded fear of the loss of vessel and cargo, or of the lives of the crew.

Id. (68) 336

3. Decree of restitution affirmed, with a certificate of probable cause of seizure, in an instance cause, on further proof.

The San Pedro, (78) 338

Wheat. 1, 2, 3, 4.

4. Libel for a forfeiture of goods imported, and alleged to have been invoiced at a less sum than the actual cost, at the place of exportation, with design to evade the duties, contrary to the 66th section of the collection law, ch. 123. Restitution decreed upon the evidence as to the cost of the goods at the place where they were last shipped; the form of the libel excluding all inquiry as to their cost at the place where they were originally shipped, and as to continuity of voyage.

The United States v. 150 Crates of Earthenware, (232) 377

5. The courts of the United States have exclusive cognizance of questions of forfeiture, upon all seizures made under the laws of the United States, and it is not competent for a state court to entertain or decide such question of forfeiture. If a sentence of condemnation be definitively pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be again litigated in any common law forum.

Gelston v. Hoyt, (246, 311) 381, 397

6. Where a seizure is made for a supposed forfeiture, under a law of the United States, no action of trespass lies in any common law tribunal, until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; for it depends upon the final decree of the court proceeding *in rem*, whether such seizure is to be deemed rightful or tortious, and the action, if brought before such decree is made, is brought too soon.

Id. (312) 398

7. If a suit be brought against the seizing officer for the supposed trespass, while the suit for the forfeiture is depending, the fact of such pending may be pleaded in abatement, or as a temporary bar of the action. If after a decree of condemnation, then that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then that may be pleaded as a bar. If after an acquittal without such certificate, then the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If, to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture in his defense, without averring a *lis pendens*, or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture in a state court.

Id. (314) 398

8. At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified.

Id. (310) 397

9. By the act of the 18th of February, 1793, ch. 8, s. 27, officers of the revenue are authorized to make seizures of any ship or goods, for any breach of the laws of the United States.

Id. (311) 397

10. A forfeiture attaches *in rem*, at the moment the offense is committed, and the property is instantly devoted.

Id. (311) 397

11. The statute of 1794, ch. 50, s. 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince or states, to cruise against the subjects of any other foreign prince, &c., does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new state previously belonged. A plea setting up a forfeiture under that statute, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad. *Id.* (328) 402
12. A plea justifying a seizure under this statute, need not state the particular prince or state by name, against whom the ship was intended to cruise. *Id.* (329) 402
13. The 7th section of the statute of 1794, was not intended to apply, except to cases where a seizure or detention could not be enforced by the ordinary civil power, and there was a necessity, in the opinion of the President, to employ naval or military power for this purpose. *Id.* (331, 334) 402, 403
14. The definitive sentence of a court of admiralty, or any other court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is conclusive, wherever the same subject-matter comes incidentally in controversy in any other tribunal. *Id.* (315) 398
15. Application of this principle to a recent case in England. Note 1. (322) 400
16. Supposing that the third article of the Constitution of the United States, which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state, where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; yet Congress have not, in the 8th section of the act of 1790, ch. 9, "for the punishment of certain crimes against the United States," so exercised this power as to confer on the courts of the United States jurisdiction over such murder. *The United States v. Bevans.* (336, 337) 404, 416
17. *Quære*, Whether courts of common law have concurrent jurisdiction with the admiralty over murder committed in bays, &c., which are inclosed parts of the sea. *Id.* (337) 416
18. Congress having, in the 8th section of the act of 1790, ch. 9, provided for the punishment of murder, &c., committed upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, "it is not the offense committed, but the bay, &c., in which it is committed, that must be out of the jurisdiction of the state." *Id.* (337) 416
19. The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union; but the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion of territory not yet given away; and the residuary powers of legislation still remain in the state. *Id.* (339) 417
20. Congress have power to provide for the punishment of offenses, committed by persons on board a ship of war of the United States, wherever that ship may lie. But Congress have not exercised that power in the case of a ship lying in the waters of the United States; the words "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States," in the third section of the act of 1790, ch. 9, not extending to a ship of war, but only to objects in their nature fixed and territorial. *Id.* (339) 417
21. Texts on the admiralty jurisdiction. Note 3, 4. (357, 361) 409, 410
22. Resolution of 1632, upon the cases of admiralty jurisdiction. Note 4. (365) 411
23. Agreement of the judges of the King's Bench and the admiralty of 1575. Note 5. (367) 411
24. Case of *The King v. Bruce*. Note 1, (371) 412
25. A question of fact under the non-importation laws. Defense set up on the plea of distress, repelled. Condemnation. *The Æolus.* (362) 418
26. Libel under the 25th sec. of the registry act of 1792, ch. 146 (l.), for a fraudulent use by a vessel of a certificate of registry, to the benefit of which she was not entitled. Vessel forfeited. The provisions of the 27th sec. apply as well to vessels which have not been previously registered as to those to which registers have been previously granted. *The Neptune.* (361) 469
- See Piracy.
See Practice, 5, 6, 7.
See Prize.
- ### ADMIRALTY—4.
- Where the pleadings in an admiralty cause are too informal and defective to pronounce a final sentence upon the merits, the cause will be remanded by this court to the Circuit Court, with directions to permit the pleadings to be amended, and for further proceedings. *The Divina Pastora.* (52, 64) 512, 515
 - A collector of the customs, who makes a seizure of goods for an asserted forfeiture, and before the proceedings *in rem* are consummated by a sentence of condemnation, is removed from office, acquires an inchoate right by the seizure, which by the subsequent decree of condemnation gives him an absolute vested right to his share of the forfeiture under the collection act of the 2d March, 1799, c. 128. *Van Ness v. Buel.* (74) 517
 - In a case of civil salvage, where under its peculiar circumstances, the amount of salvage is discretionary, appeals should not be encouraged upon the ground of minute distinctions of merit, nor will the court reverse the decision of an inferior court, unless it manifestly appears that some important error has been committed. *The Sybil.* (98) 522
 - The demand of the ship-owners for freight and general average in such a case, is to be pursued against that portion of the cargo which is adjudged to the owners of the goods, by a direct libel, or petition, and not by a claim interposed in the salvage cause. *Id.* (99) 522
 - Any citizen may seize any property forfeited to the use of the government, either by the municipal law, or as prize, in order to enforce the forfeiture; and it depends upon the government whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure. *The Caledonian.* (100) 523
 - The admiralty possesses a general jurisdiction in cases of suits by material men, *in personam* and *in rem*. *The General Smith.* (438) 609
 - Where the proceedings by material men is *in rem* to enforce a specific lien, it is incumbent upon the party to establish the existence of such lien in the particular case. *Id.* (438, 443) 609, 611
 - Where repairs have been made and necessities furnished to a foreign ship, or to a ship in the port of the state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may maintain a suit *in rem*, in the Admiralty, to enforce his right. *Id.* (443) 611
 - But as to repairs or necessities in the port or state to which the ship belongs, the case is governed altogether by the local law; and no lien is implied unless by that law. *Id.* (443) 611
 - By the common law, material men furnishing repairs to a domestic ship have no particular lien upon the ship itself for their demand. *Id.* (443) 611
 - A shipwright who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs. But if he parts with the possession (of a domestic ship), or has worked upon it without taking possession, he has no claim upon the ship itself. *Id.* (443) 611
 - The common law being the law of Maryland on this subject, material men cannot maintain a suit *in rem* in the District Court of Maryland for supplies furnished to a domestic ship, although they might have maintained a suit *in personam* in that court. *Id.* (443) 611

See Duties, 1, 2, 3.
 See Domicile.
 See License.
 See Practice, 5, 6.
 See Prize.

ALIEN—3

1. An alien enemy may take lands by purchase, though not by descent; and that whether the purchase be by grant or by devise. (14) 322

2. A title acquired by an alien enemy by purchase is not devested until office found. (14) 322

3. The 9th article of the treaty of 1794, between the United States and Great Britain completely protects the title of a British devisee, whose estate has not been previously devested by an inquest of office, or some equivalent proceeding. (14) 322

4. The treaty of 1794 relates only to lands then held by British subjects, and not to any after acquired lands. (13, 14) 322

5. A person born in the colony of New Jersey, before the declaration of independence, and residing there until 1777, but who then joined the British army, and ever since adhered to the British government, has a right to take lands by descent in the state of New Jersey. (12) 322

6. A person born in England, before the declaration of independence, and who always resided there, and never was in the United States, cannot take lands in Maryland by descent. (13) 322

7. By the acts of Maryland of 1780, ch. 45 and 49, the equitable interest of British subjects in lands were confiscated, and vested in the state, without office found, prior to the treaty of 1783, so that the British *cestui que trust* was not protected by the stipulations in that treaty against future confiscations, nor by the stipulation in the treaty of 1794, securing to British subjects, who then held lands in this country, the right to continue to hold them. (13) 322

8. An alien may take, by purchase, a freehold or other interest in land, and may hold it against all the world except the King, and even against him until office found; and is not accountable for the rents and profits previously received. (599) 466

9. Where W. R. claimed title to lands in Kentucky, derived from a warrant issued in 1774, by the Governor of Virginia, on which a grant issued in 1783, to W. S., who was a native subject of the King of Great Britain, and who left Virginia prior to the year 1776, and has never since returned to the United States; held, that W. S. took a legal title to the lands under the warrant and grant, which not having been devested by any act of Virginia prior to the treaty of 1794, was rendered absolute and indefeasible by the 9th article of that treaty. (594, 599) 467, 468

Craig v. Radford, 6.

See Chancery, 6.

See Treaty, 1.

ALIEN—4. :

1. An alien may take an estate in lands by the act of the parties, as by purchase; but he cannot take by the act of the law, as by descent. (453) 613

2. Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs in law; but the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence. (453) 613

3. The 8th article of the treaty of peace of 1783, between the United States and Great Britain, completely protected the titles of British subjects to lands in the United States, which would have been liable to forfeiture, by escheat, for the defeat of alienage. That article was not meant to be confined to confiscations *jure belli*. (1b.) 613

4. The 9th article of the treaty of 1794, between the United States and Great Britain, applies to the title of the parties, whatever it is, and gives it the same legal validity as if the parties were citizens. It is not necessary that they should show an actual possession or seisin, but only that the title was in them at the time the treaty was made. (1b.) 613

5. The 9th article of the treaty of 1794, did not Wheat. 1, 2, 3, 4.

mean to include any other persons than such as were British subjects or citizens of the United States.

Orr v. Hodgson,

See Chancery, 20.

(453) 613

ALIEN ENEMY—1.

1. The fact that the commander of a privateer was an alien enemy at the time of capture, does not invalidate it.

The Mary and Susan (Richardson, claimant), (48) 32

2. Property of an alien enemy, found within the territory, at the declaration of war, is not confiscable as prize, but may be claimed by him, upon the termination of war, unless previously confiscated by the sovereign power.

The Astrea, note 6 (The Adventure), (123) 52

AMENDMENTS—1.

1. In revenue or instance causes, the Circuit Court may, upon appeal from the district courts, allow the introduction of a new allegation into the information, by way of amendment.

The Samuel, note 1 (The Caroline and the Emily), *The Edward*, (18) 24

2. In the same causes, the Supreme Court may remand the cause to the Circuit Court, with directions to allow the libel to be amended. (261) 86

Id.

AMENDMENTS—4.

See Admiralty, 1.

ASSIGNMENT OF CHOSSES IN ACTION—1.

1. A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Welch v. Mandeville, (238) 79

2. Roman and French law on the subject of assignment of choses in action. (237) 80

Id. note 1,

BANKRUPT—4.

See Constitutional Law, 1, 2, 5.

See *Lex Loc.*

BILLS OF EXCHANGE AND PROMISSORY NOTES—2.

1. A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.

Coultidge et al. v. Payson et al. (66) 185

2. Review of the English cases on this subject. (1b.) 185

3. Law of France as to previous acceptance. (75) 188

4. American decisions on the same subject. (76) 188, 189

5. A demand of payment of a promissory note must be made of the maker on the last day of grace; and where the indorser resides in a different place, notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day.

Lenox et al. v. Roberts, (377) 265

6. An action of debt will lie by the payee or indorsee of a bill of exchange, against the acceptor, where it is expressed to be for value received.

Raborg et al. v. Peyton, (385) 268

BILLS OF EXCHANGE AND PROMISSORY NOTES—3.

1. Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place; and interest is to be allowed according to the *lex loci*.

Lanusse v. Barker, (101, 146) 343, 355

2. Where a bill of exchange was indorsed to T. T. T., Treasurer of the United States, who received it in that capacity, and for account of the United States, and the bill had been purchased by the Sec.

rotary of the Treasury (as one of the commissioners of the Sinking Fund, and as agent of that board) with the money of the United States, and was afterwards indorsed by T. T. T., Treasurer of the United States, to W. and S., and by them presented to the drawees for acceptance, and protested for non-acceptance and non-payment, and sent back by W. and S. to the Secretary of the Treasury; held, that the indorsement to T. T. T., passed such an interest to the United States as enabled them to maintain an action on the bill against the first indorser; and that the United States might recover in an action against the first indorser, without producing from W. and S. a receipt or re-indorsement of the bill, W. and S. being presumed to have acted as the agents or bankers of the United States; and all the interest which W. and S. ever had in the bill, was devested by the act of returning it to the party from whom it was received.

Dugan v. The United States, (172) 362
3. *Quære*, Whether, when a bill is indorsed to an agent, for the use of his principal, an action on the bill can be maintained by the principal in his own name. However this may be between private parties, the United States are permitted to sue in their own name, wherever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject-matter of the controversy.

Id. (180) 364
4. If a person who indorses a bill to another, whether for value, or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of such bill, and is entitled to recover thereon, notwithstanding there may be on it one or more indorsements in full, subsequent to the indorsement to him, without producing any receipt or indorsement back to him from either of such indorsees, whose names he may strike from the bill, or not as he thinks proper.

Id. (182) 364
5. The indorser of a promissory note, who has been charged by due notice of the default of the maker, is not entitled to the protection of a court of equity as a surety; the holder may proceed against either party at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding an execution against the maker.

Lenox v. Pruit, (520, 525) 449
6. By the statute of Maryland of 1763, ch. 23, s. 8, which is perhaps only declaratory of the common law, an indorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights by obtaining an assignment of the holder's judgment against the maker.

Id. (526) 451

BOND—1.

1. Where a bond was given by the agent of an unincorporated joint stock company, to the directors, for the time being, for the faithful performance of his duties, &c., and the directors were appointed annually, and changed before a breach of the condition, the agent and his sureties were held liable to an action brought by the obligees, after they had ceased to be directors.

Anderson v. Longden, (85) 42

BOTTOMRY—1.

See Hypothecation.

CHANCERY—1.

1. A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make a good title at any time before the decree is pronounced; but the dismissal of a bill to enforce a specific performance in such a case, is a bar to a new bill for the same object.

Hepburn & Dundas v. Dunlop & Co., (179) 65
2. The inability of the vendor to make a good title at the time the decree is pronounced, though it form a sufficient ground for refusing a specific performance, will not authorize a court of equity to rescind the agreement in a case where the parties have an adequate remedy at law for its breach.

Id. (179) 65
3. The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may

afford a reason for refusing a specific performance as against the vendee.

Hepburn & Dundas v. Dunlop & Co., (179) 65
4. But if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for whoever may become purchasers, under a sale by order of the court, for the benefit of the vendee.

Id. (179) 65
5. Under what circumstances, a specific performance will, or will not, be decreed.

Id. note 1, (208) 72
6. A bill, to obtain a specific performance of an alleged agreement to receive a quantity of cotton bagging, at a specified price, in satisfaction of certain judgments at law, dismissed, under the circumstances of the case.

Barr v. Lapsley, (151) 55
7. In England, the courts of equity will not, generally, entertain a bill for the specific performance of contracts for the sale of chattels, or relating to merchandise, but leave the parties to their remedy at law.

Id. note 1, (154) 59
8. Bill, to obtain a conveyance of a tract of land in Kentucky, held by the defendants as the property of the original grantee, confiscated to the state, and claimed by the plaintiffs, under an equity arising from a sale made by the original grantee of another tract of land, to which it was alleged he erroneously supposed himself legally entitled, under the same warrant and survey, dismissed.

Russel v. Trustees of Transylvania University, (432) 129

CHANCERY—2.

1.—H., in contemplation of marriage with B., gave a bond for \$5,000, and interest to trustees, to secure to B. a support during the marriage, and after the death of H., in case she should survive him, and to their child or children, in case he should survive her; with condition that if H. should, within the time of his life, or within one year after the marriage, (whichever of the said terms should first expire), convey to the trustees some good estate, real or personal, sufficient to secure the annual payment of \$300, for the separate use of his wife during the marriage, and also sufficient to secure the payment of the said \$5,000 to her use in case she should survive her husband, to be paid within six months after his death; and in case of her death before her husband, to be paid to their child or children; or if H. should die before B., and by his will should, within a year from his date, make such devise and bequests as should be adequate to these provisions, then the bond to be void. H. died, leaving his widow B. and a son, having, by his last will, devised a tract of 1,000 acres of land in the Mississippi Territory, to his son in fee; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her, in fee, of the son's moiety, if he died before he attained "the lawful age to will it away." And the residue of his estate, real and personal, to be divided equally between his wife and son with the same contingent devise over to her as with regard to the tract of 10,000 acres. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at \$10,000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband or otherwise," to be divided between her son and the plaintiff in the cause, with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought his bill to charge the lands of H. with the payment of the bond for \$5,000, and interest, to which the plaintiff derived his right under the nuncupative will of B. By the laws of Kentucky this will did not pass the real estate of the testator, but was sufficient to pass her personal estate, including the bond. Held, that the provision of the will of H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect under the will and the bond, and that this privilege was extended to her devisee, the plaintiff.

Hunter et al. v. Bryant, (32) 177

2. Actual maintenance is equivalent to the payment of a sum secured for separate maintenance.

Wheat. 1, 2, 3, 4.

and, therefore, interest upon the bond during the husband's life-time, was not allowed.

Hunter et al. v. Bryant, (40) 179

3. Under all the circumstances of the case it was determined that the bond was chargeable on the residue of the estate, and of this, the personality first in order.

Id., (41) 179

4. It is a universal rule of equity, that he who asks for a specific performance, must be in a condition to perform himself. Therefore, in a suit for the specific performance of a contract, by conveying lands in Ohio, stipulated to be conveyed as the consideration for other lands sold in Kentucky, it was held, that the vendor, being unable to make a title free from incumbrances to the lands sold in Kentucky, was not entitled to a decree for a specific performance.

Morgan's Heirs v. Morgan, (230) 242

5. Origin of the doctrine of the English court of chancery as to the specific performance of agreement.

Id. note 1, (302) 245

6. Does not, in general, extend to the enforcing of agreements respecting personal property.

Id. note 1, (308) 245

7. Vendee not obliged to take a defective title; but may elect to have compensation, by deduction from the purchase money, in case of a mistake or misrepresentation as to quantity or quality, or the estate of the vendor in the property sold, and a specific performance as to the residue.

Id. note 1, (1b.) 245

8. Moral certainty sufficient as to title.

Id. note 1, (304) 245

9. How far time is material in the enforcing of specific performance.

Id. note 1, (1b.) 245

10. In what cases the court will direct an issue of *quantum damnicatus*, or a reference to the master to ascertain the damages, where a specific performance is refused, but the party is entitled to damages.

Id. note 1, (306) 246

11. In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them. If the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy.

Coleman v. Thompson, (338, 341) 253, 256

12. The plaintiff, who seeks for a specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.

Id., (342) 256

13. Cases where a court of equity will not decree the specific performance of agreements for want of certainty.

Id. note 1, (341) 256

14. The court will, if practicable, execute an uncertain agreement by rendering it certain.

Id. note 1, (1b.) 256

See Practice.

15. Where all the property of the late Bank of the United States had been assigned, by a general assignment, in trust to assignees, for the purpose of liquidating its affairs. *Quere*, Whether any action at law could be maintained by the assignees, on certain promissory notes, indorsed to, and the property of the bank, which had not been specially assigned not indorsed to the assignees.

Lenox et al. v. Roberts, (373) 264

16. However this may be, it is clear that a suit in equity might be maintained by the assignees against the parties to the notes.

Id., (376) 265

CHANCERY—3.

1. Bill for the specific performance of an agreement for the sale of lands. The contract enforced.

M'Iver v. Kyger, (53) 332

2. The remedies in the courts of the United States, at common law and in equity, are to be, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished in that country from which we derive a knowledge of those principles. Consistently with this doctrine, it may be admitted, that where, by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be valid at law is, under circumstances of an equitable nature, declared

void, the rights of the parties in such case may be as fully considered in a suit at law, in the courts of the United States, as in any state court.

Robinson v. Campbell, (212, 220) 373, 375

3. Explanation of the decree, in *Dunlop v. Hepburn*, reported *ante*, Vol. I., p. 179, that the defendants were only to be accountable for the rents and profits of the lands (referred to in the proceedings), actually received by them.

Dunlop v. Hepburn, (231) 377

4. The indorser of a promissory note, who has been charged, by due notice of the default of the maker, is not entitled to the protection of a court of equity as a surety; the holder may proceed against either party at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding an execution against the maker.

Lenox v. Prout, (520, 525) 449, 451

5. The answer of a defendant in chancery, though he may be interested to the whole amount in controversy, is conclusive evidence, if uncontradicted by any witness in the cause.

Id., (527) 451

6. R. C., a citizen of Virginia, being seized of real property in that state, made his will: "In the first place I give, devise, and bequeath unto J. L.," and four others, "all my estate, real and personal, of which I may die seized and possessed, in any part of America, in special trust, that the aforementioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two, and three years' credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother T. C.," an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him accordingly as the payments are made, and I hereby declare the aforesaid J. L. and the four other persons, "to be my trustees and executors for the purposes afore-mentioned." Held, that the legacy given to T. C. in the will of R. C. was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien.

Craig v. Leslie, (563) 460

7. Equity considers land, directed, in wills or other instruments, to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

Id., (577) 463

8. Where the whole beneficial interest in the land or money, thus directed to be employed, belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money or the land at his election, if he elect before the conversion is made.

Id., (578) 463

9. But in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs, or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his life-time.

Id., (579) 464

10. The case of *Roper v. Radcliffe*, 9 Mod. 167, examined; distinguished from the present case; and, so far as it conflicts with it, overruled.

Id., (580) 464

11. Land, devised to trustees to sell for the payment of debts and legacies, is to be deemed as money.

Id., (582) 464

12. The heir at law has a resulting trust in such lands, after the debts and legacies are paid, and may come into equity and restrain the trustee from selling more than sufficient to pay them; or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be land, and not money.

Id., (582) 464

13. But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personality, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.

Id., (583) 465

CHANCERY—4.

1. In 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item,

what shall remain of my military certificates at the time of my death, both principal and interest, I give and bequeath to The Baptist Association, that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792, the legislature of Virginia passed an act repealing all English statutes. In 1796, the testator died. The Baptist Association in question had existed as a regularly organized body for many years before the date of his will; and in 1797 was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia Baptist Association." Held, that the Association, not being incorporated at the testator's decease, could not take this trust as a society.

Baptist Association v. Hart's Ex'rs, (1) 499
2. The above bequest could not be taken by the individuals who composed the Association at the death of the testator; the subsequent incorporation of the Association did not give it the capacity of taking this bequest; there are no persons who could entitle themselves to the benefit of this legacy, were it not a charity; and it is not sustainable in this court, as a charity.

Id. (28, 29) 506

3. Such a legacy would be sustained in England.

Id. (29) 506

4. The English stat. 43d of Eliz. gives validity to some devices to charitable uses, which were not valid, independent of that statute.

Id. (31) 507

5. Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, exercising its ordinary jurisdiction, independent of the stat. 43d Eliz.

Id. (33) 507

6. Such charitable bequests cannot be established by a court of equity, enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43d Eliz.

Id. (39) 509

7. If, in England, a charitable bequest of this nature, could be enforced by virtue of the king's prerogative as *parens patriæ*, *Quære*, How far this principle is applicable in the courts of the United States.

Id. (50) 511

8. Note on Charitable Bequests, Appendix, Note I.

(3) 500

9. The rudiments of the law of charities derived from the Roman law.

Id. (3) 500

10. The statute of the 43d Eliz., c. 4, the principal source of the law of charities.

Id. (5) 500

11. No cases are considered as charitable unless they fall within the words or intend of the statute.

Id. (8) 500

12. Modes of relief under the statute.

Id. (7) 501

13. What charities are within the statute.

Id. (9) 501

14. Mode of construing charitable bequests.

Id. (9) 501

15. How far a court of equity sitting in one jurisdiction can execute charitable bequests for foreign objects in another jurisdiction.

Id. (17) 503

16. Mode of administering charities in chancery.

Id. (19) 504

17. Remedy for misapplication of charity funds.

Id. (21) 504

18. The circuit courts of the Union have chancery jurisdiction in every state; they have the same chancery powers, and the same rules of decision in equity cases in all the states.

United States v. Howland, (108, 115) 526, 528

19. The Circuit Court has jurisdiction, on a bill in equity filed by the United States against the debtor of their debtor, they claiming a priority under the act of 1799, c. 128, s. 65, notwithstanding the local law of the state where the suit is brought allows a creditor to proceed against the debtor of his debtor by a peculiar process at law.

Id. (115) 528

20. Upon a bill in equity filed by the United States, proceeding as ordinary creditors against the debtor of their debtor for an account, &c., the original debtor to the United States ought to be

made a party, and the account taken between him and his debtor.

United States v. Howland, (117) 528

21. The equitable lien of the vendor of land, for unpaid purchase money, is waived by any act of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase money.

Brown v. Guman, and note, (255, 296) 564, 574

22. An express contract that the lien shall be waived to a certain extent, is a waiver of the lien to any greater extent.

Id. (290) 572

23. Where the deed itself remains an escrow until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser indorsed by third persons, for the residue of the purchase money, this is such a separate security as extinguishes the lien.

Id. (290) 572

24. Note on the subject of lien on land for unpaid purchase money.

Id. note 1, (298) 573

25. Bill for rescinding a contract for the sale of lands, on the ground of defect of title, dismissed with costs.

Orr v. Hodgson, (453) 613

26. Under the registry act of Ohio, which provides that certain deeds "shall be recorded in the county in which the lands, tenements, and hereditaments, so conveyed or affected, shall be situate, within one year after the day on which such deed or conveyance was executed; and, unless recorded in the manner and within the time aforesaid, shall be deemed fraudulent against any subsequent bona fide purchaser, without knowledge of the existence of such former deed of conveyance." Lands lying in Jefferson county were conveyed by deed; and a new county, called Tuscarora county, was erected partly from Jefferson, after the execution and before the recording of the deed, in which new county the lands were included, and the deed was recorded in Jefferson. Held, that the registry was not sufficient either to preserve its legal priority, or to give it the equity arising from constructive notice.

Astor v. Wells, (467, 496) 617, 621

27. Notice of a prior incumbrance to an agent, is notice to the principal.

Id. (467) 622

28. Under the statute of fraudulent conveyances of Ohio, which provides that "every gift, grant, or conveyance of lands, tenements, hereditaments, &c., made or obtained with intent to defraud creditors of their just and lawful debts and damages, or to defraud or deceive the person or persons who shall purchase such lands, &c., shall be deemed utterly void, and of no effect." Held, that a bona fide purchaser, without notice, could not be affected by the intent of the grantor to defraud creditors.

Id. (16.) 622

29. A court of equity will not decree the specific performance of an agreement concerning lands, in favor of aliens who are incapable of holding the estate to their own use.

Orr v. Hodgson, (465) 616

CHARITIES—4.

See Chancery, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

COLLECTOR—1.

See Fines, Penalties, and Forfeitures.

COLLECTOR—4.

See Admiralty, 2.

COLLUSIVE CAPTURE—2.

See Embargo, 8.

See Prize, 9, 14.

COMMON LAW—1.

See Constitutional Law, 6.

COMMON LAW—3.

See Admiralty, 5, 6, 7, 8, 14, 17.

See Constitutional Law, 3.

See Chancery, 2.

Wheat. 1, 2, 3, 4.

CONSTITUTIONAL LAW—1.

1. The appellate jurisdiction of the Supreme Court of the United States extends to a final judgment, or decree, in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty, &c.

Martin v. Hunter's Lessee, (304) 97

2. Such judgment, &c., may be re-examined by writ of error, in the same manner as if rendered in a Circuit Court.

Id. (Ib.) 97

3. If the cause has been once remanded before, and the state court decline, or refuse, to carry into effect the mandate of the Supreme Court thereon, this court will proceed to a final decision of the same, and award execution thereon.

Id. (Ib.) 97

4. *Quere*, Whether this court has authority to issue a *mandamus* to the state court, to enforce a former judgment.

Id. (302) 111

5. If the validity, or construction, of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up, by either party, under the treaty, this court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the abstract construction of the treaty itself.

Id. (Ib.) 111

6. *Quere*, Whether the courts of the United States have jurisdiction of offenses at common law, against the United States?

United States v. Coolidge, (415) 124

CONSTITUTIONAL LAW—2.

1. The courts of the U. S. have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the U. S.; and any intervention of a state authority, which, by taking the thing seized out of the hands of the U. S. officer might obstruct the exercise of this jurisdiction, is illegal.

Slocum v. Mayberry et al. (9, 10) 171

2. In such a case the court of the U. S., having cognizance of the seizure, may enforce a re-delivery of the thing, by attachment or other summary process.

Id. (9) 171

3. The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the U. S., and it depends upon the final decree of such courts, whether the seizure is to be deemed rightful or tortious.

Id. (9, 10) 171

4. If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the District Court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.

Id. (10) 171

5. Under the constitution of the U. S., the power of naturalization is exclusively in Congress.

Chirac v. Chirac, (259, 260) 234, 236

6. The jurisdiction of the Circuit Court of the U. S. extends to a case between citizens of Kentucky, claiming lands exceeding the value of five hundred dollars, under different grants, the one issued by the state of Kentucky, and the other by the state of Virginia, upon warrants issued by Virginia, and locations founded thereon prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land; and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the U. S. extends to the case, whatever may have been the equitable title of the parties prior to the grant.

Coleson et al. v. Lewis, (377) 266

CONSTITUTIONAL LAW—3.]

1. A judgment of a state court has the same credit, validity, and effect, in every other court within the United States, which it had in the court where it was rendered; and whatever pleas would be good to a suit thereon, in such state, and none others, can be pleaded in any other court within the United States.

Hampton v. McConnel, (234) 378

2. Under the judiciary act of 1789, ch. 20, s. 25, giving appellate jurisdiction to the Supreme Court of the United States, from the final judgment, or decree, of the highest court of law or equity of a state, in certain cases, the writ of error may be directed to any court in which the record and judgment on which it is to act may be found; and if the

Wheat. 1, 2, 3, 4. U. S., Book 4.

record has been remitted by the highest court, &c., to another court of the state, it may be brought by the writ of error from that court.

Gelston v. Hoyt, (246, 303) 381, 395

3. The remedies in the courts of the United States, at common law, and in equity, are to be, not according to the practices of state courts, but according to the principles of common law and equity, as defined in England. This doctrine reconciled with the decisions of the courts of Tennessee, permitting an equitable title to be asserted in an action at law.

Robinson v. Campbell, (221) 375

4. Remedies, in respect to real property, are to be pursued according to the *lex loci rei sitæ*.

Id. (219) 375

See Admiralty, 5, 6, 7, 16, 17, 19, 20.

See Practice, 14.

See Statutes of Tennessee, 1, 2, 3.

CONSTITUTIONAL LAW—4.

1. Since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, art. 1, s. 10, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law.

Sturges v. Crammishield, (122, 192) 529, 547

2. The act of New York, passed on the 3d of April, 1811 (which not only liberates the person of the debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes), so far as it attempts to discharge the contract, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, and is not a good plea in bar of an action brought upon such a contract.

Id. (122, 197) 529, 549

3. Whenever the terms in which a power is granted by the constitution to Congress, or whenever the nature of the power itself requires that it should be exercised exclusively by Congress, the subject is as completely taken away from the state legislatures as if they had been expressly forbidden to act on it.

Id. (198) 548

4. Statutes of limitation and usury laws, unless retroactive in their effect, do not impair the obligation of contracts, and are constitutional.

Id. (208) 551

5. A state bankrupt or insolvent law (which not only liberates the person of the debtor, but discharges him from all liability for the debt), so far as it attempts to discharge the contract, is repugnant to the constitution of the United States; and it makes no difference in the application of this principle, whether the law was passed before or after the debt was contracted.

McMillan v. McNeill, (200) 552

6. The act of Assembly of Maryland, of 1798, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment, against its debtors who have, by an express consent in writing, made the bonds, bills, or notes by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States, or of Maryland.

Bank of Columbia v. Okely, (236, 240) 559, 560

7. But the last provision in the act of incorporation, which gives this summary process to the bank, is no part of its corporate franchise, and may be repealed or altered at pleasure by the legislative will.

Id. (245) 561

8. Congress has power to incorporate a bank.

McCulloch v. State of Maryland, (316) 579

9. The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

Id. (408) 600

10. The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

Id. (405) 601

11. There is nothing in the constitution of the United States, similar to the articles of confederation, which excludes incidental or implied powers.

Id. (406) 601

12. If the end be legitimate, and within the scope

of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

Id. (421) 605
13. The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

Id. (411, 421) 602, 605
14. If a certain means to carry into effect any of the powers expressly given by the constitution, to the government of the Union, be an appropriate measure not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

Id. (423) 605
15. The act of the 19th April, 1816, c. 44, "to incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

Id. (424) 606
16. The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

Id. (Ib.) 606
17. The state, within which a branch of the Bank of the United States may be established, cannot, without violating the constitution, tax that branch.

Id. (425) 606
18. The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

Id. (427) 606
19. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws, enacted by Congress to carry into effect the powers vested in the national government.

Id. (436) 608
20. This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state may hold in this institution, in common with the other property of the same description throughout the state.

Id. (436) 608
21. The charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the constitution of the United States (art. 1, s. 10) which declares that no state shall make any law impairing the obligation of contracts. The charter was not dissolved by the revolution.

D. College v. Woodward. (518) 629
22. An act of the state legislature of New Hampshire, altering the charter of Dartmouth College in a material respect, without the consent of the corporation, is an act impairing the obligation of the charter, and is unconstitutional and void.

Id. (Ib.) 629
23. Under its charter, Dartmouth College was a private, not a public corporation. That a corporation is established for the purpose of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.

Id. (Ib.) 629
See Chancery, 18.
See Practice, 3, 4.

CONTRABAND—1.

1. Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of his military or naval forces, are contraband.

The Commerce. (382) 116

2. Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life, in the enemy's country, are not contraband.

Id. (Ib.) 116

3. Freight is never due to the neutral carrier of contraband.

Id. (387, 397) 117, 120

4. Articles, useful for warlike purposes exclusively are always contraband, when destined for

the enemy; those of promiscuous use, only become so under peculiar circumstances.

Id. note 5. (389) 118

5. A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

Id. (382) 116

6. It makes no difference, in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

Id. (Ib.) 116

7. Penalty for the carrying of contraband, according to the law of England, France, and Holland.

Id. note 3. (394) 119

CONTRACT—4.

1. Where A offered to purchase of B, two or three hundred barrels of flour, to be delivered at Georgetown (District of Columbia), by the first water, and to pay for the same \$9.50 per barrel; and to the letter containing this offer, required an answer by the return of the wagon by which the letter was sent. This wagon was, at that time, in the service of B, and employed by him in conveying flour from his mill to Harper's Ferry, near to which place A then was. His offer was accepted by B in a letter sent by the first regular mail to Georgetown, and received by A at that place; but no answer was ever sent to Harper's Ferry. Held, that the acceptance, communicated at a different place from that indicated by A imposed no obligation binding upon him.

Elkawn v. Henshaw. (225) 556

2. An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter according to the terms on which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it.

Id. (223) 557

See Frauds, 4.

COVENANT—2.

1. A trustee is, in general, only suable in equity; but if he chooses to bind himself by a personal covenant, he is liable at law for a breach of that covenant, although he describe himself as covenanting as trustee.

Duwall v. Craig et al. (45, 56) 180, 183

2. Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other persons, with an indemnity in lands of an equivalent value in case of eviction; it was held that these covenants were independent, and that it was unnecessary to allege in the declaration any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior incumbrance by the acts of the grantors, &c., and that the action might be maintained on the first covenant, in order to recover pecuniary damages.

Id. (58) 184

3. Where the grantors covenant generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances.

Id. (59) 184

4. An averment of an eviction under an elder title is not always necessary to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession in consequence of an existing possession or seizin by a person claiming and holding under an elder title, it is equivalent to an eviction, and a breach of the covenant.

Id. (61) 184

5. Manner in which a person who acts as agent for another must execute a deed in order to avoid a personal responsibility.

Id. note 1. (56) 183

6. Cases illustrative of the doctrine that a trustee, agent, &c., who binds himself by a personal covenant, is liable at law for a breach of that covenant, although he describe himself as covenanting as trustee.

Id. note 1. (Ib.) 183

Wheat. 1, 2, 3, 4.

7. Distinction as to public agents.

Duval v. Craig et al. note 1. (56) 183

8. Damages recoverable upon a breach of covenant of good right and title to convey against incumbrances and for quiet enjoyment, and of general warranty.

Id. note 1. (62) 185

9. Rules of the civil law as to damages in case of eviction.

Id. note 1. (65) 186

See Pleading, 1, 2, 3.

COVENANT—4.

1. Where the defendant in ejectment for lands, in North Carolina, has been in possession under title in himself, and those under whom he claims, for a period of seven years, or upwards, such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself, by positive proof, within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title.

Somerville v. Hamilton, (230, 233) 558

2. *Quære*, Whether, in an action upon a covenant against incumbrances, the plaintiff is bound to show that the adverse claimant recovered, in the suit by which the plaintiff is evicted, by title paramount, or whether the recovery itself is *prima facie* evidence of that fact.

Id. (233) 558

CRIMES AND MISDEMEANORS—1.

1. See Admiralty, 3, 4.

2. See Constitutional Law, 5.

DEED—3.

See Ejectment, 3.

DEED—4.

See Evidence, 1.

See Chancery, 23, 27, 28.

See Frauds, 3.

DEPOSITION—1.

That the deponent is a seaman on board a gun-boat, in a certain harbor, and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting, is not a sufficient reason for taking his deposition *de bene esse*, under the judicial act of 1790.

The Samuel, (9) 23

DISTRIBUTION—1.

See Fines, Forfeitures, and Penalties.

DOMICILE—1.

1. Goods, the property of merchants actually domiciled in the enemy's country, at the breaking out of a war, are subject to capture and confiscation as prize.

The Mary and Susan (Richardson, claimant), (48, 55) 32, 35

2. The property of a neutral subject, domiciled in the belligerent state, taken in trade with the enemy, is liable to capture and confiscation, in the same manner as that of persons owing permanent allegiance to the state.

The Rugen, note 9, (65) 38

The converse rule is applied to subjects of the belligerent state, domiciled in a neutral country, whose trade with the enemy (except in contraband) is lawful.

Id. (1b.) 38

3. It seems, that the property of a house of trade, in the enemy's country, is confiscable as prize, notwithstanding the neutral domicile of one or more of its partners.

The Antonia Johanna, (108) 62

4. The effect of domicile, on national character, recognized by the Continental Court of Appeals, in prize causes, during the war of the revolution; by the Supreme Court, in questions of municipal law; by Congress, in the navy prize act; by the state courts, and by the lords of appeal in Great Britain.

The Mary and Susan (Richardson, claimant), note 2, (55) 35

Wheat. 1, 2, 3, 4.

DOMICILE—2.

1. It seems that where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicile, and afterwards returned to the U. S. during the war, and re-acquired his native domicile, he became a reintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicile by again emigrating to his adopted country.

The Dos Hermanos, (77, 98) 189, 194

2. Effect of domicile on national character.

Appendix, note 1, (27, 28, 29) 289, 290

See Practice, 10.

See Treaty, 2.

DOMICILE—3.

1. The native character does not revert, by a mere return to his native country, of a merchant, who is domiciled in a neutral country, at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicile still continues.

The Friendschaft, (14, 51) 332, 331

2. British subjects, resident in Portugal (though entitled to great privileges), do not retain their native character, but acquire that of the country where they reside and carry on their trade.

Id. (14, 52) 332, 331

3. By the law of this country the rule of reciprocity prevails upon the recapture of the property of friends. The law of France denying restitution upon salvage after twenty-four hours' possession by the enemy, the property of persons domiciled in France is condemned as prize by our courts on recapture, after being in possession of the enemy that length of time.

The Star, (78, 92) 338, 342

DOMICILE—4.

The property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicile of partners.

The Friendschaft, (105) 525

DUTIES—1.

Under the prize act of the 26th of June, 1812, and the act of the 2d of August, 1813, allowing a deduction of 33 and one-third per centum, on "all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States," are not included goods captured and brought in for adjudication, sold by order of court, and ultimately restored to a neutral claimant, as his property; but such goods are chargeable with the same duties as goods imported in foreign bottoms.

The Nereide, (171) 63

DUTIES—2.

1. The act of the 24th July, 1813, imposing a duty according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicting a penalty of \$100 and double duties, for using any still or stills, or other implements, in distilling spirituous liquors, without first obtaining a license as required by the act, does not extend to the rectification, or purification, of spirits already distilled.

The United States v. Tenbroek, (247) 231

2. The word insolvency, mentioned in the duty act of 1790, ch. 35, sec. 45; and repeated in the act of 1797, ch. 75, sec. 5, and of 1799, ch. 128, sec. 65, means a legal insolvency, which, whenever it occurs, the right of preference accrues to the United States as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency.

Thelsson et al. v. Smith, (306, 424) 271, 278

3. But if before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution, the property is devested out of the debtor, and cannot be made liable to the United States.

Id. (426) 278

4. A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all

subsequent judgment creditors. But the law defeats the preference in favor of the United States, in the cases specified in the act of 1790, ch. 128, sec. 66.

Id.

(420) 277

DUTIES—3.

See Admiralty, 4.

DUTIES—4.

1. By the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a foreign country so far as respects our revenue laws.

United States v. Rice, (247, 254) 563, 564

2. Goods imported into it, are not imported into the United States, and are subject to such duties only as the conqueror may impose.

Id.

(254) 564

3. The subsequent evacuation of the conquered territory by the enemy, and resumption of authority by the United States, cannot change the character of past transactions. The *jus postliminii* does not apply to the case; and goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory. *Id.*

(*Id.*) 564

See Priority.

EJECTMENT—3.

1. A conveyance by the plaintiff's lessor, during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease. The existence of such a lease is a fiction; but it is upheld for the purposes of justice. If it expire during the pendency of a suit, the plaintiff cannot recover his term at law, without procuring it to be enlarged by the court, and can proceed only for antecedent damages.

Robinson v. Campbell,

(224) 376

2. Effect of an outstanding superior title, in ejectment.

Note 1,

(223) 376

3. Although the grantees in a deed executed after, but recorded before, another conveyance of the same land, being *bona fide* purchasers without notice, are, by law, deemed to possess the better title; yet, while L. conveyed to C. the land in controversy specifically, describing himself as devisee of A. S., by whom the land was owned in his lifetime, and by a subsequent deed (which was first recorded), L. conveyed to B. "all the right, title, and claim, which he the said A. S. had, and all the right, title, and interest, which the said L. holds as legatee and representative to the said A. S., deceased, of all land lying and being within the state of Kentucky, which cannot, at this time, be particularly described, whether by deed, patent, mortgage, survey, location, contract or otherwise," with a covenant of warranty against all persons claiming under L., his heirs and assigns; it was held, that the latter conveyance operated only upon lands, the right, title, and interest of which was then in L. and which he derived from A. S.; and, consequently, could not defeat the operation of the first deed, upon the land specifically conveyed.

Brown v. Jackson,

(449) 432

EJECTMENT—4.

1. A patent issued on the 18th November, 1784, for 1,000 acres of land in Kentucky to J. C., who had previously, in July, 1784, covenanted to convey the same to M. G., the ancestor of the lessor of the plaintiff, and on the 29d of June, 1786, M. G. made an agreement with R. B., the defendant in ejectment, to convey to him 750 acres, part of the tract of 1,000 acres, under which agreement R. B. entered into possession of the whole tract; and on the 11th April, 1787, J. C., by direction of M. G., conveyed to R. B., the 750 acres in fulfillment of said agreement, which were severed by metes and bounds from the tract of 1,000 acres. J. C. and his wife, on the 28th April, 1791, made a conveyance in trust of all his property, real and personal, to R. J. and E. C. On the 12th February, 1813, R. J., as surviving trustee, conveyed to the heirs of M. G., under a decree in equity, that part of the 1,000 acres not previously conveyed to R. B., and in the part so conveyed under the decree was included the land claimed in ejectment. R. B., the defendant, claimed the land in controversy under a patent for 400 acres issued on the 15th September, 1786, founded

on a survey made for B. N., May 12th, 1782; and under a deed of the 18th of December, 1786, from one Coburn, who had, in the winter and spring of 1791, entered into and fenced a field within the bounds of the original patent for 1,000 acres to J. C., claiming to hold the same under B. N.'s survey of 400 acres. Held, that upon the issuing of the patent to J. C. in November, 1784, the possession then being vacant, he became by operation of law vested with a constructive actual seizin of the whole tract included in his patent; that his whole title passed by his prior conveyance to M. G. (the ancestor of the plaintiff's lessor); and that when it became complete at law by the issuing of the patent, the actual constructive seizin of J. C. passed to M. G., by virtue of that conveyance. Also, held, that when subsequently, in virtue of the agreement made in June, 1786, between M. G. and R. B. (the defendant), the latter entered into possession of the whole tract under this equitable title, his possession being consistent with the title of M. G., and in common with him, was the possession of M. G. himself, and enured to the benefit of both according to the nature of their respective titles. And, that when subsequently in April, 1787, by the direction of M. G., J. C. conveyed to the defendant 750 acres in fulfillment of the agreement between M. G. and the defendant, and the same were severed by metes and bounds in the deed from the tract of 1,000 acres, the defendant became sole seized in his own right of the 750 acres so conveyed. But as he still remained in the actual possession of the residue of the tract, within the bounds of the patent, which possession was originally acquired under M. G., the character of his tenure was not changed by his own act, and therefore he was *quasi* tenant to M. G., and, as such, continued the actual seizin of the latter, over his residue at least, up to the deed from Coburn to the defendant in 1786. Also, held, that if Coburn, in 1791, when he entered and fenced a field, &c., had been the owner of B. N.'s survey, his actual occupation of a part would not have given him a constructive actual seizin of the residue of the tract included in that survey, that residue being at the time of his entry and occupation in the adverse seizin of another person, (M. G.) having an older and better title. But there being no evidence that Coburn was the legal owner of B. N.'s survey, his entry must be considered as an entry without title, and consequently his disseizin was limited to the bounds of his actual occupancy.

Barr v. Gratz,

(213) 553

2. The deed from J. C. and wife, to D. J. and E. C., in 1791, was not within the statute of champerty and maintenance of Kentucky; for as to all the land not in the actual occupancy of Coburn, the deed was operative, the grantors and those holding under them having at all times had the legal seizin.

Id.

(224) 556

3. The deed of 1813, from R. J., surviving trustee, under the decree in equity, was valid without being approved by the court, and recorded in the court, according to the statute of Kentucky of the 16th February, 1808, c. 453.

Id.

(*Id.*) 556

4. Where the defendant in ejectment, for lands in North Carolina, has been in possession under title in himself, and those under whom he claims, for a period of seven years, or upwards such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself by positive proof within some of the disabilities provided for by that statute.

Somerville v. Hamilton,

(230, 238) 558

5. An agreement, by parol, between two proprietors of adjoining lands, to employ a surveyor to run the divided line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run and marked on a plat by the surveyor in their presence, as the boundary, held to be conclusive in an action of ejectment after a corresponding possession of 20 years by the parties, and those claiming under them respectively.

Boyd v. Graves,

(513) 628

See Evidence, 1, 2, 3, 4.

ELECTION AND SATISFACTION—2.

See Chancery, 1, 2, 3.

EMBARGO—1.

See Non-Intercourse.

Wheat. 1, 2, 3, 4.

EMBARGO—2.

1. Where a seizure was made under the 11th section of the embargo act of April, 1808, it was determined, that no power is given by law to detain the cargo if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law; and in case of its detention, to bring an action of replevin therefor in the state court.

Stocum v. Mayberry. (1, 10) 169, 171

2. In seizures under the embargo laws, the law itself is a sufficient justification to the officer, where the discharge of duty is the real motive, and not the pretext for detention; and it is not necessary to show probable cause.

Otis v. Walter. (18, 21) 174, 175

3. But the embargo act of the 26th of April, 1808, related only to vessels ostensibly bound to some port in the United States, and a seizure after the termination of the voyage is unjustifiable; and no farther detention of the cargo is lawful, than what is necessarily dependent on the detention of the vessel.

Id. (21) 175

4. It is not indispensable to the termination of a voyage, that a vessel should arrive at the terminus of her original destination; but it may be produced by stranding, stress of weather, or any other cause inducing her to enter another port with a view to terminate her voyage *bona fide*.

Id. (23) 175

5. But if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention.

Id. (1b.) 175

6. Under the embargo act of the 23d December, 1807, the words "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but, consequently, rendered them liable to forfeiture under the supplementary act of the 9th January, 1808.

The William King. (148, 153) 206, 207

7. In such case, if the vessel be actually and *bona fide* carried by force to a foreign port, she is not liable to forfeiture.

Id. (153) 207

8. But if the capture, under which it is alleged the vessel is compelled to go to a foreign port, be fictitious and collusive, condemnation will ensue.

Id. (148) 206

ERROR—1.

1. Where the final judgment or decree, in the highest court of law, or equity, of a state, is re-examinable in the Supreme Court of the United States, the return of a copy of the record, under the seal of the court, certified by the clerk, is a sufficient return to the writ of error.

Martin v. Hunter's lessee. (361) 111

2. It need not appear that the judge, who granted the writ of error, did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act, that provision being merely directory to the judge.

Id. (1b.) 111

3. See Constitutional Law, 1, 2.

ERROR—4

Practice, 1, 2, 3, 4.

EVIDENCE—1.

1. Evidence, by hearsay and general reputation, is admissible only as to pedigree.

Davis v. Wood. (6) 22

2. Verdicts are evidence between parties and privies only.

Id. (8) 23

3. Where the evidence is so contradictory and ambiguous as to render a decision difficult, farther proof will be ordered in revenue or instance causes.

The Samuel. (18, 19) 25

4. Rules of evidence, adopted by the court in such cases. 1st. Where the claimants assume the *onus probandi*, not to restore, unless the defense be proved beyond a reasonable doubt. 2d. If the evidence of the claimants be clear and precisely in point, to pronounce restitution, unless that evidence be clouded with incredibility, or encounter Wheat. 1, 2, 3, 4.

ed by strong presumptions of *mala fides* from the other circumstances of the case.

The Octavia. note 5, (24) 26

EVIDENCE—2.

1. Where a witness, a clerk to the plaintiff, swore that the several articles of merchandise, contained in the account annexed to his deposition, were sold to the defendant by the plaintiff, and were charged in the plaintiff's day-book by the deponent and another person (since dead), and that the deponent delivered the goods, and farther swore, that he had referred to the original entries in the day-book; held, that this was sufficient evidence to prove the sale and delivery of the goods.

McCoul v. Lekamp's Adm. (111, 116) 197, 198

2. Law of France, as to evidence of tradesmen's books.

Id. note 1, (117) 199

3. English cases on the same subject.

Id. note 1, (118) 199

4. Rules of practice in the United States.

Id. note 1, (1b.) 199

5. Interest in the subject-matter of the suit, a fatal objection to a witness by the civil law.

Laidlaw et al. v. Organ. note 2, (192) 217

6. The answer of one defendant to a bill in chancery cannot be used as evidence against his co-defendant; and the answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless they are a part of the *res gestae*.

Leeds v. The Marine Ins. Co., (380, 383) 266, 267

See Prize.

EVIDENCE—3.

See Practice, 2, 3, 4, 6, 12, 13, 15, 16, 18.

See Chancery, 5.

EVIDENCE—4.

1. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend.

Williams v. Peyton. (77, 79) 518, 519

2. In the case of lands sold for the non-payment of taxes, the Marshal's deed is not even *prima facie* evidence that the pre-requisites required by law have been complied with.

Id. (79) 519

3. A deed more than thirty years old, proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, is admissible in evidence without regular proof of its execution.

Barr v. Gratz. (221) 555

4. In general, judgments and decrees are evidence only in suits between parties and privies; but the doctrine is wholly inapplicable to a case where a decree in equity was introduced on the trial of an ejectment, not as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate.

Id. (220) 555

5. The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself; but the fact, that the vessel cruising under such commission is employed by such new government, may be established by other evidence without proving the seal.

The Estrella. (308) 576

6. Where the privateer, cruising under such a commission was lost subsequent to the capture in question, the previous existence of the commission on board was allowed to be proved by parol evidence.

Id. (304) 576

See Covenant, 1, 2.

See Ejectment, 4.

FARTHER PROOF—1.

See Evidence.

See Prize.

FARTHER PROOF—3.

See Prize, 1, 2.

FINES, FORFEITURES, AND PENALTIES—1.

1. The personal representatives of a deceased collector and surveyor, who was such at the time of the seizure being made, or prosecution, or suit commenced, and not their successors in office, are entitled to that portion of fines, forfeitures and penalties, which is, by law, to be distributed among the revenue officers of the district where they were incurred.

Jones et al. v. Shore's Executor. (462) 136

2. In such case, there being no naval officer in the district, the division adjudged to be made, in equal proportions, between the collector and surveyor.

Id. (475) 139

FOREIGN SUIT—1.

1. The commencement of another suit, for the same cause of action, in the court of another state, since the last continuance, cannot be pleaded in abatement of the original suit.

Renner & Bussard v. Marshall. (215) 74

2. The *exceptio rei judicate* applies only to final, or definitive, sentences in another state, or in a foreign court, upon the merits of the case.

Id. note 1. (217) 75

FREIGHT—1.

See Hypothecation, 1.

See Prize.

FRAUDS—4.

1. E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship *Aristides*, W. P. Z., supercargo, say at \$2,522.83, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration under the statute of frauds being set up as a defense, on the ground of the defect of mutuality in the written contract; the court below left it to the jury to infer from the evidence an actual performance of the agreement; the jury found a verdict for the plaintiff, and the court below rendered judgment thereon. The judgment affirmed by this court.

Weightman v. Caldwell. (85) 520

2. Note on the 17th sec. of the statute of frauds, as to the sale of goods.

Id. note 3. (89) 521

3. A deed made upon a valuable and adequate consideration, which is actually made, and the change of property *bona fide*, or such as is purported to be, cannot be considered as a conveyance to defraud creditors.

Wheaton v. Sexton. (503, 507) 626, 627

4. An agreement by parol, between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run and marked on a plat by the surveyor in their presence, as the boundary, is conclusive in an action of ejectment, after a correspondent possession of 20 years by the parties and those claiming under them. Such an agreement is not within the statute of frauds, as being a contract for the sale of lands, or any interest in or concerning them.

Boyd v. Graves. (513) 628

See Chancery, 26, 27, 28.

GUARANTY—3.

1. B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th January, 1806, mentioning that a ship, belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, and purchase and put on board of her 500 bales of cotton on the owners' account, "for the payment of all shipments on the owners' account, thy bills on T. & Son, of Portland, or me, sixty days sight, shall meet due honor." On the 13th February, B. again wrote to L., reiterating the former request, and in-

closing a letter from T. & Son to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me for their account, for cotton they ordered shipped by the Mac, shall meet with due honor." On the 24th July, 1806, B. again wrote L. on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which thy bill on me shall meet with due honor at sixty days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid. He afterwards drew two bills on T. & Son, payable in New York, which were protested for non-payment, they having, in the meantime, failed; and about two years afterwards, drew bills on B. for the balance due, including the two protested bills, damages and interest. Held, that the letters of the 13th February, and 24th July, contained no revocation of the undertaking in the letter of the 9th January; that although the bills on T. & Son were not drawn according to B.'s assumption, this could only affect the right of L. to recover the damages paid by him on the return of the bills, but that L. had still a right to recover on the original guaranty of the debt. It was also held that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also, held, that L. had a right to recover from B. the commissions, disbursements, and other charges of the transaction.

Lanuse v. Barker. (101) 343

2. The cases on the subject of guaranty collected.

Note 1. (148) 356

See Bills of Exchange, &c., 5, 6.

HYPOTHECATION—1.

1. A hypothecation of the ship and freight by the master, is invalid, unless it is shown by the creditor that the advances were necessary to effectuate the object of the voyage, or the safety of the ship, and the supplies could not be procured upon the owner's credit, or with his funds at the place.

The Aurora. (102) 46

2. A bottomry bond given to pay off a former bond, must stand or fall with the first hypothecation, and the subsequent lenders can only claim upon the same ground with the preceding.

Id. (107) 48

3. Illustration of these rules by foreign writers and codes.

Id. note 1. (109) 48

INDICTMENT—1.

See Constitutional Law, 6.

INDICTMENT—2.

1. Under the act of the 6th July, 1812, "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act.

The United States v. Sheldon. (119) 199

2. Driving living fat oxen, &c., on foot is not a transportation thereof within the true intent and meaning of the same act.

Id. (121) 199

INFORMATION—1.

An information *in rem*, in a revenue, or instance cause, is synonymous with a libel, and is not a common law proceeding.

The Samuel. (14) 24

INSURANCE—1.

1. The insurer on memorandum articles, is only liable for a total loss, which can never happen where the cargo, or part of it, has been sent on by the insured, and reaches the original port of its destination.

Moreau v. The United States Ins. Co. (219) 75

2. Where the ship being cast on shore, near the port of destination, the agent of the insured em-

Wheat. 1, 2, 3, 4.

ployed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one-half was landed, dried, and sent on to the port of destination, and sold by the consignees, at about one-quarter the price of sound corn, this was held not to be a total loss, and the insurer not to be liable.

Id. (1b.) 75

3. With respect to such articles, the underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average.

Id. note 2, (*Blays v. The Chesapeake Ins. Co.*) (237) 78

4. It is now the established rule, that a damage exceeding the moiety of the value of the thing insured, is sufficient to authorize an abandonment, but this rule has been deemed not to extend to a cargo consisting wholly of memorandum articles.

Id. note 3, (*Marcardier v. The Chesapeake Ins. Co.*) (228) 78

So, also, in the cargo of a mixed character, consisting of articles, some within, and some without, the purview of the memorandum, no abandonment, for mere deterioration in value, during the voyage, is valid, unless the damage on the non-memorandum articles exceeds a moiety of the whole cargo, including the memorandum articles.

Id. (1b.) 78

5. Law of Italy and France as to memorandum articles.

Id. note 1. (231) 79

INSURANCE—3.

1. Insurance on a vessel and freight "at and from Teneriffe to the Havanna, and at and from thence to New York, with liberty to stop at Matanzas," with a representation that the vessel was to stop at Matanzas to know if there were any men-of-war off the Havanna. The vessel sailed on the voyage insured, and put into Matanzas to avoid British cruisers, who were then off the Havanna, and were in the practice of capturing neutral vessels trading from one Spanish port to another. While at Matanzas, she unloaded her cargo, under an order from the Spanish authorities; and afterwards proceeded to the Havanna, whence she sailed on her voyage for New York, and was afterwards lost by the perils of the seas. It was proved that the stopping and delay at the Havanna was necessary to avoid capture; that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished. Held, that the order of the Spanish government was obtained under such circumstances as took from it the character of a *vis major* imposed upon the master, and was therefore no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unloading the cargo was not a deviation. This case distinguished from that of the *Maryland Ins. Co. v. LeRoy*, 7 Cranch, 28.

Hughes v. The Union Ins. Co., (159) 357

2. To entitle the plaintiff to recover in an action on a policy of insurance, the loss must be occasioned by one of the perils insured against. The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial whether the loss so produced occurred during the continuance of the barratry or afterwards.

Swann v. The Union Insurance Company, (168) 361

3. Cases on the subject of barratry.

Note 1, (171) 362

4. A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it sustains a loss by a peril within that clause of the policy insuring against the "arrests, restraints, and detentions of kings," &c., for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful.

Olivera v. The Union Insurance Company, (183) 365

5. A blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted.

Id. (1b.) 365

6. A technical total loss must continue to the time of abandonment. *Quere*, as to the application of this principle to a case where the loss was by a restraint on the blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of abandonment.

Id. (1b.) 365

Wheat. 1, 2, 3, 4.

INSOLVENT LAW—4.

See Constitutional Law, 1, 2, 5.

JURISDICTION—1.

1. The courts of this country have no jurisdiction to redress any supposed wrongs committed on the high seas, upon the property of its citizens, by a cruiser regularly commissioned by a foreign and friendly power, except when such cruiser has been fitted out in violation of our neutrality.

L'Invincible, (238) 80

2. Law of France and Spain, and practice of the Italian states, as to the restitution of the property of their subjects, captured by foreign cruisers, and brought into their ports.

Id. note 3, (243) 82

3. A public vessel of war, belonging to the Emperor Napoleon, which was before the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself in a friendly manner, held to be exempt from the jurisdiction of this country, and could not be reclaimed by the former owner in its tribunals.

Id. note 1, (*The Exchange*) (252) 84

4. The exclusive cognizance of questions of prize belongs to the courts of the capturing power; but the admiralty courts of a neutral may take jurisdiction so far as to ascertain whether the capture be piratical, or made in violation of its neutrality.

Id. (258) 86

5. A citizen of a territory cannot sue a citizen of a state, in the court of the United States; nor can those courts take jurisdiction by other parties being joined, who are capable of suing; all the parties, on each side, must be subject to the jurisdiction, or the suit will be dismissed.

The Corporation of New Orleans v. Winter et al. (91) 44

6. In this respect, there is no distinction between a territory and the District of Columbia; the citizens of neither can sue a citizen of a state, in the courts of the United States.

Id. (94) 45

JURISDICTION—2.

1. Where a seizure for a breach of the laws of the United States is finally adjudged wrongful, and without probable cause, by their courts, the party may proceed, at his election, by a suit at common law, or in the instance court of admiralty, for damages for the illegal act. But the common law remedy in such case must be sought for in the state courts; the courts of the United States having no jurisdiction to decide on the conduct of their officers, in the execution of their laws, in suits at common law, until the case shall have passed through the state courts.

Sicum v. Mayberry et al. (10) 171

2. The jurisdiction of the Circuit Court having once vested between citizens of different states, cannot be defeated by a change of domicile of one of the parties, and his removal into the same state with the adverse party, *pendente lite*.

Morgan's heirs v. Morgan et al. (390, 397) 242, 244

3. This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, according to the 7th section of the act of the 10th of May, 1800, "providing for the sale of the lands of the United States north-west of the Ohio, and above the mouth of Kentucky River," which *mandamus* had been refused by the Supreme Court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state.

McCluny v. Sullivan, (366) 263

4. Cases where the courts of the United States have, or have not, authority to issue writs of *mandamus*.

Id. note 2, (370) 263

See constitutional law.

JURISDICTION—3.

1. M'R., a citizen of Kentucky, brought a suit in equity, in the Circuit Court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E. without any designation of citizenship; all

the defendants appeared and answered; and a decree was pronounced for the plaintiff: it was held, that if a joint interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause. But that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

Cameron v. M'Roberts, (591) 467

2. This court has no jurisdiction of causes brought before it upon a certificate of division of opinions of the judges of the Circuit Court for the District of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgments and decrees of the latter.

Ross v. Triplett, (600) 469

See Admiralty, 5, 8, 16, 17, 18, 19, 20, 21, 22, 23, 24.

See Constitutional Law, 2, 3.

See Patent, 7.

See Practice, 14.

See Prize, 10, 11, 12, 13, 14.

JURISDICTION—4.

See Chancery, 5, 6, 7, 18, 19.

See Prize, 2, 8, 7, 9.

LEX LOCI—4.

A discharge under a foreign bankrupt law is no bar to an action, in the courts of this country, on a contract made here.

M'Mullan v. M'Neil, (208, 218) 552, 553

LIBEL—1.

See Information.

See Admiralty, 1.

LIBEL—3.

See Practice, 11.

LIBEL—4.

See Practice.

LICENSE—1.

1. Navigating under a license from the enemy, is cause of confiscation, and is closely connected, in principle, with the offense of trading with the enemy; in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.

The Hiram, (440) 131

2. Where the ship-owner procured the license, the existence of which was known to the supercargo, but the claimants of the cargo were ignorant that the vessel sailed under the protection of a license, this was held to constitute such constructive notice to the claimants of the cargo as precluded them from showing the want of actual notice.

Id., (1b.) 131

LICENSE—2.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage, or the port of destination.

The Ariadne, (143) 205

LICENSE—3.

1. One citizen of the United States has no right to purchase of, or sell to another, a license or pass from the public enemy, to be used on board an American vessel.

Patton v. Nicholson, (204) 371

2. Cases on the subject of Licenses collected.

Note 1, (207) 372

LICENSE—4.

1. A vessel and cargo, which is liable to seizure as enemy's property, or for sailing under the pass or license of the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The *delictum* is not purged by the termination of the voyage.

The Caledonian, (100) 523

2. The circumstance of a vessel having been sent into an enemy's port for adjudication, and after-

wards permitted to resume her voyage, held to raise a violent presumption that she had a license, which the claimant not having repelled by explanatory evidence, condemnation was pronounced.

The Langdon Cheves, (103) 525

LIEN—1.

See Statutes of Virginia.

LIMITATION—1.

See Statutes of Kentucky, 4.

LIMITATION OF ACTIONS—3

The terms "beyond seas," in the proviso or saving clause of a statute of limitations, are equivalent to without the limits of the state where the statute is enacted; and a party who is without those limits is entitled to the benefit of the exception.

Murray v. Baker, (541) 455

See Statutes of Tennessee, 4.

LIMITATION OF ACTIONS—4.

See Constitutional law, 4.

See Ejectment, 4.

LOCAL LAW—1.

See Statutes of Rhode Island.

See " of Maryland.

See " of North Carolina.

See " of Kentucky.

See " of Virginia.

See " of Tennessee.

LOCAL LAW—2.

1. It is essential to the validity of an entry, that the land intended to be appropriated should be so described as to give notice of the appropriation to subsequent locators.

Johnson v. Pannel's heirs, (206, 208) 221

2. In taking the distance from one point to another on a large river, the measurement is to be with its meanders, and not in a direct line.

Id., (211) 222

3. In ascertaining a place to be found by its distance from another, the vague words "about" or "nearly," and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance is to be taken positively.

Id., (1b.) 222

4. Reasonable certainty is required, both in the descriptive call and the locative call of an entry: if the descriptive call will not inform a subsequent locator in what neighborhood he is to search for the land, the entry is defective, unless the particular object is one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive calls, the entry is also defective. A single call may, at the same time, be of such a nature (as, for example, a spring of general notoriety), as to constitute within itself a call of description and of location; but if this call be accompanied with another, such as a marked tree at the spring, it seems to be required that both should be satisfied.

Id., (1b.) 222

5. The call for an unmarked tree of a kind which is common in the neighborhood of a place sufficiently described by the other parts of the entry to be fixed with certainty may be considered as an immaterial call.

Id., (212) 222

6. Therefore, where the entry was in the following words, "D. P. enters 2,000 acres on a treasury warrant on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree on the river bank, running up the river from thence 1,000 poles, thence at right angles to the same, and back for quantity," it was held, that the call for a sugar tree might be declared immaterial, and the location be sustained on the other calls.

Id., (219) 224

7. The entry in this case was decreed to be surveyed, beginning 12 miles below the mouth of Licking on the bank of the Ohio, and running up that river 1,000 poles; which line was to form the base of a rectangular parallelogram, to include 2,000 acres of land.

Id., (1b.) 224

8. An error in description is not fatal in an entry if it does not mislead a subsequent locator. The

Wheat, 1, 2, 3, 4.

following entry, "H. M. enters 1,687 acres of land on a treasury warrant, No. 6,168, adjoining Chapman Aston on the west side, and Israel Christian on the north, beginning at Christian's north-west corner, running thence west, 300 poles; thence north parallel with Aston's line, until an east course to Aston's line will include the quantity," was held valid, although no such entry as that referred to could be found in the name of Aston, but the particular description clearly pointed out an entry in the name of Chapman Austin, as the one intended, and this, together with Christian's entry, satisfied the calls of H. M.'s entry.

Shipp v. Miller's heirs, (316) 248
9. It is a general rule that when all the calls of an entry cannot be complied with, because some are vague or repugnant, the latter may be rejected or controlled by other material calls which are consistent and certain. Course and distance yield to known, visible, and definite objects; but they do not yield, unless to calls more material and equally certain.

Id., (321) 250
10. It is a settled rule that where no other figure is called for in an entry, it is to be surveyed in a square, coincident with the cardinal points, and large enough to contain the given quantity, and that the point of beginning is deemed to be the centre of the base line of such square.

Id., (323) 250
11. The act of Kentucky of 1797, taken in connection with preceding acts, declaring that entries for land shall become void if not surveyed before the first day of October, 1798, with a proviso allowing to infants and *femes covert* three years after their several disabilities are removed to complete surveys on their entries; held, that if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners. Distinction between this statute and a statute of limitations of personal actions.

Id., (Ib.) 250
12. A call for a spring branch generally, or for a spring branch to include a marked tree at the head of such spring, is not a sufficiently specific locative call; and where farther certainty is attempted to be given by a call for course and distance, and the course is not exact, and the distance called for is a mile and a half from the place where the object is to be found, the entry is void for uncertainty.

Id., (326) 251
13. By the act of incorporation of the Union Bank of Georgetown, ch. 86, sec. 11, the shares of any individual stockholder are transferable only on the books of the bank, according to the rules (conformably to law) established by the president and directors; and all debts due and payable to the bank, by a stockholder, must be satisfied before a transfer shall be made, unless the president and directors should direct to the contrary. Held, that no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation of which he is bound to take notice.

The Union Bank v. Laird, (300) 269
14. A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either until the debt is paid; therefore, the bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same. *Id.*, (304) 271
See Statutes of North Carolina.
See Statutes of Maryland.

LOCAL LAW—3.

1. Note on the laws of Louisiana.
Shepherd v. Hampton, note 1, (302) 393
2. If, under the Virginia land law, the warrant must be lodged in the office of the surveyor at the time when the survey is made, his certificate stating that the survey was made by virtue of the governor's warrant, and agreeably to the royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time.

Craig v. Radford, (594, 597) 467, 468
3. The 6th sec. of the act of Virginia of 1748, entitled, "An act directing the duty of surveyors of lands," is merely directory to the officer, and does not make the validity of the survey depend upon his conforming to its requisitions.
Id., (597) 468
Wheat. 1, 2, 3, 4.

4. A survey made by the deputy-surveyor is, in law, to be considered as made by the principal surveyor. *Id.*, (588) 468

See Bills of Exchange, &c., 1, 6.
See Chancery, 1, 2.
See Ejectment, 3.
See Statutes of Tennessee.
See Statutes of North Carolina.
See Statutes of Georgia.

LOCAL LAW—4.

1. The statute of charitable uses of the 43d Elizabeth, c. 4, is not in force in Virginia.

Baptist Association v. Hart's Ex'rs, (1) 499
2. If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle, that the course and distance must yield to natural objects called for in the patent.

McIver's lessee v. Walker, (444, 447) 611, 612
3. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey; consequently distances must be lengthened or shortened, and courses varied, so as to conform to the natural objects called for.

Id., (447) 612
4. If a patent refer to a plat annexed, and if in that plat a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as nearly as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey nor the patent called for that water-course.

Id., (448) 612
5. The rule which prevails in Kentucky and Ohio, as to land titles, is, that, at law, the patent is the foundation of title, and neither party can bring his entry before the court; but a junior patentee, claiming, under an elder entry, may, in chancery, support his equitable title.

McArthur v. Browder, (488, 491) 622, 623
6. A description which will identify the lands is all that is necessary to the validity of a grant; but the law requires that an entry should be made with such certainty, that subsequent purchasers may be enabled to locate the adjacent residuum.

Id., (492) 623
7. An entry for 1,000 acres of land in Ohio, or Deer Creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line on each side of the creek 400 poles, thence up the creek 400 poles in a direct line, thence from each side of the given line with the upper line at right angles with the side lines for quantity," is a valid entry.

Id., (495) 624
8. Distinction between amending and withdrawing an entry.

Id., (Ib.) 624
See Chancery, 19.
See Constitutional Law, 6, 7.
See Covenant, 1.
See Ejectment, 1, 2, 3, 4.

MASTER—2.

1. Where the owner of certain slaves, and also part owner of a vessel, hired the slaves to the master of the vessel, to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring; held, that the master, having acted with good faith, was not responsible for the escape of the slaves in a foreign port, which was one of the contingent *termini* of the voyage; and, consequently, within the hazards to which the owner knew his property might be exposed; although it was doubtful whether the master had strictly pursued his orders in going to such port.

Beverly v. Brooke, (100) 194
2. Duties of the master to the ship-owner, and extent of his responsibility. *Id.* note 1. (109) 197
3. Effect of the illegal acts of the master upon the owner's property, and as the agent of the cargo. Appendix, note 1. (87) 293

NATIONAL CHARACTER—1.

See Domicile.

NON-INTERCOURSE—1.

Under the 8d section of the act of Congress, of the 28th June, 1809, every vessel bound to a foreign permitted port, was obliged to give bond, with a condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port.

The Edward, (285) 87
See Evidence, 3, 4.

NON-INTERCOURSE—3.

See Admiralty, 1, 2, 25.

NOTES—3.

See Bills of Exchange, &c.

ORDERS IN COUNCIL—1.

Dates and substance of the British orders in council, French decrees, and consequent acts of the United States government.

The Edward, note 1, (277) 90

PATENT—3.

1. *Quere*, Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of the several machines separately, as well as a right to the exclusive use of those machines in combination.

Evans v. Eaton, (444, 506) 430, 446
2. However this may be, the act of the 21st of January, 1808, ch. 117, "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery and improvements, in the art of manufacturing flour, and in the several machines applicable to that purpose.

Id., (506) 446
3. *Quere*, Whether Congress can constitutionally decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention.

Id., (513) 448
4. The act of the 21st of January, 1808, ch. 117, for the relief of Oliver Evans, does not decide the fact of the originality of his invention, but leaves the question open to investigation under the general patent law.

Id., (513) 448
5. Under the 8th section of the patent law, ch. 156, if the thing secured by patent had been in use, or had been described in a public work anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description, or not.

Id., (514) 448
6. Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously discovered; but where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

Id., (514, 518) 448, 449
7. The act for the relief of O. Evans is grafted on the general patent law, so as to give him a right to sue in the Circuit Court, for an infringement of his patent rights, although the defendant may be a citizen of the same state with himself.

Id., (518) 449
8. Note on the patent laws. Appendix, note II. (13) 484

See Practice, 18, 19.

PENALTY—1.

See Fines, Forfeitures, &c.

PIRACY—3.

1. A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the 8th section of the

714

act of 1790, ch. 36 (IX.), for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof.

The United States v. Palmer, (610, 626) 472, 476

2. The crime of robbery, as mentioned in the act, is the crime of robbery as recognized and defined at common law.

Id., (630) 477

3. The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, or on persons in a foreign vessel, is not piracy under the act, and is not punishable in the courts of the United States.

Id., (630) 477

4. When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States. If that government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.

Id., (634) 478

5. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly-created government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

Id., (635) 478

PLEADING—1.

If matter in abatement is pleaded *pute darrein continuance*, the judgment, if against the defendant, is peremptory.

Renner & Bussard v. Marshall, (218) 75

See Admiralty, 1.
See Amendments, 1, 2.
See Foreign Suit.
See Information.

PLEADING—2.

1. Variances between the writ and declaration, are matters pleadable in abatement only, and cannot be taken advantage of upon general demurrer to the declaration.

Duwall v. Craig, (45, 55) 180

2. No proof of a deed is necessary, where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

Id., (61) 184

3. Manner of assigning breaches upon the covenants of title, &c.,

Id. note 1, (62) 185

4. In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly; held, that this was matter pleadable in abatement only, and that by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy.

Liter et al. v. Green, (306, 307) 246

5. The tenants could not, in this case, severally plead, in addition to the mise or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error.

Id., (306) 246

6. *Quere*, Whether the tenants could plead the mise severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue.

Id., (308) 246

7. Under such pleas, and the replication prescribed by the statute, the mise was joined; the parties proceeded to trial; and the following general verdict was found, viz.: "The jury find that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned."

Wheat. 1, 2, 3, 4.

It was held, that this verdict, being certain to a common intent, was sufficient to sustain a judgment.

Liter et al. v. Green, (300) 247

8. Also held, that a joint judgment against the tenants for costs, as well as the land, was correct. *Id.* (311) 247

PLEADING—3.

1. If an action be brought against an officer making a seizure under the laws of the United States, for a supposed trespass while the suit for the forfeiture is depending in the United States courts, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action. If the action is brought after a decree of condemnation, then that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then that may be pleaded as a bar. If, after an acquittal, without such certificate, then the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture in his defense without averring *in pendenza*, or a condemnation, or an acquittal, with a certificate of reasonable cause of seizure, the plea is bad; if it attempts to put in issue the question of forfeiture in a state court.

Gelston v. Hoyt, (246, 313) 382, 399
2. The statute of 1794, ch. 50, s. 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince, &c., to cruise against the subjects, &c., of any other foreign prince, &c., does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new government previously belonged. And a plea setting up a forfeiture under that statute in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

Id. (328) 402
3. A plea justifying a seizure under the statute of 1794, ch. 50, need not state the particular prince or state by name, against whom the ship was intended to cruise.

Id. (329) 402
4. A plea justifying a seizure and detention by virtue of the 7th sec. of the statute of 1794, ch. 50, under the express instructions of the President, must aver that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed.

Id. (331) 402
5. To trespass for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it by way of new assignment.

Id. (326) 401
6. A plea alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that the property thereby became, and was actually, forfeited, and was seized as forfeited.

Id. (327) 401

POWER—4.

In the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede its exercise.

Williams v. Peyton, (77, 79) 518, 519

PRACTICE—1.

1. Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below.

The Elsinour, (430) 130

2. In cases of joint or conclusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

The George, The Bothnea, and the Janstaff (408) 123

3. If the national character of the property captured and brought in for adjudication, appears ambiguous, and neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no Wheat. 1, 2, 3, 4.

claimant appears within that time, the property is condemned to the captors.

The Harrison, (208) 95

4. In prize causes, this court has an appellate jurisdiction only, and a claim cannot, for the first time, be interposed here; but where the court below had proceeded to adjudication, before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein and the libel to be amended, &c.

Id. (Ib.) 95

5. An agreement in a court of common law, chancery, or prize, made under a clear mistake, will be set aside.

The Hiram, (444, 447) 131, 132

6. Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be rendered by the court, without a writ of inquiry.

Renner & Bussard v. Marshall, (218) 75

7. Until the cause is heard, in a question of prize, further proof cannot be admitted; but if, upon the opening, it appears to be a case for further proof, it may be admitted *instanter*, unless the court should be of opinion that the captors ought to be allowed to produce further proof also.

The Venus, (113) 49

8. General principles of the practice in prize causes.

Appendix, note II., (494) 145

9. Examination of the captured person upon the standing interrogatories.

Id. (495, 496) 145

10. Delivery of the papers found on board the captured vessel.

Id. (495) 145

11. Hearing originally confined to the documentary evidence and depositions of the captured persons.

Id. (498, 499) 146

12. Claim and monition to proceed to adjudication.

Id. (500) 147

13. By what circumstances a claim may be excluded.

Id. (501) 147

14. Delivery upon bail and sale of prize property.

Id. (502, 503) 147, 148

15. Further proof, when admitted, and how excluded.

Id. (504) 148

16. Plea and proof. *Id.* (Ib.) 148

17. Invocation of papers from other causes, and affidavits of captors.

Id. (508) 149

PRACTICE—2.

1. A. L. brought an action of *assumpsit* in the Circuit Court, and after issue joined, the plaintiff died, and the suit was revived by *scire facias* in the name of his administratrix. While the suit was still depending the administratrix intermarried with F. A., which marriage was pleaded *pute darrein continuance*. Held, that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment, under the judiciary act of 1789, ch. 20, sec. 31.

McCrut v. Lekamp's Adm., (111, 115) 197, 198

2. Under the judiciary act of 1789, ch. 20, and the act of the 3d of March, 1803, ch. 93, causes of admiralty and maritime jurisdiction, or in equity, cannot be removed, by writ of error, from the Circuit Court for re-examination in the Supreme Court.

The San Pedro, (132) 202

3. The appropriate mode of removing such causes is by appeal; and the regulations contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, when it shall operate as a *superedeas*; the citation to the adverse party, the security to be given by the plaintiff in error, and the restrictions upon the appellate court as to reversals, &c., are applicable to appeals, and to be substantially observed; except that where the appeal is prayed at the same term when the decree is pronounced, a citation is not necessary.

Id. (142) 205

4. Nature of the process of sequestration in the practice of the civil law.

Laidlaw v. Organ, note 1, (179) 214

NON-INTERCOURSE—1.

Under the 3d section of the act of Congress, of the 28th June, 1809, every vessel bound to a foreign permitted port, was obliged to give bond, with a condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port.

The Edward, (285) 87
See Evidence, 3, 4.

NON-INTERCOURSE—3.

See Admiralty, 1, 2, 25.

NOTES—3.

See Bills of Exchange, &c.

ORDERS IN COUNCIL—1.

Dates and substance of the British orders in council, French decrees, and consequent acts of the United States government.

The Edward, note 1, (277) 90

PATENT—3.

1. *Quere*, Whether, under the general patent law, improvements on different machines can be comprehended in the same patent, so as to give a right to the exclusive use of the several machines separately, as well as a right to the exclusive use of those machines in combination.

Evans v. Eaton, (444, 508) 430, 448
2. However this may be, the act of the 21st of January, 1808, ch. 117, "for the relief of Oliver Evans," authorizes the issuing to him of a patent for his invention, discovery and improvements, in the art of manufacturing flour, and in the several machines applicable to that purpose.

Id., (508) 448
3. *Quere*, Whether Congress can constitutionally decide the fact, that a particular individual is an author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention.

Id., (512) 448
4. The act of the 21st of January, 1808, ch. 117, for the relief of Oliver Evans, does not decide the fact of the originality of his invention, but leaves the question open to investigation under the general patent law.

Id., (513) 448
5. Under the 6th section of the patent law, ch. 156, if the thing secured by patent had been in use, or had been described in a public work anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or description, or not.

Id., (514) 448
6. Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvement on machines previously discovered; but where his claim is for an improvement on a machine, he must show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

Id., (514, 518) 448, 449
7. The act for the relief of O. Evans is grafted on the general patent law, so as to give him a right to sue in the Circuit Court, for an infringement of his patent rights, although the defendant may be a citizen of the same state with himself.

Id., (518) 449
8. Note on the patent laws. Appendix, note II. (13) 484
See Practice, 18, 19.

PENALTY—1.

See Fines, Forfeitures, &c.

PIRACY—3.

1. A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the 8th section of the 714

act of 1790, ch. 36 (IX.), for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof.

The United States v. Palmer, (610, 626) 472, 476

2. The crime of robbery, as mentioned in the act, is the crime of robbery as recognized and defined at common law.

Id., (630) 477

3. The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, or on persons in a foreign vessel, is not piracy under the act, and is not punishable in the courts of the United States.

Id., (630) 477

4. When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States. If that government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.

Id., (634) 478

5. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly-created government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

Id., (636) 478

PLEADING—1.

If matter in abatement is pleaded *pais darrain continuance*, the judgment, if against the defendant, is peremptory.

Renner & Bussard v. Marshall, (218) 75

See Admiralty, 1.
See Amendments, 1, 2.
See Foreign Suit.
See Information.

PLEADING—2.

1. Variances between the writ and declaration, are matters pleadable in abatement only, and cannot be taken advantage of upon general demurrer to the declaration.

Duwall v. Craig, (45, 55) 180

2. No profert of a deed is necessary, where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

Id., (61) 184

3. Manner of assigning breaches upon the covenants of title, &c.,

Id., note 1, (63) 185

4. In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly; held, that this was matter pleadable in abatement only, and that by pleading in bar, the tenants admitted their joint seizin, and lost the opportunity of pleading a several tenancy.

Liter et al. v. Green, (306, 307) 246

5. The tenants could not, in this case, severally plead, in addition to the mise or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error.

Id., (306) 246

6. *Quere*, Whether the tenants could plead the mise severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue.

Id., (306) 246

7. Under such pleas, and the replication prescribed by the statute, the mise was joined; the parties proceeded to trial; and the following general verdict was found, viz.: "The jury find that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned."

Wheat. 1, 2, 3, 4.

It was held, that this verdict, being certain to a common intent, was sufficient to sustain a judgment.

Litter et al. v. Green, (300) 247

8. Also held, that a joint judgment against the tenants for costs, as well as the land, was correct. *Id.* (311) 247

PLEADING—3.

1. If an action be brought against an officer making a seizure under the laws of the United States, for a supposed trespass while the suit for the forfeiture is depending in the United States courts, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action. If the action is brought after a decree of condemnation, then that fact may be pleaded as a bar: if after an acquittal, with a certificate of reasonable cause of seizure, then that may be pleaded as a bar. If, after an acquittal, without such certificate, then the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture in his defense without averring a *lis pendens*, or a condemnation, or an acquittal, with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture in a state court.

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2. The statute of 1794, ch. 50, § 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince, &c., to cruise against the subjects, &c., of any other foreign prince, &c., does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new government previously belonged. And a plea setting up a forfeiture under that statute in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

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3. A plea justifying a seizure under the statute of 1794, ch. 50, need not state the particular prince or state by name, against whom the ship was intended to cruise.

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4. A plea justifying a seizure and detention by virtue of the 7th sec. of the statute of 1794, ch. 50, under the express instructions of the President, must aver that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed.

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5. To trespass for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it by way of new assignment.

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6. A plea alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that the property thereby became, and was actually, forfeited, and was seized as forfeited.

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Williams v. Peyton, (77, 79) 518, 519

PRACTICE—1.

1. Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below.

The Eleineur, (430) 130

2. In cases of joint or conclusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

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3. If the national character of the property captured and brought in for adjudication, appears ambiguous, and neutral, and no claim is interposed, the cause is postponed for a year and a day after the prize proceedings are commenced; and if no Wheat. 1, 2, 3, 4.

claimant appears within that time, the property is condemned to the captors.

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4. In prize causes, this court has an appellate jurisdiction only, and a claim cannot, for the first time, be interposed here; but where the court below had proceeded to adjudication, before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein and the libel to be amended, &c.

Id. (1b.) 95

5. An agreement in a court of common law, chancery, or prize, made under a clear mistake, will be set aside.

The Hiram, (444, 447) 131, 132

6. Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be rendered by the court, without a writ of inquiry.

Renner & Hussard v. Marshall, (218) 75

7. Until the cause is heard, in a question of prize, further proof cannot be admitted; but if, upon the opening, it appears to be a case for further proof, it may be admitted *instantly*, unless the court should be of opinion that the captors ought to be allowed to produce further proof also.

The Venus, (113) 49

8. General principles of the practice in prize causes.

Appendix, note II., (494) 145

9. Examination of the captured person upon the standing interrogatories.

Id. (495, 496) 145

10. Delivery of the papers found on board the captured vessel.

Id. (495) 145

11. Hearing originally confined to the documentary evidence and depositions of the captured persons.

Id. (496, 499) 146

12. Claim and monition to proceed to adjudication.

Id. (500) 147

13. By what circumstances a claim may be excluded.

Id. (501) 147

14. Delivery upon bail and sale of prize property.

Id. (502, 503) 147, 148

15. Further proof, when admitted, and how excluded.

Id. (504) 148

16. Plea and proof. *Id.* (11b.) 148

17. Invocation of papers from other causes, and affidavits of captors.

Id. (506) 149

PRACTICE—2.

1. A L. brought an action of *assumpsit* in the Circuit Court, and after issue joined, the plaintiff died, and the suit was revived by *scire facias* in the name of his administratrix. While the suit was still depending the administratrix intermarried with F. A., which marriage was pleaded *puls daretin continuance*. Held, that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment, under the judiciary act of 1789, ch. 20, sec. 31.

McClure v. Lekamp's Adm., (111, 115) 197, 198

2. Under the judiciary act of 1789, ch. 20, and the act of the 3d of March, 1803, ch. 93, causes of admiralty and maritime jurisdiction, or in equity, cannot be removed, by writ of error, from the Circuit Court for re-examination in the Supreme Court.

The San Pedro, (122) 209

3. The appropriate mode of removing such causes is by appeal; and the regulations contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, when it shall operate as a *superseas*; the citation to the adverse party, the security to be given by the plaintiff in error, and the restrictions upon the appellate court as to reversals, &c., are applicable to appeals, and to be substantially observed; except that where the appeal is prayed at the same term when the decree is pronounced, a citation is not necessary.

Id. (142) 205

4. Nature of the process of sequestration in the practice of the civil law.

Latikaw v. Organ, note 1, (179) 214

5. Intervention, in the practice of the civil law, nature of.

Laidlaw v. Organ, note 2, (192) 217

6. A verdict is bad, if it varies from the issue in a substantial matter, or if it finds only a part of that which is in issue: and, though the court may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

Patterson v. The United States, (221) 224

7. A Circuit Court has no authority to issue a *certiorari*, or other compulsory process, to the District Court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced.

Id., (225) 225

8. In such a case the District Court may, and ought, to refuse obedience to the process of the Circuit Court; and either party may move the Circuit Court for a *procedendo*, after the transcript of the record is removed into that court, or may pursue the cause in the District Court, as if it had not been removed.

Id., (226) 226

9. But if the party, instead of properly taking advantage of the irregularity in the proceedings, enters his appearance in the Circuit Court, takes defense, and pleads to issue, it is too late, after verdict, to object to the irregularity, and the Supreme Court will, on error, consider the cause as an original suit in the Circuit Court.

Id., (1b.) 226

10. The jurisdiction of the Circuit Court, having vested between citizens of different states, cannot be devested by a change of domicile of one of the parties, and his removal into the same state with the adverse party, *pendente lite*.

Morgan's heirs v. Morgan et al., (290, 297) 242, 244

11. Rule requiring all persons interested to be parties to a bill in chancery.

Id., (298) 244

12. Exceptions to this rule. *Id.* note 1, (1b.) 244

Liter et al. v. Green, (306) 246

14. Distinction between a writ of right patent, and a writ of right close. *Id.* note 1, (311) 247

15. No writ of error lies to the highest court of law or equity of a state, under the 25th section of the judiciary act of 1789, unless there is something apparent on the record bringing the case within the appellate jurisdiction of this court.

Ingle v. Coolidge, (363, 368) 261, 262

16. The report of the judge who tries the cause at *not prius* containing a statement of the facts, is not to be considered as a part of the record; the judgment being rendered upon a general verdict, and the report being mere matter *in pais* to regulate the discretion of the court, as to the propriety of granting a new trial, the writ of error, in such a case, will be dismissed.

Id., (368) 262

17. Consequence of moving for a new trial, instead of tendering a bill of exceptions, or having a special verdict found.

Id. note 5, (367) 262

18. No costs are given where the writ of error is dismissed for want of jurisdiction.

Id., (368) 263

19. But costs will be allowed, if the original defendant be also defendant in error.

Id., (363) 261

20. Where a chancery cause is set down for hearing on the bill, answer, and exhibits, without other pleadings, the whole of the answer must be considered as true.

Leeds v. The Marine Ins. Co. of Alexandria, (380, 383) 266, 268

21. A writ of error does not lie to carry to this court a civil cause which has been carried from the District to the Circuit Court by writ of error.

The United States v. Barker, (395) 271

22. The United States never pay costs.

Id., (1b.) 271

23. The provision in the judiciary act of 1789, ch. 20, sec. 30, as to taking depositions *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts. Testimony by depositions can be regularly taken for this court only, under a commission issuing according to its rules.

The Argo, (287) 241

24. Farther proof in revenue or instance causes. *Id.* note 1, (299) 241

See Admiralty, 1.

See Bill of Exchange, 5.

See Chancery, 15, 16.

See Constitutional Law, 1, 2, 3, 4, 6.

See Jurisdiction, 1, 2, 3, 4.

See Prize.

PRACTICE—8.

1. Informal and imperfect proceedings in the District Court, corrected and explained in the Circuit Court.

The Freundschaft, (14, 45) 322, 330

2. A bill of lading, consigning the goods to a neutral, though unaccompanied by an invoice or letter of advice, is sufficient evidence to lay a foundation for the introduction of farther proof.

Id., (48) 331

3. Spoliation of papers, by the enemy master, will not preclude a neutral claimant from farther proof.

Id., (48) 331

4. Prize practice of France as to farther proof. Note 1, (49) 331

5. Decree in an instance cause affirmed with damages, at the rate of 6 per centum per annum, on the amount of the appraised value of the cargo (the same having been delivered to the claimant on ball), including interest from the date of the decree of condemnation in the District Court.

The Diana, (56) 333

6. A witness offered to be examined *visa voce*, in open court, in an instance cause, ordered to be examined out of court.

The Samuel, (77) 335

7. Decree of restitution affirmed in this court, with a certificate of reasonable cause of seizure, in an instance cause, on farther proof.

The San Pedro, (78) 335

8. An agreement of the parties entered on the transcript, stating the amount of damages to be adjudged to one of the parties upon several alternatives (the verdict stating no alternative), not regarded by this court as a part of the record brought up by the writ of error; but a *venire de novo* awarded to have the damages assessed by a jury in the court below.

Lanuse v. Barker, (147) 356

9. A conveyance by a plaintiff's lessor during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease. If the lease expire during the pendency of a suit, the plaintiff cannot recover his term at law, without having it enlarged by the court, and can proceed only for antecedent damages.

Robinson v. Campbell, (212, 223) 373, 376

10. Note on the effect of an outstanding title in a third person, in ejectment.

Note 1, (224) 376

11. Libel for a forfeiture of goods imported into the United States, and alleged to have been exported from Bordeaux, in France, and invoiced at a less sum than the actual cost, at the place of collection law, ch. 126. It appeared that the goods were originally shipped from Liverpool, and were landed at Bordeaux. Restitution decreed upon the evidence as to the cost of the goods at Bordeaux; the form of the libel excluding all inquiry as to their cost at Liverpool, the place where they were originally shipped, and as to continuity of voyage.

The United States v. 150 Crates, (222) 377

12. Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation.

The Fortuna, (226, 245) 379, 381

13. It is a relaxation of the rules of the Prize Court, to allow time for farther proof, in a case where there has been a concealment of material papers.

Id., (245) 381

14. This court has no jurisdiction under the 25th section of the judiciary act of 1789, ch. 20, unless the judgment or decree of the state court be a final judgment or decree. A judgment, reversing that of an inferior court, and awarding a *venire factas de novo*, is not a final judgment.

Houston v. Moore, (436) 438

15. The captors are competent witnesses upon an order for farther proof, where the benefit of it is extended to both parties.

The Anne, (435, 444) 435, 430

16. The captors are always competent witnesses, Wheat. 1, 2, 3, 4.

as to the circumstances of the capture, whether it be joint, collusive, or within neutral territory.

The Anne, (444) 430

17. Irregularities on the part of the captors, originating from mere mistake, or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.

Id., (448) 431

18. Under the 6th section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove at the trial, that the machine for the use of which, without license, the suit was brought, had been used previous to the alleged invention of the plaintiff, in several places which were specified in the notice, or in some of them, "and also, at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant, having given evidence as to some of the places specified, offered evidence as to others not specified. Held, that this evidence was admissible; but that the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent the patentee from being injured by surprises.

Eaton v. Eaton, (454, 508) 433, 445

19. Testimony on the part of the plaintiff, that the persons, of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for license to use the machine, ought not to be absolutely rejected, though entitled to very little weight.

Id., (508) 446

20. The circuit courts have no power to set aside their decrees in equity on motion, after the term at which they are rendered.

Cameron v. M'Roberts, (501) 467

See Jurisdiction.

PRACTICE—4.

1. A writ of error will not lie on a judgment of non-suit.

Eaton v. Phillips, (73) 516

2. The refusal of the court to grant a motion for a new trial affords no ground for a writ of error.

Barr v. Gratz, (220) 555

3. Where a cause is brought to this court, by writ of error, or appeal from the highest court of law or equity of a state, under the 25th sec. of the judiciary act of 1789, c. 20, upon the ground that the validity of a statute of the United States was drawn in question, and that the decision of the state court was against its validity, &c.; or that the validity of a statute of a state was drawn in question, as repugnant to the constitution of the United States, and the decision was in favor of its validity; it must appear, from the record, that the act of Congress, or the constitutionality of the state law was drawn into question.

Müller v. Nicholas, (311, 315) 578, 579

4. But it is not required that the record should, in terms, state a misconstruction of the act of Congress, or that it was drawn into question. It is sufficient to give this court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case.

Id., (315) 579

5. Depositions, taken on further proof, in one prize cause, cannot be invoked into another.

The Experiment, (84) 520

6. Practice of invoking testimony in the prize causes.

Id. Note 1, (Ib.) 520

7. A sale under a *fi. fa.*, duly issued, is legal, as respects the purchaser, provided the writ be levied upon the property before the return day, although the sale be made after the return day and the writ be never actually returned.

Wheaton v. Sexton, (503, 506) 626

8. Depositions taken according to the proviso in the 30th sec. of the judiciary act, of 1789, c. 20, under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are, under no circumstances, to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the provisions of the act relative to depositions taken *de bene esse* being confined to those taken under the enacting part of the section.

Sergeant v. Biddle, (508) 627

See Admiralty, 1, 4, 5.
Chancery, 20.

PRESIDENT—1.

The President's instructions of the 28th August, Wheat. 1, 2, 3, 4.

1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war, in order to invalidate captures made contrary to the letter and spirit of the instructions.

The Mary & Susan, (Richardson claimant), (57) 38

PRESIDENT—3.

See Admiralty, 13.

PRIORITY—2.

See Duties, 2, 3, 4.

PRIORITY—4.

1. The United States are not entitled to priority over other creditors, under the act of 1799, c. 123, s. 65, upon the ground of the debtor having made an assignment for the benefit of creditors, unless it is proved that the debtor has made an assignment of all his property.

United States v. Howland, (108, 116) 526, 528

2. Where the deed of assignment conveys only the property mentioned in a schedule annexed to the deed, and the schedule does not purport to contain all the property of the party who made it, the *onus probandi* is thrown on the United States to show that the assignment embraced all the debtor's property.

Id., (116) 528

3. The decisions on the subject of the priority of the United States in case of insolvency, &c., collected.

Id. note 1, (118) 529

PRIZE—1.

1. Where an enemy's vessel was captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for adjudication, it was held, that the prize vested in the last captor; an interest acquired in war, by possession, being devested by the loss of possession.

The Astrea, (125) 53

2. A neutral ship, chartered for a voyage from London to St. Michael's, thence to Fayal, thence to St. Petersburg, or any port in the Baltic, and back to London, at the freight of 1,000 guineas, on her passage to St. Michael's was captured, and brought into the port of Wilmington, N. C., for adjudication. A part of the cargo was condemned, and part restored. The freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned.

The Antonia Johannah, (159) 60

Quære, Whether more than a *pro rata* freight was due to the master in such case.

Id., (168) 62

3. The charter-party is not the measure by which the captor is bound, where the freight is inflated to an extraordinary rate by the perils of navigation.

Id. note 1, (170) 63

4. Where the goods were shipped in the enemy's country, in pursuance of orders from this country, received before the declaration of war, but previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to them (the bankers) and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers; held, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

The Mary and Susan, (B. G. & H. Van Wagenen, claimants.) (25) 27

5. The property of a citizen engaged in trade with the enemy is liable to capture and confiscation as prize, whether that trade be carried on between an enemy's port and the United States, or between such port and any foreign country; and the offense of trading with the enemy is complete the moment the vessel sails with the intention to carry a cargo to an enemy's port.

The Rugen, (74) 40

PRIZE—4.

1. The government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy.

The Divina Pastora, (52, 68) 512, 514

2. Unless the neutral rights of the United States (as ascertained by the law of nations, the acts of Congress, and treaties) are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country.

Id. (64) 515

3. Note on the jurisdiction of neutral courts over belligerent captures made in violation of the neutral jurisdiction.

Id. note 3. (65) 515

4. Different publicacts by which the government of the United States has recognized the existence of a civil war between Spain and her colonies.

Appendix, note II. (28) 686

5. Prize code of Buenos Ayres and Chili.

Id. 26

6. Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burthen of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, in order to bring the case within the proviso of the 2d sec. of the act of June 5th, 1794, c. 226, and of the act of the 20th April, 1818, c. 83.

The Estrella, (286, 306) 574, 576

7. The right of adjudicating on all captures and questions of prize, belongs exclusively to the courts of the captors country; but, it is an exception to this general rule, that where the captured vessel is brought, or voluntarily comes *infra presidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the cruiser which made the capture; and, if such violation has been committed, is in duty bound to restore to the original owner property captured by cruisers illegally equipped in its ports.

Id. (307) 577

8. No part of the act of the 5th June, 1794, c. 226, is repealed by the act of the 3d March, 1817, c. 58. The act of 1794, c. 226, remained in force until the act of the 20th April, 1818, c. 83, by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed.

Id. (311) 578

9. In the absence of any act of Congress on the subject, the courts of the United States would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality, under a commission, issued within the United States, or under an armament, or augmentation of the armament, or crew of the capturing vessel, within the same.

Id. (311) 578

10. A cruiser, equipped at the port of Carthagena, in South America, and commissioned under the authority of the province of Carthagena, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo belonging to the subjects of the King of Spain, and put a prize crew on board, and ordered her to proceed to the said port of Carthagena: the captured vessel was afterwards fallen in with by a private armed vessel of the United States, and the cargo taken out and brought into the United States for adjudication as the property of their enemy. The original Spanish owner, and the prize-master from the Carthagenian privateer, both claimed the goods. The possession was decreed to be restored to the Carthagenian prize-master.

The Neutra Senora de la Caridad. (497) 624

11. War having been recognized to exist between Spain and her colonies by the government of the United States, it is the duty of the courts of the United States, where a capture is made by either of the belligerent parties, without any violation of our neutrality, and the captured prize is brought

innocently within our jurisdiction, to leave things in the same state they find them, or to restore them to the state from which they have been forcibly removed by the act of our own citizens.

Id. (502) 625

12. The Spanish treaty held not to apply to the above case, as the court could not consider the Carthagenian captors as pirates, and the capture was not made within the jurisdictional limits of the United States, the only two cases in which the treaty enjoins restitution.

Id. (502) 625

See Domicile.

See License.

See Practice, 5, 6.

RULE OF 1756—1.

1. Grounds of the rule of the war of 1756.

The Commercen, (366, 367) 120

2. Origin and judicial history of the rule.

Appendix, note III. (507) 149

SALE—1.

Where R. G. agreed with the managers of a lottery to take 2,500 tickets, giving approved security on the delivery of the tickets, which were specified in a schedule, and deposited in books of 100 tickets each, thirteen of which books were received and paid for by him, and the remaining twelve were subscribed by him, with his name in his own handwriting, and indorsed by the managers, "Purchased, and to be taken by R. G." and on the envelope covering the whole, "R. G., 12 books;" on the second day a drawing of the lottery, one of the last designated tickets was drawn a prize of \$20,000, and between the third and fourth day's drawing R. G. tendered sufficient security, and demanded the last 1,200 tickets, and the managers refused to deliver the prize ticket; held, that the property in the tickets vested when the selection was made and assented to, and that they remained in the possession of the vendors merely as collateral security, and that the vendee was entitled to recover the amount of the prize.

Thompson v. Gray, (75) 40

2. When commodities are sold by the bulk, for a gross price, the sale is perfect; but if the price is regulated at so much for every piece, pound, or measure, the sale is not perfect, except only as to so much as is actually counted, weighed or measured.

Id. note 1, (84) 42

3. But an article, purchased in general terms, from many of the same description, if afterwards selected and set apart, with the assent of the parties, as the thing purchased, is as completely identified, and as completely sold, as if it had been selected previous to the sale, and specified in the contract.

Id. (83) 42

4. The common law and the prize law, as to the vesting of property, are the same, by which the thing sold, after the completion of the contract, is at the risk of the vendee.

The St. Jose Indiano, (212) 74

Rules of the Roman and French law on this subject.

Id. note 1, (1b.) 74

5. Where an agent abroad purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal, the property vests in the principal immediately on the purchase.

Id. (1b.) 74

But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, no property in the goods vests in the correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent.

Id. (213) 74

6. If the thing agreed to be purchased is to be sent by the vendor to the vendee, it is necessary, to the perfection of the contract, that it should be delivered to the purchaser, or to his agent, which the master of a ship, to many purposes, is considered to be.

Id. note 2 (*The Venue*),

See Prize, 4, 6.

(1b.) 74

Wheat. 1, 2, 3, 4.

SALE—2.

1. Where a promissory note is given for the purchase of real property, the failure of consideration through defect of title must be total, in order to constitute a defense to an action on the note.

Greenleaf v. Cook, (13, 16) 172, 173

2. *Querre*, Whether, after receiving a deed, a party can avail himself at law even of a total failure of consideration.

Id., (16) 173

3. But where the note is given with full knowledge of the extent of the incumbrances, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.

Id., (17) 173

4. Any partial defect in the title or the deed is not inquirable into by a court of law in an action on the note; but the party must seek relief in chancery.

Id., (1b.) 173

5. Rule of the French law as to the recovery of purchase money on a failure of title.

Id. note 3, (1b.) 173

6. It is not the duty of the vendee to communicate to the vendor intelligence of extrinsic circumstances which may influence the price of the commodity, where the particular information is exclusively within the knowledge of the vendee, but the means of intelligence are equally open to both parties. But, at the same time, each party must take care not to say or do anything tending to impose upon the other.

Laidlaw et al. v. Organ, (178, 196) 214, 215

7. Doctrine of Pothier as to the respective obligations of the vendor and vendee in this respect.

Id. note 2, (185) 215

SALE—3.

1. In an action by the vendee for a breach of the contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article at the time of the breach of the contract, and not at any subsequent period.

Shepherd v. Hampton, (200) 369

2. *Querre*, How far this rule applies to a case where advances of money have been made by the purchaser under the contract.

Id., (1b.) 369

3. One citizen of the United States has no right to purchase of, or sell to, another, a license or pass from the public enemy, to be used on board an American vessel.

Patton v. Nicholson, (204) 371

SALE—4.

See Chancery, 21, 22, 23, 24.

SALVAGE—1.

Where a British ship was captured by two French frigates, and, after a part of the cargo was taken out, presented to the libelants in the cause, citizens of the United States (then neutral), whose vessel the frigate had before taken and burnt, by whom the prize was navigated into a port in this country, and, pending the suit instituted by them, war was declared between the United States and Great Britain, it was determined, that this was a case of salvage. A salvage of one-half was given, and as to the residue, it was placed on the same footing with other property found within the territory at the declaration of war, and might be claimed on the termination of war, unless previously confiscated by the sovereign power.

The Astrea, note 6. (*The Adventure*), (128) 52

SALVAGE—3.

1. An American vessel was captured by the enemy, and after condemnation and sale to a subject of the enemy, was recaptured by an American privateer. Held, that the original owner was not entitled to restitution on payment of salvage, under the salvage act of the 3d March, 1800, ch. 14, and the prize act of 26th June, 1812, ch. 107.

The Star, (78) 338

2. By the general maritime law, a sentence of condemnation completely extinguishes the title of the original proprietor.

Id., (86) 340

3. The British salvage acts reserves the *just pretium* as to vessels of British subjects, even after condemnation, unless they have been after capture set forth as ships of war.

Id., (88) 341

Wheat. 1, 2, 3, 4. U. S., Book 4.

4. The statute of the 43d George III., ch. 160, sec. 39, has no farther altered the previous British law than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy.

The Star, (88) 341

5. Neither of the British statutes extent to neutral property.

Id., (1b.) 341

6. The 5th section of the prize act of 1812, ch. 107, does not repeal any of the provisions of the salvage act of the 3d March, 1800, ch. 14, but is merely affirmative of the pre-existing law.

Id., (89) 341

7. By our law the rule of reciprocity prevails upon the recapture of the property of friends.

Id., (91) 341

8. Note on the laws of the different maritime countries of Europe as to recaptures and salvage.

Note 1, (93) 342

9. Law of Great Britain. *Id.*, (94) 342

10. Law of France. *Id.*, (95) 343

11. Law of Spain, Portugal and Holland. *Id.*, (97) 343

12. Law of Denmark and Sweden. *Id.*, (98) 344

13. Recaptures from pirates. *Id.*, (99) 344

SPECIFIC PERFORMANCE—1.

See Chancery, 1, 2, 3, 4, 5, 6, 7.

SPECIFIC PERFORMANCE—2.

See Chancery, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

SPECIFIC PERFORMANCE—3.

See Chancery, 1.

STATUTES OF GEORGIA—3.

The terms "beyond seas," in the proviso or saving clause of the statute of limitations of Georgia, of 1767, are equivalent to without the limits of the state; and a party who is without those limits is entitled to the benefit of the exception.

Murray v. Baker, (541) 454

STATUTES OF KENTUCKY—1.

1. The law of Kentucky requires, in the location of warrants for land, some general description designating the place where the particular object is to be found, and a description of the object itself.

Matson v. Hord, (133) 54

The general description must be such as will enable a person, intending to locate the adjacent *residuum*, and using reasonable care and diligence, to find the object mentioned, and avoid the land already located. If the description will fit another place better, or equally well, it is defective.

Id., (1b.) 54

The hunter's trace, leading from Bryant's station, over the waters of Hingston, on the dividing ridge between the waters of Hingston and Elkhorn, is a defective description and will not sustain the entry.

Id., (130) 53

2. A question of fact respecting the validity of the location of a warrant for lands, under the laws of Kentucky.

Taylor v. Walton et al., (141) 56

3. Under the act of assembly of Kentucky, of 1798, entitled, "an act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession.

Walden v. The Heirs of Gratz, (235, 236) 94, 95

4. The statute of limitations of Kentucky does not differ essentially from the English statute of the 21 James I. c. 1, and is to be construed as that statute, and all other acts of limitation founded upon it, have been construed; the whole possession must be taken together; when the statute has once begun to run, it continues, and an adverse possession, under a survey, previous to its being carried into grant, may be connected with a subsequent possession.

Id., (296) 95

5. Extract from the preface of Bibb's Reports of Cases in the Court of Appeals of Kentucky.

Appendix, note 1, (489) 143

STATUTES OF KENTUCKY 2.

See Local Law. 11.

STATUTES OF KENTUCKY—4.

See Ejectment, 2, 3.
See Local Law.

STATUTES OF MARYLAND—1.

The act of assembly of Maryland, prohibiting the importation of slaves into that state for sale, or to reside, does not extend to a temporary residence, nor to an importation by a hirer, or person other than the master or owner of such slave.

Henry v. Ball, (3) 21

STATUTES OF MARYLAND—2.

See Treaty, 6, 7, 8.

STATUTES OF MARYLAND—4.

See Constitutional Law, 6, 7.

STATUTES OF NORTH CAROLINA—1.

1. The act of assembly of North Carolina, of 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July, 1777. The act of April, 1778, is a legislative declaration, explaining and amending the former act, and no title is acquired by an entry contrary to these laws.

Preston v. Brouder, (116) 50

2. The acts of assembly of North Carolina, passed between the year 1783 and 1789, avoid all entries, surveys, and grants of lands, set apart for the Cherokee Indians, and no title can be thereby acquired to such lands.

Danforth's Lessee v. Thomas, (155) 59

3. The boundaries of the reservation have been altered by successive treaties with the Indians; but it seems that the mere extinguishment of their title did not subject the land to appropriations, unless expressly authorized by the legislature.

Id., (1b.) 59

See Statutes of Tennessee.

STATUTES OF NORTH CAROLINA—2.

1. Where the plaintiffs in ejectment claimed under a grant from the state of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which by the statutes of that state and Tennessee, constitutes a bar to the action, if the possession be under color of title. To repel this defense, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning, and nearly the whole land, and all the corners, except one, were within the Cherokee Indian boundary, not having been ceded to the United States until the year 1806, within seven years from which time the suit was brought, but the land in the defendant's possession, and for which the suit was brought, did not lie within the Indian boundary. It was held that, notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not therefore survey the lands granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years under color of title.

M'Iver et al. v. Rayan et al., (25) 175

2. A question relative to the title of the late Major-General Nathaniel Greene, to 25,000 acres of land given to him, within the bounds of the land reserved for the use of the army, by the 10th section of the act of the legislature of North Carolina, passed in 1782, as a mark of the sense entertained by that state of his eminent services.

Rutherford v. Green's heirs, (196) 218

STATUTES OF NORTH CAROLINA—3.

1. The state of North Carolina, by her act of cession of the western lands, of 1789, ch. 3, recited in the act of Congress of 1790, ch. 33, accepting that cession, and by her act of 1803, ch. 3, ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the state of Tennessee, upon entries made before the cession.

Burton v. Williams, (520) 452

2. But it seems, that the holder of such a grant

722

may resort to the equity jurisdiction of the United States Court for relief.

Id., (540) 454

3. Under the cession act of North Carolina of 1789, ch. 3, ratified by the act of Congress of 1790, ch. 33, the United States held the domain of the vacant lands in Tennessee, subject to the right which North Carolina retained of perfecting the inchoate titles created under her laws.

Id., (536) 453

4. The act of North Carolina of 1803, ch. 3, grants to Tennessee, irrevocably, the power of perfecting titles to land reserved to North Carolina by the cession act, and is assented to by Congress, in their act of 1806, ch. 31.

Id., (1b.) 453

5. The act of Congress of 1806, ch. 31, does not violate the cession act.

Id., (1b.) 454

STATUTES OF NORTH CAROLINA—4.

See Covenant, 1.
See Ejectment, 4.

STATUTES OF OHIO—4.

See Chancery, 26, 28.
See Local law.

STATUTES OF RHODE ISLAND—1.

A discharge, according to the act of the legislature of Rhode Island, for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and, upon such a discharge, no action can be maintained upon a bond for the liberty of the prison-yard.

Ammidon v. Smith et al., (447) 132

STATUTES OF TENNESSEE—1.

1. Under the act of the legislature of Tennessee, passed in 1797, to explain an act of the legislature of North Carolina of 1715, a possession of seven years is a bar only when held under a grant, or a deed, founded on a grant.

Patton's Lessee v. Easton, (476) 139

The act of assembly vesting lands in the trustees of the town of Nashville, is a grant of those lands; and where the defendant showed no title under the trustees, nor under any other grant, his possession of seven years was held insufficient to protect his title, or bar that of the plaintiff under a conveyance from the trustees.

Id., (1b.) 139

2. Where the plaintiff in ejectment claimed lands in the state of Tennessee, under a grant from said state, dated the 26th April, 1806, founded on an entry made in the entry-taker's office of Washington county, dated the 2d of January, 1779, in the name of J. M'Dowell, on which a warrant issued on the 17th of May, 1779, to the plaintiff, as assignee of J. M'Dowell, and the defendants claimed under a grant from the state of North Carolina, dated the 9th of August, 1787, it was determined that the prior entry might be attached to a junior grant, so as to overreach an elder grant, and that a survey having been made, and a grant issued upon M'Dowell's entry, in the name of the plaintiff, calling him assignee of M'Dowell, was *prima facie* evidence that the entry was the plaintiff's property, and that a warrant is sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place.

Ross and Morrison v. Reed, (482) 141

STATUTE OF TENNESSEE—3.

1. By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared that all claims and titles to lands derived from Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles both of the plaintiff and defendant in ejectment were derived under grant from Virginia, to lands which fell within the limits of Tennessee, it was held, that a prior settlement-right thereto, which would, in equity, give the party a title, could not be asserted as a sufficient title in an action of ejectment brought in the Circuit Court of Tennessee.

Robinson v. Campbell, (512) 373

Wheat. 1, 2, 3, 4.

2. Although the state courts of Tennessee have decided, that, under their statutes (declaring an elder grant founded on a junior entry to be void), a junior patent founded on a prior entry shall prevail at law against a senior patent founded on a junior entry, this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee, and could not apply to titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states.

Robinson v. Campbell, (212) 373

3. The general rule is, that remedies in respect to real property are to be pursued according to the *lex loci rei sitæ*. The statutes of the two states are to be construed as giving the same validity and effect to the titles in the disputed territory as they had, or would have, in the state by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

Id., (219) 375

4. In the above case, it was held, that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run until it was ascertained by the compact of 1792 that the land fell within the jurisdictional limits of Tennessee.

Id., (224) 376

STATUTES OF VIRGINIA—1.

1. Under the act of assembly of Virginia, of the 22d of December, 1794, secs. 6 and 8, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the hands of a *bona fide* purchaser, without notice.

The Mutual Assurance Society v. Watts' Executor, (279) 91

2. A mere change of sovereignty produces no change in the state of rights existing in the soil, and the cession of the District of Columbia to the national government, did not affect the lien created by the above act on real property, situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property.

Id., (1*b.*) 91

3. See Statutes of Kentucky.

STATUTES OF VIRGINIA—3.

See Local Law, 2, 3.

STATUTES OF VIRGINIA—4.

See Local Law, 1.

TRADE WITH THE ENEMY—1.

1. See Domicile, 2.
2. See Prize, 5.
3. See License, 1.

TRADE WITH THE ENEMY—3.

See License, 2.

TRADE WITH THE ENEMY—4.

See License, 1.

TREATY—1.

Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens; the parties must show that the title to the land for which the suit was commenced was in them, or their ancestors, at the time the treaty was made.

Harnden v. Fisher, (300) 96

TREATY—2.

1. Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the Wheat, 1, 2, 3, 4.

proprietary interest in the ship may be proved by other equivalent testimony. But if upon the original evidence, the cause appears extremely doubtful and suspicious, and further proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of prize courts in other cases.

The Pizarro, (244, 245) 230

2. The term "subjects," in the 15th article of the treaty, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

Id., (245) 230

3. The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property engaged in trade with the enemy is not protected by the treaty.

Id., (248) 231

4. The privilege of the neutral flag of protecting enemy's property, conferred by treaty or otherwise, does not extend to a fraudulent use of the flag.

Id. note 1, (247) 231

5. The stipulation of the Spanish treaty, taken in connection with the law of Spain, does not necessarily imply the converse proposition that enemy's ships shall make enemy's goods, which is not expressed in the treaty.

Id. note 1, (248) 231

6. The treaty of amity and commerce of 1778 with France, art. 11, enabling French subjects to purchase and hold lands in the United States, being abrogated in 1798; the act of Maryland of 1780, permitting the lands of a French subject who had become a citizen of that state, dying intestate, to descend on the next of kin being non-naturalized Frenchmen, with a proviso vesting the land in the state, if the French heirs should not within ten years become resident citizens of the state, or convey the lands to a citizen; and the convention of 1800 between the United States and France, enabling the people of the one country holding lands in the other to dispose of the same by testament, and to inherit lands in the other without being naturalized; held, that the latter treaty dispensed with the performance of the condition in the act of Maryland, and that the conventional rule applied equally to the case of those who took by descent under the act, as to those who acquired by purchase without its aid.

T. C. F. Chirac v. the lessee of A. F. Chirac et al., (259) 234

7. The further stipulation in the convention, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold or otherwise disposed of, to citizens or inhabitants of that country where it may be," does not affect the rights of a French subject who takes or holds, by the convention, so as to deprive him of the power of selling to citizens of this country; and gives to a French subject, who has acquired lands by descent or devise (and, perhaps, in any other manner), the right, during life, to sell, or otherwise dispose of the same, if lying in a state where lands purchased by an alien, generally, would be immediately escheatable.

Id., (276) 238

8. Although the convention of 1800 has expired, the instant a descent is cast on a French subject during its continuance, his rights become complete under it, and cannot be affected by its subsequent expiration.

Id., (277) 238

9. Modification of the *droit d'aubain* in France by treaties with other powers.

Id. note 1, (271) 237

TREATY—3.

1. G. C. born in the colony of New York, went to England in 1738, where he resided until his decease; and being seized of lands in New York, he, on the 30th November, 1778, in England, devised the same to the defendant, and E. C., as tenants in common, and died so seized on the 10th December, 1778. The defendant, and E. C., having entered, and becoming possessed, E. C., on the 2d December, 1791, bargained and sold to the defendant all his interest. The defendant and E. C. both were born in England long before the revolution. On the 22d

March, 1791, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to within the state, by purchase or descent, in fee-simple, and to sell and dispose of the same in the same manner as any natural born citizen might do. The defendant, at the time of the action brought, still continued to be a British subject. Held, that he was entitled, under the 8th section of the treaty of 1794, between the United States and Great Britain, to hold the lands so devised to him by G. C. and transferred to him by E. C. Jackson, *ex dem.*

The People of New York v. Clarke, (1) 319
See Allen.

724

TREATY—4.

See Allen.
See Prize, 12.

VERDICT 2.

See Practice, 6.
See Pleading, 7.

WRIT OF RIGHT—2.

See Pleading, 4, 5, 6, 7, 8.

Wheat. 1, 2, 3, 4.





